The Current Landscape of Qualified Immunity: The Times, Are They a-Changin?

(Session: Qualified Immunity)

Karen M. Blum
Professor Emerita
Suffolk University Law School
120 Tremont St.
Boston, MA 02108
(617) 573-8216
kblum@suffolk.edu
Research Date: July 19, 2021

Karen M. Blum is Professor Emerita and Research Professor of Law at Suffolk University Law School where she has taught for over forty years in the areas of Federal Courts, Police Misconduct Litigation and Civil Procedure. She received her B.A. from Wells College, a J.D. from Suffolk University Law School and an LL. M. from Harvard Law School. Professor Blum has been a regular faculty member for Federal Judicial Center training and education programs for federal judges and has authored numerous articles in the section 1983 area. She is co-author, along with Michael Avery, David Rudovsky, and Jennifer Laurin of POLICE MISCONDUCT: LAW AND LITIGATION.

Table of Contents

I. Introduction: Current Landscape of Qualified Immunity

Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court has confronted the issue of qualified immunity in approximately thirty three cases. Plaintiffs have prevailed in three of those cases: *Hope v. Pelzer,* 536 U.S. 730 (2002), *Groh v. Ramirez*, 540 U.S. 551 (2004), and most recently *Taylor v. Riojas*, 141 S. Ct. 52 (2020). *See also McCoy v. Alamu*, 950 F.3d 226 (5th Cir. 2020), *cert. granted, vacated and remanded in light of Taylor v. Riojas*, 592 U.S. ___ (2020) (per curiam), 141 S. Ct. 1364 (2021). In eight cases, including *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), the Court reversed denials of qualified immunity in per curiam summary dispositions. Five of the eight per curiam decisions were unanimous. *See White v. Pauly*, 137 S. Ct. 548 (2017); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *Carroll v. Carman*, 135 S. Ct. 348 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Ryburn v. Huff*, 132 S. Ct. 987 (2012).

In eleven cases between 2012-2018, the Court exercised its discretion under *Pearson v. Callahan*, 555 U.S. 223 (2009), to jump to the second prong of the qualified immunity analysis, granting qualified immunity because the law was not clearly established and leaving unresolved the "merits" question of prong one. *Kisela v. Hughes* (2018); *White v. Pauly* (2017) (per curiam); *Mullenix v. Luna* (2016) (per curiam); *Taylor v. Barkes* (2015) (per curiam); *City & County of San Francisco, Cal. v. Sheehan* (2015); *Carroll v. Carman* (2014) (per curiam); *Wood v. Moss* (2014); *Stanton v. Sims* (2013) (per curiam); *Reichle v. Howards* (2012) *Ryburn v. Huff* (2012) (per curiam); *Messerschmidt v. Millender* (2012). The Court is consistently reminding and reinforcing its message to the lower courts that they "'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." *District of Columbia v. Wesby*, 138 S. Ct. at 589 n.7, *citing Camreta v. Greene*, 563 U. S. 692, 707 (2011).

In four cases, the Court granted certiorari, vacated, and remanded for reconsideration of the qualified immunity determination in light of *Mullenix v. Luna*, 136 S. Ct. 305 (2016*)* and/or *Pauly*. In three of those cases, the respective circuits granted immunity on reconsideration. *Petersen v. Lewis County*, 697 F. App'x 490, 491 (9th Cir. 2017) (granting qualified immunity on remand because plaintiff "failed to identify any clearly established law putting [officer] on notice that, under these facts, his conduct was unlawful."); *Middaugh v. City of Three Rivers*, 684 F. App'x 522, 530 (6th Cir. 2017) (granting qualified immunity on remand where precedents did not apply with obvious clarity to the specific conduct challenged); *Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016) (granting qualified immunity on remand because the officers' conduct was "nothing like that exhibited in the cited cases" and "none of those cases squarely govern[ed] this one.").

Since June 2020, the Court has denied certiorari in roughly 20 cases where qualified immunity was an issue. Legislation has been proposed on the national level and several states (Colorado, New Mexico, Connecticut), as well as New York City, have enacted laws curtailing or eliminating the qualified immunity defense.

The doctrine of qualified immunity, though still robustly embraced by the Supreme Court, has increasingly come under attack by scholars and judges. Professor Baude has questioned the legal justification for the doctrine, William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 101 (2018), while Professor Joanna Schwartz has documented how the doctrine works to provide unnecessary protection from liability to officers who are indemnified for their wrongdoing in the overwhelming majority of cases, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014), and has highlighted its failure in achieving the stated goal of shielding government officials from burdens of pre-trial discovery and trial, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017). *See also* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605 (2021). Volume 93, Number 5, of the Notre Dame Law Review is dedicated to the "Future of Qualified Immunity." The volume collects essays critical of the doctrine on many fronts. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); Karen M. Blum, *Qualified Immunity*: *Time to Change the Message*, 93 Notre Dame L. Rev. 1887 (2018); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937 (2018).

Judicial criticism has become more frequent and the sources of such criticism are surprisingly quite diverse. (*See* excerpts from cases below)

II. Judicial Criticism of Doctrine

SUPREME COURT

Hoggard v. Rhodes, 141 S. Ct. 2421, 2421-22 (2021) (Statement of Justice Thomas respecting the denial of certiorari) ("As I have noted before, our qualified immunity jurisprudence stands on shaky ground. *Ziglar* v. *Abbasi*, 582 U. S. ——, ——, 137 S.Ct. 1843, 1869-72, 198 L.Ed.2d 290 (2017) (opinion concurring in part and concurring in judgment); *Baxter* v. *Bracey*, 590 U. S. ——, 140 S.Ct. 1862, 207 L.Ed.2d 1069 (2020) (opinion dissenting from denial of certiorari). Under this Court's precedent, executive officers who violate federal law are immune from money damages suits brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, unless their conduct violates a 'clearly established statutory or constitutional righ[t] of which a reasonable person would have known.'. . But this test cannot be located in § 1983's text and may have little basis in history. . . Aside from these problems, the one-size-fits-all doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions. . . This petition illustrates that oddity: Petitioner alleges that university officials violated her First Amendment rights by prohibiting her from placing a small table on campus near the student union building to promote a student organization. According to the university, petitioner could engage with students only in a designated 'Free Expression Area'—the use of which required prior permission from the school. The Eighth Circuit concluded that this policy of restricting speech around the student union was unconstitutional as applied to petitioner. *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 879 (2020). Yet it granted immunity to the officials after

determining that their actions, though unlawful, had not transgressed '"clearly established"' precedent. . . But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question. . . This approach is even more concerning because 'our analysis is [not] grounded in the common-law backdrop against which Congress enacted [§ 1983].' . . It may be that the police officer would receive more protection than a university official at common law. . . Or maybe the opposite is true. . . Whatever the history establishes, we at least ought to consider it. Instead, we have 'substitute[d] our own policy preferences for the mandates of Congress' by conjuring up blanket immunity and then failed to justify our enacted policy. . .The parties did not raise or brief these specific issues below. But in an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally.")

Baxter v. Bracey, 140 S. Ct. 1862, 1862-64 & n.2 (2020) (Thomas, J., dissenting from the denial of certiorari) ("Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging excessive force and failure to intervene, in violation of the Fourth Amendment. Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied. I have previously expressed my doubts about our qualified immunity jurisprudence. See *Ziglar* v. *Abbasi*, 582 U. S. ——, —— – ——, 137 S.Ct. 1843, 1869–1872, 198 L.Ed.2d 290 (2017) (THOMAS, J., concurring in part and concurring in judgment). Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition. . . . The text of § 1983 'ma[kes] no mention of defenses or immunities.'. . Instead, it applies categorically to the deprivation of constitutional rights under color of state law. . . . [I]n *Harlow v. Fitzgerald*, . . . the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the 'substantial costs [that] attend the litigation of' subjective intent[.] . . .The Court has subsequently applied this objective test in § 1983 cases. . . .In several different respects, it appears that 'our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act.'. . There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this 'clearly established law' test. . . .There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. . . . Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. . . An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense. Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity 'was "historically accorded the relevant official" in an

analogous situation "at common law."'. . The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. . . We should do so in qualified immunity cases as well.[2] **[fn.2:** Qualified immunity is not the only doctrine that affects the scope of relief under § 1983. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court held that an officer acts "under color of any statute, ordinance, regulation, custom, or usage of any State"' even when state law did not authorize his action[.] . . Scholars have debated whether this holding is correct. . . Although concern about revisiting one doctrine but not the other is understandable, . . . respondents—like many defendants in § 1983 actions—have not challenged *Monroe*.**]** I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.")

Kisela v. Hughes, 138 S. Ct. 1148, 1155, 1158-62 (2018) (per curiam) (Sotomayor, J., joined by Ginsburg, J., 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,' . . . 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.'. . 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. . . 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. . . .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. . . 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.'. . That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, . . . 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[.]'. . '[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . At its core, then, the 'clearly established' inquiry boils down to whether Kisela had 'fair notice' that he acted unconstitutionally. . .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.'. . It is equally

well established that any use of lethal force must be justified by some legitimate governmental interest. . . 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. . . 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. . . . [T]he majority asserts that Hughes was 'within striking distance' of Chadwick, . . 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. [citing *Tolan*] 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. . . . 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. . . . If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. [collecting cases] 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. . . It is enough that governing law places 'the constitutionality of the officer's conduct beyond debate.'. . 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. . . .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.'. . . 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. . . 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.'. . 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.")

Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. . . Although the Act made no mention of defenses or immunities, 'we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.'. . We have done so because '[c]ertain immunities were so well established in 1871 ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them.'. . Immunity is thus available under the statute if it was 'historically accorded the relevant official' in an analogous situation 'at common law,'. . . unless the statute provides some reason to think that Congress did not preserve the defense[.] . . .In some contexts, we have conducted the common-law inquiry that the statute requires. . . For example, we have concluded that legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871. . . We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the 'judicial phase of the criminal process,'. . . although not from suits relating to the prosecutor's advice to police officers[.] In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson,* we held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. . . Rather, we concluded that police officers could assert 'the defense of good faith and probable cause' against the claim for an unconstitutional arrest because that defense was available against the analogous torts of 'false arrest and imprisonment' at common law. . .In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. . . In the decisions following *Pierson,* we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'. . Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . We apply this 'clearly established' standard 'across the board' and without regard to 'the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated.'. . We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. [*citing* Baude, Is Qualified Immunity Unlawful?] Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret [ing] the intent of Congress in enacting' the Act. . . Our qualified immunity precedents instead represent precisely the sort of

'freewheeling policy choice[s]' that we have previously disclaimed the power to make. . . We have acknowledged, in fact, that the 'clearly established' standard is designed to 'protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties.'. . The Constitution assigns this kind of balancing to Congress, not the Courts. In today's decision, we continue down the path our precedents have marked. We ask 'whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted,'. . . rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.")

FIRST CIRCUIT

Irish v. Fowler, 436 F.Supp.3d 362, 428 n.157 (D. Me. 2020) (Woodcock, J.), *aff'd in part, vacated in part and remanded by* ***Irish v. Fowler (Irish II),*** 979 F.3d 65 (1st Cir. 2020) ("The terrible circumstances of this case give the Court pause as to whether the rationale underlying the doctrine of qualified immunity should be reexamined. Recently, qualified immunity has come under judicial and academic scrutiny. *See, e.g., Zadeh v. Robinson*, 928 F.3d 457, 474 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (reaffirming his "broader conviction that the judge-made immunity regime ought not to be immune from thoughtful reappraisal"); *Russell v. Wayne Cty. Sch. Dist.*, No. 3:17-CV-154-CWR-JCG, 2019 WL 3877741, at *2 (S.D. Miss. Aug. 16, 2019); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019); *Kong ex rel. Kong v. City of Burnsville*, No. 16-cv-03634 (SRN/HB), 2018 WL 6591229, at *17 n.17 (D. Minn. Dec. 14, 2018); *Manzanares v. Roosevelt Cty. Adult Det. Center*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) ("Moreover, in a day when police shootings and excessive force cases are in the news, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive"); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *11 (E.D.N.Y. June 26, 2018) ("The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9-10, 26, 76 (2017); Judge Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219 (2015); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912-913 (2014). As the facts in this case demonstrate, these issues are complicated. The primary culprit is Anthony Lord, not Detective Perkins, not Detective Fowler. Despite the Court's conclusions about some of the Detectives' conduct, it is also true that Detectives Perkins and Fowler did not ignore Brittany Irish's complaint and actively investigated her allegations into the very early hours of the morning. Further, the Court acknowledges that members of the public cannot expect the state or local police to act as a private security force, and there must be limits as to when upset citizens may force officers to trial because

of something the officers did or did not do in the line of duty. Even if individual officers rarely personally pay damage awards, the filing of a claim can have repercussions against the officers' careers and the prospect of a lawsuit may affect the willingness of officers to take risks for public safety that the public wants them to take. Even so, the current law of qualified immunity—in the Court's mind—has it upside down, with the governmental entity and supervisors rarely facing liability and the front-line, lowest-level employees more directly exposed. This model contrasts with the principles of tort law where the employer is generally responsible for the tortious actions of an employee performed within the scope of employment. Using police as an example, the Court accepts as a premise that there will be an irreducible percentage of law enforcement interactions with the public that will result in potential claims with and without proper police work. Except where the actions of the officer were beyond the scope of employment, if the governmental entity, not the governmental employee, were legally responsible, the risk of harm from governmental acions could be distributed among the public at large, as occurs for privately insured employers, rather than placed on the individual governmental employee. The solutions are not easy and may be impossible given the current state of law at the federal level, particularly in light of the Eleventh Amendment; however, public skepticism of the adequacy of internal discipline proceedings and the need in cases of extreme untoward conduct to provide a mechanism for redress and individual deterrence suggest a new regime is necessary, perhaps with state legislation. The nub of the problem is that the summary disposition of this case will deprive the Plaintiffs of their day in court and runs counter to a fundamental and ancient precept of our legal system: '[W]here there is a legal right, there is also a legal remedy.' *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).")

SECOND CIRCUIT

United States v. Weaver, 975 F.3d 94, 109 & n.2 (2d Cir. 2020) (Calabresi, J., concurring) ("There may well be hundreds of situations in which searches like the one before us today turned up nothing. But surely no more than a handful will get to court. And even these will almost always get decided against the innocent 'searchee' on qualified immunity. All this might not matter if courts knew, directly and emotionally, from personal experience, the stories of those unnecessarily, improperly, and humiliatingly searched. But we judges, and our families and friends, are not likely to be the ones whom the police decide to search on a hunch. We are not likely to be stopped for failing to signal. And we are most unlikely to be made to spread eagle, even if stopped. My dissenting colleague is correct that this case is not that many steps beyond *Padilla*, which itself was only a step or two from the prior precedent. *See United States v. Bayless*, 201 F.3d 116 (2d Cir. 2000). But these are steps we must not take, and so I join the majority opinion. I write this concurrence in sadness and in hope. It is not for me or for other judges to find a way out of our current dilemma, hence my sadness. Yet recent events have focused attention on the qualified immunity doctrine.[2] **[fn. 2:** Both judges and academics have criticized the doctrine in recent years. [collecting cases and articles] As I am writing this, some state legislatures are considering or have acted to modify qualified immunity. *See, e.g.*, Conn. HB 6004; Colo. SB 20-217.**]** And some have even suggested alternatives to the exclusionary rule. .

. (Wearing my academic hat, I have done so myself—but, as is usually the case with purely academic suggestions, it can only be a beginning. *See* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111 (2003).) It is this current attention that gives me hope. Finding an answer will not be easy. It will require careful and coordinated thought by the political branches, by the academy, and by judges as well. But we must do better. The noxious effects of our current approach are all too obvious, and are manifested both broadly, in the current protests, and narrowly, in the instant case. Given where the law is, and the need to avoid further erosion of Fourth Amendment rights, I fully join the majority in its holding that what the officer did here went too far, and hence that the evidence must be excluded. Can we do better? I certainly hope so.")

Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *2, *6-8, *11-13 (E.D.N.Y. June 26, 2018) (as amended) (Weinstein, J.) ("Qualified immunity is denied. Its grant, in the instant case, would be inconsistent with the purpose of 42 U.S.C. § 1983. . . .The courts, police, and public, will benefit from a clarifying jury decision in this often replicated situation. . . . Qualified immunity has recently come under attack as over-protective of police and at odds with the original purpose of section 1983: 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'. . The Court's expansion of immunity, specifically in excessive force cases, is particularly troubling. . . .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. . . .The failure to address whether or not an act was constitutional prevents the creation of 'clearly established' law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court. . . . Although the Court is no longer constrained by a common law good faith defense, it continues to rely on the common law as precedent for granting immunity. . . . The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress; state governments are protected by sovereign immunity and municipalities are not liable under *Monell* unless individual liability can be first proven. . . . Courts should, when reasonable, follow *Saucier's* guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was 'clearly established.'. . . Turning to the application of qualified immunity, courts should, it has been suggested, return to the standard expressed in *Hope v. Pelzer*, 536 U.S. 730 (2002), and define 'clearly established law' at a 'high level of generality.' The key inquiry being whether officers are on 'notice their conduct is lawful.'. . This allows courts to recognize 'obvious' constitutional violations, even if not yet specifically outlawed in a prior Supreme Court ruling. Such a standard is vital in a rapidly changing society, where any willing judge or jurist may distinguish precedent as not 'clearly established' because of slightly differing facts. . . . If courts, as instructed in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), decline to address constitutional issues by looking first to qualified immunity, and are instructed to rely on 'existing precedent ... [established] beyond debate,' government officials and officers may continue to operate in clear violation of constitutional standards without advise of what is constitutional and without fear of

redress, because the law will continue to protect 'all but the plainly incompetent.'. . .The court declines to apply qualified immunity. Case precedent and policy rationale fail to justify an expansive regime of immunity that would prevent plaintiff from proving a serious constitutional violation.")

THIRD CIRCUIT

Diamond v. Pennsylvania State Education Association, 972 F.3d 262, 273-85 (3d Cir. 2020) (Fisher, J., concurring in the judgment) ("In April 1871, Congress passed, and President Grant signed, an extraordinary act, variously called the Ku Klux Klan Act, Third Force Act, or Civil Rights Act of 1871. On its face, the first section of that act—what we now know as 42 U.S.C. § 1983—provided its violators no immunities from or defenses to liability. . . Of course, the Supreme Court has since read immunities and defenses into § 1983, but it has done so principally on the conceit that they were available at common law in 1871, and implicitly incorporated into the statute. While this approach certainly limits the scope of liability, it also constrains judges from straying too far from the statutory text. In only one context has the Court invented a freestanding defense: the qualified immunity of certain state officials. Whatever might be said for that doctrine—and it is increasingly under scrutiny—I believe that the precedent of neither the Supreme Court nor our own Court warrants another divergence from the common-law approach in the present context. And however strongly considerations of equality and fairness might recommend such action, it is beyond our remit to invent defenses to § 1983 liability based on our views of sound policy. I must, therefore, respectfully disagree with the reasoning of JUDGE RENDELL's opinion announcing the Court's judgment. Nevertheless, I concur in the affirmance of the District Courts' orders. There was available in 1871, in both law and equity, a well-established defense to liability substantially similar to the liability the unions face here. Courts consistently held that judicial decisions invalidating a statute or overruling a prior decision did not generate retroactive civil liability with regard to financial transactions or agreements conducted, without duress or fraud, in reliance on the invalidated statute or overruled decision. Because this defense comports with the history and purposes of § 1983, I conclude that it is available to the unions here and supports the dismissal of the plaintiffs' complaints. . . . Early on, the Court did refer to the common law. In *Pierson*, which concerned common-law and § 1983 claims against police officers, the Court held that because 'the defense of good faith and probable cause' was '[p]art of the background of tort liability[ ] in the case of police officers making an arrest,' it was available to the officers in the § 1983 action as well as the common-law action. . . Soon, however, as it confronted cases involving other executive officials, the Court generalized this defense without regard to its common-law moorings. '[T]he relevant question' became 'whether [the official] "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff]."'. . This drift culminated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), where 'the Court completely reformulated qualified immunity along principles not at all embodied in the common law[.] . . The Court abandoned any reference to a subjective good-faith standard, noting that such

'[i]nquiries ... can be peculiarly disruptive of effective government.'. . Instead, the question was now purely one of objective reasonableness, and it would apply 'across the board,'. . . to all 'government officials performing discretionary functions[.]. . . JUDGE RENDELL's opinion suggests that in rejecting the application of qualified immunity, *Wyatt* opened the door to another freestanding, judge-made defense. In my view, however, *Wyatt* stands for the proposition that the common-law approach must guide any limitation on private-party liability under § 1983. . . . In what follows, I describe an alternative basis for a defense, well established at both common law and equity in 1871, and providing a closer similarity to the facts that we confront. Resolving these cases on this ground would both avoid the knotty problems raised by a most-analogous-tort test and preserve the notion, accepted by six Justices in *Wyatt*, that *Harlow* was an exception that should not swallow the common-law rule. Indeed, in my view, that latter benefit is especially compelling, given the recent cogent critiques of qualified immunity as incongruent with the principles of statutory interpretation. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018). . . . When Congress in 1871 enacted the law that became § 1983, it was well established at both law and equity that court decisions that invalidated a statute or overruled a prior decision, and thereby affected transactional relationships—between private parties and government officials or representatives, or between private parties alone—established in reliance on that statute or decision, did not generate civil liability for repayment except where duress or fraud was present. Whatever the nature of the state action in the present cases—whether the state 'act[ed] jointly with' the unions or 'compel[led] the [unions] to' collect the fees, . . . the factual circumstances underlying this doctrine bear a substantial similarity to those we confront here. Therefore, in my view the doctrine constitutes 'a previously existing, independent legal basis' sufficient to limit the unions' liability under § 1983. . . I know of no authority on '§ 1983's history or purposes' that might 'counsel against' recognition of this defense, . . . and the consistency of its application in law and equity safely permits the conclusion that Congress did not wish to 'impinge' on it 'by covert inclusion in the general language' of § 1983[.] . . It may be tempting, in cases like the present, to read precedent broadly, or appeal to freestanding principles such as the rule of law and basic notions of fairness. But we must interpret and apply § 1983 as we would any other statute, always prepared for the faithful execution of that duty to result in a seemingly extreme outcome. For even when that does not occur, there is value in adhering to the well-established principles of interpretation. Because the plaintiffs in these cases have not pleaded any facts, suggesting that their payments were either sufficiently involuntary or exacted on a fraudulent basis, . . . to permit a reasonable person to infer that the unions might be liable, I concur in the affirmance of the orders granting the unions' motions to dismiss.")

FOURTH CIRCUIT

https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ Judge Wynn (4th Cir.) ("Eliminating the defense of qualified immunity

would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system.")

FIFTH CIRCUIT

Mayfield v. Currie, 976 F.3d 482, 488-93 (5th Cir. 2020) (Willett, J., concurring) ("Stating the correct outcome is easy in this case; untangling a knotty constitutional inquiry to arrive at that outcome, less so. Today's bottom-line disposition is certainly correct: Reversing the denial of Officer Currie's *Malley*-based motion to dismiss, and remanding the *Franks* issue. I write separately only to point out that the Mayfields have not shown *any* constitutional violation, much less a clearly established one. . . The court begins (and ends) its immunity analysis on 'clearly established law' grounds, declining to address—let alone determine—whether Officer Currie violated the Fourth Amendment in the first place. True, the Supreme Court has blessed our 'sound discretion' to pivot solely on prong two of the qualified-immunity analysis. . . And 'clearly established law' is often outcome-determinative. But just because we *can* jump straight to prong two without undertaking the nettlesome task of determining if anyone's rights were violated doesn't mean we *should*. Leapfrogging the constitutional merits does make for easier sledding. . . But such skipping, jurists and scholars lament, leads to ' "constitutional stagnation"—fewer courts establishing law at all, much less *clearly* doing so.'. . The modern immunity regime, as with many judge-invented doctrines, could use greater precision. And one way to advance constitutional clarity is to give courts and public officials more matter-of-fact guidance as to what the law prescribes and proscribes. Yes, scrutinizing the alleged constitutional offense requires more work. More time. More resources. Overworked federal courts already resemble Lucy and Ethel in the chocolate factory. . .But since we require plaintiffs to prove a violation of clearly established law, it seems only fair that we do our part in establishing what that law is. How can a plaintiff produce precedent if fewer courts are producing precedent? How can a plaintiff show a violation if fewer courts are showing what constitutes a violation? The result: Section 1983 meets Catch-22.... Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. . .Ordinary citizens are told that ignorance of the law is no excuse. The judge-created rules of qualified immunity are, well, different. Accordingly, judges should, whenever possible, shrink the universe of uncertainty and 'clearly establish' which alleged misdeeds violate the law, and which do not, thus narrowing the presumed knowledge gap between those who enforce our laws and those who live under them. . . .Officer Currie is shielded from civil liability 'insofar as [her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . .Specifically, the Mayfields must show: '(1) that [Officer Currie] violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'. .As explained below, the Mayfields fall doubly short: There is no Fourth Amendment violation at all, clearly established or otherwise. . . . In sum, the record evidence establishes that the municipal court judge was presented with an arrest-warrant affidavit containing facts that were corroborated and

supplemented by other arrest and search-warrant affidavits, which, considered together, establish probable cause and justify the warrant for Mr. Mayfield's arrest. . . Because the warrant was supported by probable cause, the Mayfields have not shown a constitutional violation. . . Turning to the second issue—'clearly established law'—the court rightly concludes that the Mayfields fail to establish that the alleged Fourth Amendment violation was 'clearly established' at the time of the challenged conduct. . . To be clearly established, a right must be sufficiently clear 'that every "reasonable official would [have understood] that what he is doing violates that right."'. . An officer is not eligible for qualified immunity under *Malley* when there is an 'obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant.'. . . We have held the standard in *Malley* is not satisfied when an officer proffers a facially invalid warrant affidavit—one devoid of any facts—one that 'states nothing more than the charged offense, accompanied by a conclusory statement' that the individual committed the offense. . . . And, while we have held that an officer is not entitled to qualified immunity under *Malley* when the warrant was based solely on a skimpy affidavit, the burden is on the Mayfields to cite a case holding that the Fourth Amendment required the affidavit to establish probable cause on its own, without consideration of other supporting documents. . . They have not done so. . . The Supreme Court has explicitly recognized our discretion to address the qualified-immunity prongs in whatever order we choose. In my judgment, the development of the law is best served by undertaking, wherever possible, the threshold constitutional analysis. Respectfully, courts should attempt to provide greater judicial guidance at the outset, explaining whether a right was in fact violated, not merely whether a rights violation was clearly established. In any event, because the Mayfields have failed to show a constitutional violation, let alone a clearly established one, Officer Currie cannot be liable under *Malley*. And the court is right to remand the *Franks* issue so that the district court can tackle it in the first instance.")

Horvath v. City of Leander, Texas, 946 F.3d 787, 795, 800-03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("I would welcome a principled re-evaluation of our precedents under both prongs. . . The second prong has been widely criticized, and for good reason: Neither the text nor the original understanding of 42 U.S.C. § 1983 supports the 'clearly established' requirement. . . In addition, courts too often misuse the first prong, finding constitutional violations where none exist as an original matter. . . In sum, we grant immunity when we should deny—and we deny immunity when we should grant. But be that as it may, I am duty bound to faithfully apply established qualified immunity precedents, just as I am duty bound to faithfully follow *Smith*. I concur in the judgment in part and dissent in part. . . .The 'clearly established' requirement is controversial because it lacks any basis in the text or original understanding of § 1983. Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement. . . By contrast, Congress has expressly adopted a 'clearly established' requirement in other contexts. For example, in the Antiterrorism and Effective Death Penalty Act of 1996, Congress imposed special burdens on habeas petitioners who seek relief from convictions. AEDPA requires habeas petitioners not only to establish a violation of law, but to identify '*clearly* established Federal law, as determined by the Supreme Court of the United States.'. . The qualified immunity doctrine

imposes a similar 'clearly established' standard in § 1983 cases—but without any corresponding textual basis. That is troubling because, in other contexts, the Supreme Court has declined to read language into a statute if Congress explicitly included the same language in other statutes. . . Nor is there any other basis for imputing such a requirement to Congress, such as from the common law of 1871 or even from the early practice of § 1983 litigation. . . In sum, there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases. . . One of the primary justifications for the 'clearly established' requirement is that the fear of litigation not only deters bad conduct, but chills good conduct as well. That is a valid but, I believe, ultimately misplaced concern. For if courts simply applied the *first* prong of the doctrine in a manner more consistent with the text and original understanding of the Constitution, we might find that the second prong is unnecessary to prevent chilling, as well as unwarranted by the text. Law enforcement officials and other public officials who engage in misconduct should be held accountable. . . Public officials who violate the law without consequence 'only further fuel public cynicism and distrust of our institutions of government.'. . But there is also concern that the fear of litigation chills public officials from lawfully carrying out their duties. . . . Much of the chilling problem, however, stems from misuse of the first prong of the doctrine. Simply put, courts find constitutional violations where they do not exist. For example, the Fourth Amendment does not prohibit reasonable efforts to protect law-abiding citizens from violent criminals—it forbids only '*unreasonable* searches and seizures.'. . As those words were understood at the time of the Founding, the Fourth Amendment allows police officers to take the steps necessary to apprehend and prevent felons from harming innocent citizens. . . .So if chilling police conduct is the concern, there is no need for an atextual 'clearly established' requirement. The Constitution should be enough—if we get the substantive Fourth Amendment analysis right. Our court's recent debates about qualified immunity illustrate this point. In *Winzer v. Kaufman County*, 916 F.3d 464 (5th Cir. 2019), no member of our court claimed that the officers violated 'clearly established' law. We all agreed that the officers involved in the death of a suspected active shooter were entitled to qualified immunity under the second prong. . . What divided us was the first prong—whether the plaintiff established a violation of the Fourth Amendment. Four members of our court dissented from the denial of rehearing en banc, writing that, '[i]f we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them'—echoing the same chilling concerns previously expressed by the Supreme Court. *Winzer v. Kaufman County*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J., dissenting from denial of rehearing en banc). But we did so under the first prong, not the second. . . So too in *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). There we again divided over whether the officers violated the Fourth Amendment—the first prong of the qualified immunity doctrine—in taking steps to prevent a distraught and armed teenager from shooting up a nearby school. . . Once again, so long as the substantive analysis under the first prong is right, there is no need for the second prong. . . . *Smith* does not foreclose Horvath's Free Exercise claim against the city. But qualified immunity requires us to affirm the judgment as to the fire chief. I would vacate the judgment as to the Free Exercise claim against the city and remand to allow Horvath to proceed on that claim. I dissent in part for that reason. In all other respects, I concur in the judgment.")

Zadeh v. Robinson, 928 F.3d 457, 474-81 (5th Cir. 2019) (on rehearing) (Willett, J., concurring in part, dissenting in part), *cert. denied*, 141 S. Ct. 110 (2020) ("The majority opinion correctly diagnoses Dr. Zadeh's injury but refuses to prescribe a remedy: His rights were violated, but since the law wasn't clearly established, Dr. Zadeh loses. I originally agreed with this violation-without-vindication result. . .But deeper study has convinced me that the officials' constitutional misstep violated clearly established law, not a previously unknown right. And it has reaffirmed my broader conviction that the judge-made immunity regime ought not be immune from thoughtful reappraisal. . . . Here, Texas officials gave Dr. Zadeh no time to question the subpoena's reasonableness. That's a violation. Plain and simple. . . .But there are exceptions to most every rule. Under the Supreme Court's 1981 decision in *Burger*, officials don't have to give people time to comply if:

• the business is part of a closely regulated industry;
• there's a substantial government interest;
• warrantless searches are necessary; and
• there's a 'constitutionally adequate substitute for a warrant.'. . .

This search whiffs two requirements. So I agree with the majority opinion: The *Burger* exception doesn't apply. Medical practices—including pain-management clinics—aren't 'closely regulated' industries. . . . In sum, the law strongly protects privacy in medicine. Pain management is a medical field. So pain-management clinics aren't closely regulated. Unfortunately, the majority opinion assumes without deciding that pain-management clinics *are* closely regulated. In doing so, the majority blurs constitutional contours. . . Our legal system serves the public best when it provides clear rules, consistently applied—bright lines and sharp corners. We owe clarity to the courts below us, the litigants before us, and the cases beyond us. Thankfully, our court has at least established that medicine generally isn't closely regulated. . . . Setting aside the 'closely regulated' issue, the *Burger* exception still doesn't apply. The laws here aren't a constitutionally adequate substitute for a warrant. In *Burger*, the Court explained that a statute has to notify the public that the government can search on-demand. And it must limit officer discretion. These statutes neither notify nor limit. Here, the statutes don't notify business owners of on-demand searches. These statutes allow 'a reasonable time' to produce records. And they define 'reasonable time' as 'fourteen calendar days'; less only if there's an emergency or a risk 'that the records may be lost, damaged, or destroyed.' That's not notice of routine, on-the-spot searches. Lastly, the statutes don't limit officer discretion. The only limits: who can subpoena things (the Board); who the Board can subpoena (licensees); and what the Board can demand (medical records). But that's it. Otherwise, there's total discretion. Thus, the *Burger* exception doesn't apply. And so all that's left to decide is if the violation was clearly established. . . . The Supreme Court in *See*, *Lone Steer*, and *Patel* made clear the need for precompliance review of administrative subpoenas. That's controlling law. Summing up: The Board violated Dr. Zadeh's Fourth Amendment rights. No exception applies. And the law was clearly established. The state officials are thus not immune. On this basis alone, Dr. Zadeh deserves his day in court. . . . The majority concedes that the statutes here don't limit the discretion of the inspecting officers as *Burger* requires. The court also acknowledges that statutes must provide notice. Yet the court holds that these requirements weren't—themselves—clearly established. I understand the impulse. After all, qualified immunity

is supposed to protect 'all but the plainly incompetent or those who knowingly violate the law'—that's what the Supreme Court remarked in *Wesby*. So if reasonably competent officers wouldn't necessarily know that they're violating the law, they shouldn't be liable. For example, the majority says that since we haven't yet enforced the limited-discretion requirement, reasonable officials could've thought that the subpoena satisfied *Burger*. Thus, they wouldn't necessarily realize they're breaking the law. But that hyperspecific take snubs the Supreme Court's time-worn test: Was there a clearly established violation? Yes, it's a violation to conduct a warrantless search without precompliance review. Sometimes there's an exception to this test. But not here. No exception applies. And it's only when an exception applies that the general rule doesn't. . . Yet even if we should ask whether the *Burger* exception was clearly established, Dr. Zadeh still ought to win. Controlling law dictates that there must be statutory notice. . . .Everyone agrees his Fourth Amendment rights were violated. But owing to a legal *deus ex machina*—the 'clearly established' prong of qualified-immunity analysis—the violation eludes vindication. At first I agreed with the panel majority that the government violated the law but not *clearly established* law. I was wrong. Beyond this case, though, I must restate my broader unease with the real-world functioning of modern immunity practice. To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached. Today the majority opinion says Dr. Zadeh loses because his rights weren't clearly established. But courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist. How indistinguishable must existing precedent be? On the one hand, the Supreme Court reassures plaintiffs that its caselaw 'does not require a case directly on point for a right to be clearly established.' On the other hand, the Court admonishes that 'clearly established law must be "particularized" to the facts of the case.' How to square these abstract instructions? Take Dr. Zadeh. Effectively, he loses since no previous panel has ever held this exact sort of search unconstitutional. In day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts. Two other factors perpetuate perplexity over 'clearly established law.' First, many courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less *clearly* doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. Second, constitutional litigation increasingly involves cutting-edge technologies. 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. Result: gauzy constitutional guardrails as technological innovation outpaces legal adaptation. Qualified immunity aims to balance competing policy goals: 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.' And I concede that the doctrine enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness. The Court recently declined to take up a closely watched case challenging the warrantless strip search of a four-year-old preschooler. A strange-bedfellows alliance of leading scholars and advocacy groups of every ideological stripe—perhaps the most diverse amici ever assembled—had joined forces to urge the Court to fundamentally reshape immunity doctrine. Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence. Indeed, it's curious how this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations. Count me with Chief Justice Marshall: 'The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.' Doctrinal reform is arduous, often-Sisyphean work. Finding faults is easy; finding solutions, less so. But even if qualified immunity continues its forward march and avoids sweeping reconsideration, it certainly merits a refined procedural approach that more smartly—and fairly—serves its intended objectives.")

Jamison v. McClendon, 476 F.Supp.3d 386, 391-424 (S.D. Miss. 2020) ("The Constitution says everyone is entitled to equal protection of the law–even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called 'qualified immunity.' In real life it operates like absolute immunity. . . . Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability. This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted. But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine. As the Fourth Circuit concluded, 'This has to stop.'. . . Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*. The doctrine of qualified immunity is perhaps the most important limitation. . . . A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; prison guards who forced a prisoner to sleep in cells 'covered in feces' for days; police officers who stole over $225,000 worth of

property; a deputy who body-slammed a woman after she simply 'ignored [the deputy's] command and walked away'; an officer who seriously burned a woman after detonating a 'flashbang' device in the bedroom where she was sleeping; an officer who deployed a dog against a suspect who 'claim[ed] that he surrendered by raising his hands in the air'; and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother. If Section 1983 was created to make the courts '"guardians of the people's federal rights,"' what kind of guardians have the courts become? One only has to look at the evolution of the doctrine to answer that question. Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.' This 'clearly established' requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982. In 1986, the Court then 'evolved' the qualified immunity defense to spread its blessings 'to all but the plainly incompetent or those who knowingly violate the law.' It further ratcheted up the standard in 2011, when it added the words '*beyond debate.*' In other words, 'for the law to be clearly established, it must have been "beyond debate" that [the officer] broke the law.' An officer cannot be held liable unless *every* reasonable officer would understand that what he is doing violates the law. It does not matter, as the Fifth Circuit has explained, 'that we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct ... [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a constitutional right.' Even evidence that the officer acted in bad faith is now considered irrelevant. The Supreme Court has also given qualified immunity sweeping procedural advantages. 'Because the defense of qualified immunity is, in part, a question of law, it naturally creates a "super-summary judgment" right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – summary judgment can still be granted when the law is not reasonably clear.' And there is more. The Supreme Court says defendants should be dismissed at the 'earliest possible stage' in the proceedings to not be burdened with the matter. The earliest possible stage may include a stage in the case before any discovery has been taken and necessarily before a plaintiff has obtained all the relevant facts and all (or any) documents. If a court denies a defendant's motion seeking dismissal or summary judgment based on qualified immunity, that decision is also immediately appealable. Those appeals can lead all the way to the United States Supreme Court even before any trial judge or jury hears the merits of the case. Qualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial. Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied 'in novel factual circumstances,' the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement. Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established 'beyond debate' at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable. . . . To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting. If you've been a Circuit Judge since 1979—sitting on the bench longer than

any current Justice—you might expect a more forgiving reversal. Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days. It is also unnecessary to blame the doctrine of qualified immunity on ideology. 'Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court.' Judges disagree in these cases no matter which President appointed them. Qualified immunity is one area proving the truth of Chief Justice Roberts' statement, 'We do not have Obama judges or Trump judges, Bush judges or Clinton judges.' There are numerous critiques of qualified immunity by lawyers, judges, and academics. Yet qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court. . . . [T]he Court finds a genuine factual dispute about whether Jamison voluntarily consented to the search. A reader would be forgiven for pausing here and wondering whether we forgot to mention something. When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive? Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman. Pelahatchie is also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man. Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities. For Black people, this isn't mere history. It's the present. . . . Jamison's traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives. Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike. United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as 'the world's greatest deliberative body.' The 'vast majority' of the stops were the result of 'nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial.'The situation is not getting better. The number of people killed by police each year has stayed relatively constant, and Black people remain at disproportionate risk of dying in an encounter with police. It was all the way back in 1968 when Nina Simone famously said that freedom meant 'no fear! I mean really, no fear!' Yet decades later, Black male teens still report a 'fear of police and a serious concern for their personal safety and mortality in the presence of police officers.' In an America where Black people 'are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,' who can say that Jamison felt free that night on the side of Interstate 20? Who can say that he felt free to say no to an armed Officer McClendon? It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison's consent being involuntary, a situation where he felt

he had 'no alternative to compliance' and merely mouthed 'pro forma words of consent.' Accordingly, Officer McClendon's search of Jamison's vehicle violated the Fourth Amendment. . . . Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not. Jamison identifies a Tenth Circuit case finding that an officer unlawfully prolonged a detention 'after verifying the temporary tag was valid and properly displayed.' That court wrote that '[e]very temporary tag is more difficult to read in the dark when a car is traveling 70 mph on the interstate. But that does not make every vehicle displaying such a tag fair game for an extended Fourth Amendment seizure.' Aside from the fact that a Tenth Circuit case is not 'controlling authority' nor representative of 'a robust consensus of persuasive authority,' the case is unavailing here since Officer McClendon was awaiting NCIC results when he began to question Jamison. As discussed above, questioning while awaiting results from an NCIC check is 'not inappropriate.' Officer McClendon's initial questioning was not in and of itself a Fourth Amendment violation. As to Officer McClendon's 'particular conduct' of intruding into Jamison's vehicle, making promises of leniency, and repeatedly questioning him, Jamison primarily argues that 'a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison's alleged consent to allow the Defendant McLendon to search his car.' He contends that a grant of 'qualified immunity [is] inappropriate based on those factual conflicts.'To prevail with this argument, Jamison must show that the factual dispute is such that the Court cannot 'settl[e] on a coherent view of what happened in the first place.' Further, '[Jamison's] version of the violations [should] implicate clearly established law.' That is not the case here. While Jamison and Officer McClendon's recounting of the facts differs, the Court is able to settle on a coherent view of what occurred based on Jamison's version of the facts. Considering the evidence in a light 'most favorable' to Jamison,' Jamison has failed to show that Officer McClendon acted in an objectively unreasonable manner. An officer's 'acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.' While Jamison contends that Officer McClendon's intrusion was coercive, Jamison fails to support the claim with relevant precedent. He cites to this Court's opinion in *United States v. Alvarado*, which found it unreasonable to detain a person on the side of the highway for an hour 'for reasons not tied to reasonable suspicion that he had committed a crime or was engaged in the commission of a crime.' However, this Court's opinions cannot serve as 'clearly established' precedent. Moreover, the facts of that case are distinguishable since the defendant in *Alvarado* was unlawfully held after background checks came back clear. The cases the Court cited above regarding physical intrusions – *United States v. Pierre* and *New York v. Class* – are also insufficient. While it has been clearly established since at least 1986 that an officer may be held liable for an unreasonable 'intrusion into the interior of [a] car,' this is merely a 'general statement[ ] of the law.' '[C]learly established law must be particularized to the facts of the case.' . . . Given the lack of precedent that places the Constitutional question 'beyond debate,' Jamison's claim cannot proceed. Officer McClendon is entitled to qualified immunity as to Jamison's prolonged detention and unlawful search claims. . .

. Our nation has always struggled to realize the Founders' vision of 'a more perfect Union.' From the beginning, 'the Blessings of Liberty' were not equally bestowed upon all Americans. Yet, as people marching in the streets remind us today, some have always stood up to face our nation's failings and remind us that 'we cannot be patient.' Through their efforts we become ever more perfect. The U.S. Congress of the Reconstruction era stood up to the white supremacists of its time when it passed Section 1983. The late Congressman John Lewis stared down the racists of his era when he marched over the Edmund Pettus Bridge. The Supreme Court has answered the call of history as well, most famously when it issued its unanimous decision in *Brown v. Board of Education* and resigned the 'separate but equal' doctrine to the dustbin of history. The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity. . . .That the Justices haven't acted so far is perhaps understandable. Not only would they likely prefer that Congress fixes the problem, they also value *stare decisis*, the legal principle that means 'fidelity to precedent.' *Stare decisis*, however, 'isn't supposed to be the art of methodically ignoring what everyone knows to be true.' From TikTok to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice. Justice Kennedy 'complained' as early as 1992 that in qualified immunity cases, 'we have diverged to a substantial degree from the historical standards.' Justice Scalia admitted that the Court hasn't even 'purported to be faithful to the common-law immunities that existed when § 1983 was enacted.' Justice Thomas wrote there is 'no basis' for the 'clearly established law' analysis and has expressed his 'growing concern with our qualified immunity jurisprudence.' Justice Sotomayor has noted that her colleagues were making the 'clearly established' analysis ever more 'onerous.' In her view, the Court's doctrine 'tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.' It remains to be seen how the newer additions to the Court will vote. . . . We read § 1983 against a background of robust immunity instead of the background of a robust Seventh Amendment. . . .[E]very hour we spend in a § 1983 case asking if the law was 'clearly established' or 'beyond debate' is one where we lose sight of why Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights. . . . Instead of slamming shut the courthouse doors, our courts should use their power to ensure Section 1983 serves all of its citizens as the Reconstruction Congress intended. Those who violate the constitutional rights of our citizens must be held accountable. When that day comes we will be one step closer to that more perfect Union. . . . I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity. . . . Let us waste no time in righting this wrong.") [footnotes omitted]

SIXTH CIRCUIT

Stewart v. City of Euclid, Ohio, 970 F.3d 667, 677-84 (6th Cir. 2020), *cert. denied*, 141 S. Ct. ___ (2021) (Donald, J., concurring in part and dissenting in part) ("While I agree that the district court should be reversed on the state law claims and that Officer Rhodes violated Luke Stewart's Fourth

Amendment right to be free from unreasonable seizures, I would also find that the constitutional right was clearly established and that, therefore, Rhodes is not entitled to qualified immunity. The majority evaluates the clearly-established prong too narrowly and provides immunity to an officer who created a dangerous situation and then used that situation to justify the fatal shooting of a man who did not present an immediate danger of serious physical injury to the officer. In fact, it is debatable whether Stewart presented any danger to the officer or the public, or if he even knew that Rhodes was a law enforcement officer, since neither Rhodes nor Catalani announced themselves as police officers. . . . Despite § 1983's categorical decree that all persons under color of state law who cause the deprivation of a constitutional right 'shall' be subject to liability, the Supreme Court overlaid qualified immunity onto the statute's directive in an effort to balance its underlying policies. . . More specifically, the doctrine—as we know it today—was deemed necessary to protect public officials from unforeseeable developments in the law. . . Today, the seemingly endless struggle with applying the doctrine is in defining the extent of a clearly established right. . . .Judge Willett from the Fifth Circuit recently highlighted some of the issues with the clearly-established standard in his dissent in *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting). Noting the courts' division over what level of 'factual similarity must exist,' he wrote that 'the "clearly established" standard is neither clear nor established among our Nation's lower courts.' *Id.* He also emphasized that deciding immunity issues based on a too-narrow construction of clearly established law prevents the vindication of constitutional rights[.] . . . Of course, the problems do not end there, as courts have increasingly begun to skip the constitutional question and simply ask whether the right was clearly established. . . . Here, the majority answered the constitutional question first but construes the clearly-established prong too narrowly. The sole purpose of the clearly-established prong, as created and announced by the Supreme Court, is to protect officials from unforeseeable or unknowable developments in the law. . . It is not a blank check to engage in specific acts that have not previously been considered by a court of controlling authority. . . Nor is it 'a license to lawless conduct.'. . When defining clearly established rights, we must have in the forefront of our mind this question: would a reasonable officer have known that his actions were unconstitutional? . . . . The majority notes that Rhodes had no duty to retreat. However, Rhodes likewise had a duty to only use such force as was necessary under the totality of the circumstances. The fact that Rhodes shot Stewart five times at near point-blank range defies reasonableness. This is the type of wantonness that does not require a case on point to put an officer on notice that his conduct is unreasonable. As Judge Gorsuch opined, 'some things are so obviously unlawful that they don't require detailed explanations' or happen so rarely that there will be no case on point. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). Had Rhodes been standing outside of the car when he used lethal force, this would be a very simple case—he would not be entitled to qualified immunity. . . . However, in this Circuit, the Court has not encountered the exact situation that occurred in this case—the officer being *inside* of the car at the time of the shooting. That lack of precisely-analogous controlling law can oftentimes sound the death knell to a § 1983 claim. . . Here, the majority sounds the death knell for Stewart's § 1983 claims and finds that the right was not clearly established, but I disagree. In addition to this being a situation where precisely-analogous law should not be required, both in-circuit cases and out-of-circuit cases show that Rhodes violated

Stewart's clearly-established right to be free from excessive force when he shot Stewart five times and killed him, even though he posed no imminent threat of physical injury or death to the officer or the public. . . . The law is clearly established in this Circuit that an officer may not use deadly force against a fleeing suspect unless the suspect is presenting an imminent threat of physical injury or death to the officer or the public. . . . Although Rhodes asserts that he felt that he was in danger while the car was moving, and that he feared that he may be in danger if the car were to begin moving again, the fact remains that the car was not moving at the time Rhodes chose to shoot Stewart. This lack of imminent threat of serious physical injury renders lethal force objectively unreasonable in this circumstance (despite Rhodes' individualized concern to the contrary). . . .Although this case presents unique factual circumstances within this Circuit, there are at least *four* factually similar cases from other jurisdictions. [discussing cases] While it is arguable that these four cases establish the 'robust consensus' that would put a reasonable officer on notice of Stewart's specific rights, . . . what is more persuasive is that these four cases illuminate the application of the specific—and clearly established—right that an individual has to be free from lethal force when fleeing arrest in a car that is not presenting an imminent threat of serious physical harm to anybody. . . Moreover, these four cases applied that specific right when the suspect's car was actually moving, whereas in our case Stewart's car was *stopped* when he was killed. That distinction makes it even more apparent that a reasonable officer would have known that lethal force was inappropriate in this case. As such, I would find that Stewart's rights were clearly established at the time that Rhodes shot and killed him. . . . I find myself writing separately about the dangers of unchecked police powers with unsettling and increasing frequency. Six years ago, I dissented from a decision affirming summary judgment for several officers who killed Leroy Hughes, an African American man suffering from mental illness, by shocking him with tasers twelve times in five minutes. *See Sheffey v. City of Covington*, 564 F. App'x 783, 796-97 (6th Cir. 2014) (Donald, J., dissenting). The first eight shocks occurred in a single minute. . . The total delivery exceeded 14,000 volts. . . In that dissent, I recalled the names of Amadou Diallo, Sean Bell, Oscar Grant, Jonathan Ferrell, and others. . . And I exhorted this Court and its readers not to 'ignore the seeds of systemic inequalities sown in our Nation's history and lain bare by diligent review.'. . We have new names today: George Floyd, Elijah McClain, Rayshard Brooks, and too many others. The world knows why they died. The same seeds whose bitter fruit killed Leroy Hughes killed them too. And on March 13, 2017, in Euclid, Ohio, they killed Luke Stewart. That the seeds of these senseless killings are systemic should not absolve the shooters. Our system of justice bestows upon police great powers and a sacred trust. We rightly protect police from penalties that otherwise would follow from poor conduct when officers act with reason. But when officers fail to act with reason, when they are motivated by impulses that spring from dark corners of the psyche or simply fail implicitly to acknowledge the humanity of the people before them, they violate our sacred trust. And then the same system that empowers and protects police must, if it is to function properly, if it is to be worthy of recognition as a system of justice, strip those powers and protections away. Luke Stewart should be alive today. He was unarmed, unsuspected of committing a serious felony, and behind the wheel of a stationary vehicle when Rhodes opened fire into his torso, chest, neck, and wrist. Qualified immunity should not shield Rhodes from the consequences of that unreasonable decision. I dissent.")

EIGHTH CIRCUIT

Baldwin v. City of Estherville, 915 N.W.2d 259, 281-99 (Iowa 2018) (Appel, J., joined by Hecht, J., dissenting) ("The federal doctrine of statutory qualified immunity progressively dilutes legal norms, embraces numerous false assumptions, fails to recognize the important role of juries in restraining government, and is inconsistent with important tenants of Iowa law. We should not voluntarily drape our constitutional law with the heavy chains of indefensible doctrine. We should aim to eliminate fictions in our law and be honest and forthright on the important question of what happens when officers of the law commit constitutional wrongs that inflict serious reputational, emotional, and financial harms on our citizens. . . .We should tread very carefully before we limit the scope of remedies for unconstitutional conduct because we are, in effect, cutting down the scope of the substantive rights involved. Make no mistake, this case is not about the tail on the dog. It is about the dog. The notion that judges may create a 'gap' between constitutional rights and the remedies afforded is untenable. The consequence of such a gap is to effectively reduce the constitutional protections afforded to the public. To the extent they are not enforced, the nice words in the constitution do not mean what they seem to mean. . . . In short, when citizens suffer potentially grievous harms from unconstitutional conduct in violation of article I, section 1 or article I, section 8, we should require the officials who engaged in the unconstitutional conduct to bear the burden of the loss. We should not allow the officials who engage in unconstitutional conduct to respond to the prayer of the harmed citizen with, 'Aw, tough luck. Tut tut. Bye bye.'. . . The common law provenance of broad-brushed statutory qualified immunity asserted by the United States Supreme Court in its statutory qualified immunity cases is based on an incorrect view of common law history. . . .[T]he Supreme Court has, in its constitutional immunity cases, confused the role of good faith as an element of a specific offense with the different and much broader notion of good-faith immunity. For instance, in *Pierson*, the Supreme Court cited the elements of the tort of false arrest at common law. . . But the fact that bad faith and flagrancy are elements of certain common law torts is not a basis for a broadly framed, across-the-board constitutional immunity doctrine. . . And in *Harlow v. Fitzgerald*, the Court jettisoned subjective bad faith for objective bad faith, a clear departure from any approach to the common law immunities. . . This innovation had no basis at all in common law. Even among members of the Supreme Court, the fiction that broad statutory qualified immunity under 42 U.S.C. § 1983 is supported by the common law is unraveling. At least three Justices have recognized that the statutory qualified immunities caselaw, in fact, departs from common law precedents. For example, in *Wyatt v. Cole*, Justice Kennedy noted that the Court had 'diverged to a substantial degree from the historical standards' of the common law and observed that statutory immunity was not supposed to be based upon 'freewheeling policy choice[s].'. . In a dissenting opinion in *Crawford-El v. Britton*, Justice Scalia noted that 'our 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.'. . . Most recently, in *Ziglar v. Abbasi*, Justice Thomas observed that 'we have diverged from the historical inquiry mandated by the statute.'. . The sandy foundation of federal statutory qualified immunity is not withstanding the test of time but rather is being washed away.

. . . Robust qualified immunity for individuals committing constitutional wrongs is completely inconsistent with the wording, the legislative history, and the challenging historical purpose of the statute. . . . If it is true that police conduct will be chilled by tort rules, then the granting of immunity will lead police to engage in more unconstitutional activities because they do not have to worry about potential liabilities. We must consider both halves of the deterrence walnut. Indeed, at common law, an official's exposure to 'being mulcted in damages was precisely the deterrent for errors of judgment.' . . More recently, the NAACP Legal Defense Fund has explicitly called for a reexamination of the legal standards governing qualified immunity in light of police violence involving African-Americans. . . According to the NAACP view, more deterrence is needed. . . Judge Jon Newman agrees, calling upon Congress to abolish the defense of qualified immunity in order to better control police misconduct. Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, Wash. Post (June 23, 2016), http://wapo.st/28R2Np4?tid=ss_mail&utm_term=.16d65eac7e49y [https://perma.cc/2CSG-2ERG]. The libertarian Cato Institute has joined the fray, noting 'the deleterious effect [that qualified immunity] has on the ability of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.' Brief of the Cato Institute as Amicus Curiae Supporting Plaintiffs-Appellees and Affirmance at 1, *Williams v. Cline*, —— F.3d. —— (7th Cir. 2018) (No. 17–2603), https://object.cato.org/sites/cato.org/files/pubs/pdf/williams-v-cline-cato-amicus-brief-motion.pdf [https://perma.cc/R6UU-E7AB]; *see also* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1519–24 (2016) (examining problems presented by qualified immunity and indemnification). . . . The handwringing of the United States Supreme Court in its qualified immunity cases shows a dissatisfaction with the common law and with the failure of the legislative branch to enact policy preferences that the majority of the Court seems to prefer. Qualified immunity is thus simply judicial legislation—it reflects dissatisfaction with the failure of the legislative process to relieve individual officers of liability through indemnification and the achievement of the desired policy result through judicially legislating a policy of qualified immunity. . . .The federal approach to statutory qualified immunity embraces a dynamic that has progressively chewed and choked potential remedies for constitutional violations. The federal approach requires a plaintiff to overcome qualified immunity by demonstrating that the officials involved engaged in violations of 'clearly established rights.'. . A key question, of course, is at what level of generality is this test imposed? The federal caselaw suggests that the level of generality has become increasingly specific—namely, that unless there is an authoritative, reported case that is nearly factually identical to the case in question, the constitutional right is not clearly established. . . Further, in determining whether there has been a violation of constitutional rights, the federal courts jettisoned any subjective test in favor of a 'reasonableness' test in determining whether the actions of the officers qualify for immunity. . . The objective reasonableness test is, of course, so amorphous that some liability might have emerged for officials, so the federal caselaw has now tightened the screw another turn by replacing or supplementing the objectively reasonable standard with the new formulation of 'entirely unreasonable.'. . And, there is more. By now allowing, if not encouraging, courts not to reach the question of whether a constitutional violation actually occurred, but only whether the right involved was 'clearly established,' the constitutional immunity doctrine has

prevented the development of substantive constitutional law by reducing the number of cases that address claims on the constitutional merits. . . . The federal constitutional immunity doctrine thus serves to limit the development of constitutional law by eliminating consideration of constitutional uncertainties in filed cases. . . Further, the presence of difficult-to-meet constitutional immunity standards has dramatic impact in law offices where lawyers and putative clients weight the practicalities of bringing constitutionally based legal actions in the face of strong immunity headwinds. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 494–95 (2011) (noting "qualified immunity plays a large role in case selection" and "limit[s] the extent to which civil rights litigation tests the boundaries of the law"). The creation of artificial immunities for constitutional violations is bad news for the development of state constitutional law. . . . The mere lifting of federal statutory qualified immunity doctrine and supplanting it into analysis of constitutional claims under the Iowa Constitution is a nonstarter. The question is whether we should independently develop a judge-made doctrine of qualified immunity to relieve public officials from liability for damages arising from their unlawful conduct as a supplement to the constitutional text contained in article I of the Iowa Constitution. I conclude that we should not manufacture a qualified immunity doctrine for constitutional wrongs of public officials. Our state constitutional tradition places strong emphasis on the Bill of Rights. . . There can simply be no doubt that limiting the remedies available for violations of constitutional provisions limits the substantive protections of those constitutional provisions for all practical purposes. Justice Harlan was spot-on when he observed that the relationship between substance and remedy is one-on-one. . . . In any event, the basic premise that qualified immunity is needed to prevent overdeterrence of official conduct has little support. A recent study by Professor Joanna Schwartz confirms what one might suspect, namely, that at least with respect to police officers, local governments almost always indemnify for settlements and judgments arising out of misconduct lawsuits. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014). . . .The fact that officers are almost always indemnified undercuts one of the primary arguments in favor of the immunity doctrine—that without it, officers will be deterred from engaging in appropriate activities for fear of the financial consequences of a wrong decision.")

See also ***Wendt v. Iowa***, 971 F.3d 816, 820 (8th Cir. 2020) ("At the motion to dismiss stage, both parties briefed the new 'all due care' qualified immunity standard as applied to the hunters' unreasonable search claim under Article I, § 8 of the Iowa Constitution. The officers again raised qualified immunity at the summary judgment stage, although neither party referenced the new standard, instead applying federal standards. The district court, noting the error, applied the correct legal standard to the Iowa constitutional claim. The hunters do not challenge that *Baldwin* is the applicable Iowa standard, or that the district court correctly applied the new standard to the facts of this case. They also do not argue they were not given an adequate opportunity to brief the issue. . . The district court did not err in considering summary judgment for the unreasonable search claims under the Iowa Constitution.")

NINTH CIRCUIT

Ventura v. Rutledge, 398 F.Supp.3d 682, 697 n.6 (E.D. Cal. 2019) (Drodz, J.), *aff'd*, 978 F.3d 1088 (9th Cir. 2020) ("In legal circles and beyond, one of the most debated civil rights litigation issues of our time is the appropriate scope and application of the qualified immunity doctrine, particularly in cases of deaths resulting from police shootings. *See, e.g.*, Nicolas Sonnenburg, *Pressure Mounts on Justices in Qualified Immunity Cases*, SAN FRANCISCO DAILY J., Apr. 12, 2019, at 1; Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1937 (2018) ("[I]t is fair to say that the doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges, and litigators for half a century."). Many legal scholars and others have called for the doctrine to be revisited and eliminated, significantly restricted, or at the very least altered. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Cato Institute, *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability* (March 1, 2018 policy forum). For years, justices of the Supreme Court, as well as judges of the lower federal courts, have been critical of the application and expansion of the doctrine. *See, e.g., Kisela*, 138 S. Ct. at 1162 (Sotomayor, J, dissenting) ("The majority today...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."); *Ziglar v. Abbasi*, ___U.S.___, ___, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Anderson v. Creighton*, 483 U.S. 635, 647 (1987) (Stevens, J., dissenting) ("The Court stunningly restricts the constitutional accountability of the police by creating a false dichotomy between police entitlement to summary judgment on immunity grounds and damages liability for every police misstep, by responding to this dichotomy with an uncritical application of the precedents of qualified immunity that we have developed for a quite different group of high public office holders, and by displaying remarkably little fidelity to the countervailing principles of individual liberty and privacy that infuse the Fourth Amendment."); *Zadeh v. Robinson*, ___F.3d___, 2019 WL 2752310, at *16 (5th Cir. July 2, 2019) (Willett, J., concurring) ("Qualified immunity aims to balance competing policy goals. And I concede it enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness. Even so, I add my voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence and its 'real world implementation.' "); *Manzanares v. Roosevelt Cty. Adult Detention Ctr.*, 331 F. Supp. 3d 1260, 1293–94 n.10 (D.N.M. 2018) (critiquing the Supreme Court's application of qualified immunity in many respects, among them the application of the clearly established law requirement, noting: "Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way"). While there is so much more that could, and perhaps should, be said about the current state of this judicially created doctrine, the undersigned will stop here for today. In short, this 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. However, the Supreme Court's decision in *Kisela* is, of course, binding on this court. The circumstances

presented there, where the Supreme Court held the officer was entitled to qualified immunity on summary judgment, posed a significantly lesser degree of danger to a third party than those presented in this case. Accordingly, application of the holding in *Kisela* to the undisputed evidence in this case dictates the result reached herein."), *aff'd*, 978 F.3d 1088 (9th Cir. 2020).

TENTH CIRCUIT

Cox v. Wilson, 971 F.3d 1159, 1161-65 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from the denial of rehearing en banc) ("Because the panel decision in this case exponentially expands in this circuit the judicially created doctrine of qualified immunity into an all-purpose, no-default, use-at-any-time defense against asserted police misconduct, and because it clearly demonstrates so much of what is wrong with qualified immunity, I requested that my colleagues review the panel decision en banc. From the denial of that request, I respectfully dissent. . . . Instead of expressly ruling on the merits of the issues raised and granting the parties the due process to which they are entitled, the panel chose to openly entangle the previously denied and dismissed doctrine of qualified immunity into its analysis. It denied the parties a ruling on the merits of their appeal and instead concluded that because police misconduct in a prior case was arguably more egregious than the misconduct at issue in this case—but was nevertheless shielded by qualified immunity—the deputy sheriff in this case is similarly protected by qualified immunity. Specifically, the panel reasons that because the conduct in the prior case was apparently 'improp[er]' to 'most laypersons' but not in violation of clearly established law, it follows that the officer's conduct in this case is also not a violation of clearly established law. . . .As has been noted, the text of 42 U.S.C. § 1983 'makes no mention of defenses or immunities.' *Baxter v. Bracey*, —— U.S. ——, 140 S. Ct. 1862, 1862, —— L.Ed.2d —— (2020) (Thomas, J., dissenting from the denial of certiorari) (quotation and alteration omitted). Qualified immunity is entirely a court-created doctrine. As concerns police officer misconduct, it stems from the Court's 1967 decision, *Pierson v. Ray*, 386 U.S. 547, 556-57, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Following its creation, which intended to prevent frivolous and harassing litigation, . . . the doctrine has mutated in seemingly unending fashion. The case before us is Exhibit A of that continuing transformation. Much of the problem with the expansion of the doctrine is exacerbated because the Court has failed to give direction on (1) the scope of appellate court power to raise qualified immunity as a basis for disposition of a case when qualified immunity was denied by or not raised before the district court, and (2) the required nexus of particular facts necessary to satisfy the clearly-established element of qualified immunity analysis. In concluding that Wilson was entitled to qualified immunity, the panel relies solely on the second prong of the qualified immunity inquiry—whether the constitutional right violated 'was clearly established at the time of the defendant's unlawful conduct.'. . But it ignores that the district court denied qualified immunity to Wilson under this prong because the relevant 'factual context [wa]s highly disputed.'. . And worse, rather than compare the specific facts of the present case with those of prior cases, the panel satisfies itself with comparing the relative perceived egregiousness of police conduct in factually dissimilar cases. Specifically, the panel relies only on the facts of *Pauly*, a case that did not involve a car

chase, vehicular pursuit, or any facts remotely similar to the facts of the instant case. . . . At a time when 'courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist' for a constitutional violation to be clearly established, *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part), the panel opinion effectively signals to lower courts that they may circumvent issues of factual fit by relying on idiosyncratic assessments of the relative impropriety of officer misconduct. Shifting the focus from 'particularized' facts to nebulous notions of comparative impropriety places this case squarely into the conflict among our sibling circuits in applying the clearly-established prong. . . . And it calls for just 'the sort of "freewheeling policy choice[s]"' the Court has 'disclaimed the power to make.'. . Further, the panel's most unusual resurrection of the qualified immunity issue to correct a squarely presented trial error similarly invites lower courts to make 'freewheeling policy choice[s]' inappropriate under § 1983. . . . Though the federal courts of appeals disagree as to whether courts are empowered to raise *sua sponte* the affirmative defense of qualified immunity on behalf of the government, . . . none have suggested appellate power extends to reversing the trial court's denial of qualified immunity when such reversal has not been appealed—until now. Thus, by resurrecting an issue raised, resolved, and not appealed, the panel takes yet another step down the road of mutating the doctrine into an 'absolute shield' against consequences for the violation of constitutional rights. . . As noted, this case is Exhibit A of that metastasis. For these reasons, the panel's decision is neither 'right [n]or just under the law.'. . The modern qualified immunity doctrine already sends the 'alarming signal to law enforcement officers ... that they can shoot first and think later.'. . Our panel opinion adds another signal: egregious police misconduct will go unpunished if the court can locate prior, arguably more improper conduct that escaped liability. In other words, the Tenth Circuit now holds that a reasonable officer would *not* 'understand that what he is doing violates [a constitutional] right,'. . . if 'worse' conduct has previously been shielded by qualified immunity. This terrible precedent, thus created, is two-fold. One: it allows panels to use qualified immunity, at any stage of litigation, to uphold an otherwise erroneous decision of the district court—notwithstanding a substantial dispute regarding the evidence; notwithstanding the denial of a previous motion not appealed in a timely manner; and notwithstanding the district court denied qualified immunity time and again. Two: it shields police misconduct from liability so long as any other government officer at some point committed—in the panel's mind—more improper conduct and was not held liable. Together, these two pronouncements create a carte blanche which can be scripted and negotiated to counter the public interest and foster the violation of constitutional rights by those charged with protecting them. Regrettably, this case is one of many illustrating that the profound issues with qualified immunity are recurring and worsening. 'Given the importance' of these issues, we can no longer delay confronting them. *Baxter*, 140 S. Ct. at 1865 (Thomas, J., dissenting from the denial of certiorari). Particularly in light of recent—though not novel—unrest, at least one of our sibling circuits has recognized that the relentless transformation of qualified immunity into an absolute shield must stop. *See Est. of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020). But as it stands in the Tenth Circuit, the panel opinion allows courts to finesse ambiguities to avoid confronting the hard issues presented. And that's a denial of due process any way you look at it. By continuing to await addressing deep and

troubling qualified immunity issues brought to our attention time and again, we are complicit in this denial.")

White v. City of Topeka, 489 F.Supp.3d 1209, 1212-14 (D. Kan. 2020) ("In recent years, many judicial officers have criticized qualified immunity. For example, Justice Thomas repeatedly has expressed his 'strong doubts about [the Supreme Court's] § 1983 qualified immunity doctrine.' [citing *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) and *Ziglar*, 137 S. Ct. at 1870, 1872 (Thomas, J., concurring in part and concurring in the judgment)] Recently, several federal district court judges have levied strong criticism of the qualified immunity doctrine because of the way it immunizes police officers for their actions. [citing *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) and other cases] This dialogue, however, can't displace the court's current job in this case. The court 'is required to apply the law' governing qualified immunity 'as stated by the Supreme Court.'. . So, within these strictures imposed by the qualified immunity doctrine, the court must determine whether the two officers violated Mr. White's *clearly established* constitutional right against use of excessive force. This summary judgment order reaches two primary conclusions. *First*, based on the summary judgment facts, the court holds that a reasonable jury could conclude that the totality of the circumstances do not support probable cause to believe Mr. White committed severe crimes or that he posed a threat of serious physical harm to the officers or others. And so, under these facts, a genuine issue exists whether the officers' use of force was unjustified. . .*Second*, and again applying the summary judgment facts, the court nonetheless holds that qualified immunity applies. It reaches this conclusion because plaintiffs have failed to identify a 'clearly established right' that the officers violated. In other words, plaintiffs have identified no clearly established Supreme Court or Tenth Circuit case that prohibited use of deadly force against an individual who was carrying a firearm in his pocket, had ignored officers' commands to lie down and stop, had resisted officers' attempts to secure his firearm, and then fled from officers with the gun still in his possession. Likewise, the court's independent research has located no such case. This second conclusion requires the court to grant summary judgment on plaintiffs' claim against the two officers.")

Green v. Padilla, No. CIV 19-0751 JB\JFR, 2020 WL 5350175, at *20 n.6 (D.N.M. Sept. 4, 2020) (Browning, J.) ("It seems ironic that the federal courts would restrict a congressionally mandated remedy for constitutional violations -- presumably the rights of innocent people -- and discourage case law development on the civil side -- and restrict case law development to motions to suppress, which reward only the guilty and is a judicially created, rather than legislatively created, remedy. Commentators have noted that, '[o]ver the past three decades, the Supreme Court has drastically limited the availability of remedies for constitutional violations in' exclusionary rule litigation in a criminal case, habeas corpus challenges, and civil litigation under § 1983. . . Some commentators have also encouraged the courts to drop the suppression remedy and the legislature to provide more -- not less -- civil remedies for constitutional violations. . . In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Supreme Court noted that civil remedies were a viable alternative to a motion to suppress when it held that the exclusionary rule was inapplicable to cases in which police officers

violate the Fourth Amendment when they fail to knock and announce their presence before entering. . . Rather than being a poor or discouraged means of developing constitutional law, § 1983 seems the better and preferable alternative to a motion to suppress. It is interesting that the current Supreme Court and Tenth Circuit appear more willing to suppress evidence and let criminal defendants go free, than have police pay damages for violations of innocent citizens' civil rights. It is odd that the Supreme Court has not adopted a clearly established prong for suppression claims; it seems strange to punish society for police violating unclear law in criminal cases but protect municipalities from damages in § 1983 cases.")

Stevenson on behalf of Howard v. City of Albuquerque, No. CIV 17-855 JB\LF, 2020 WL 873937, at *26 n.46 (D.N.M. Feb. 21, 2020) (Browning, J.) ("The Supreme Court signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established, and the Tenth Circuit is now sending those signals to the district courts. . . Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. . . The Supreme Court's view of the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case. It 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*?' Thus, when the Supreme Court grounds its clearly-established jurisprudence in the language of what a reasonable officer or a 'reasonable official' would know, *Kisela v. Hughes*, 138 S. Ct. at 1153, yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers,' *Kisela v. Hughes*, 138 S. Ct. at 1162 (Sotomayor, J. dissenting). The Court concludes that the Supreme Court is doing the latter, crafting its recent qualified immunity jurisprudence to effectively eliminate § 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong. . . 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. As the Cato Institute noted in a recent amicus brief, 'qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based.'. . *See generally* William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45 (2018)(arguing that the Supreme Court's justifications for qualified immunity are incorrect). Further, as the Honorable Clarence Thomas, Associate Justice for the Supreme Court, has argued, because the Supreme Court's qualified immunity analysis 'is no longer grounded in the common-

law backdrop against which Congress enacted [§ 1983], we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act.'. . . The judiciary should be true to § 1983 as Congress wrote it. Moreover, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive. If the citizens of New Mexico decide that state actors used excessive force or were deliberately indifferent, the verdict should stand, not be set aside because the parties could not find an indistinguishable Tenth Circuit or Supreme Court decision. Finally, to always decide the clearly established prong first and then to always say that the law is not clearly established could be stunting the development of constitutional law. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 6 (2015). And while the Tenth Circuit -- with the exception of now-Justice Gorsuch, *see* Shannon M. Grammel, *Justice Gorsuch on Qualified Immunity*, 69 Stan. L. Rev. Online 163 (2017) -- seems to agree with the Court, *see, e.g., Casey v. City of Federal Heights*, 509 F.3d at 1286, the per curiam reversals appear to have the Tenth Circuit stepping lightly around qualified immunity's clearly established prong, *see Aldaba II*, 844 F.3d at 874; *Malone v. Bd. of Cty. Comm'rs for Cty. of Dona Ana*, 707 F. App'x at 555-56; *Brown v. City of Colorado Springs*, 709 F. App'x 906, 915-16 (10th Cir. 2017), and willing to reverse district court decisions.") **[***See also* ***Green v. Padilla***, No. CIV 19-0751 JB\JFR, 2020 WL 5350175, at *23 n.9 (D.N.M. Sept. 4, 2020); ***O'Farrell v. The Board of Commissioners for the County of Bernalillo***, No. CIV 17-1052 JB\JFR, 2020 WL 1955292, at *19 n.29 (D.N.M. Apr. 23, 2020)**]**

Ganley v. Jojola, 402 F.Supp.3d 1021, 1095 n.38 (D.N.M. 2019) (Browning, J.) ("The Court further notes that the Supreme Court's qualified immunity jurisprudence 'effectively eliminate[s] § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong. . . Such de facto rigidity has led Professor Karen Blum of Suffolk University Law School to conclude that the Supreme Court's approach to qualified immunity has

(1) stifled the development of constitutional standards while creating a confusing and divisive debate about what constitutes 'clearly established' law; (2) imposed substantial burdens and costs on the litigation of civil rights claims by encouraging multiple and often frivolous or meritless interlocutory appeals; and (3) resulted in judges displacing jurors as fact finders. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1891 (2018)(citing *Nelson v. City of Albuquerque*, 283 F. Supp. 3d at 1107 n.44). Professor Blum is not alone. The Honorable Robert W. Pratt, senior United States District Judge for the United States District Court for the Southern District of Iowa, sitting by designation, has likewise noted that 'because every individual case will present at least nominal factual distinctions[,] ... [i]f precisely identical facts were required, qualified immunity would in fact be *absolute* immunity for government officials.'. . Moreover, the Honorable Jack B. Weinstein, senior United States District Judge for the United States District Court for the Eastern District of New York, has also criticized the doctrine on the same grounds, and, in *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975 (E.D.N.Y. June 11, 2018), Judge Weinstein devotes significant discussion to highlighting concerns he and others have regarding the Supreme Court's qualified immunity jurisprudence. . . Although

the Court agrees that such criticism is warranted, and would, if the Court were writing on a clean slate, minimize the expansion of the judicially created clearly established prong so that it does not eclipse the congressionally enacted § 1983 remedy, as a district court, the Court is bound to apply faithfully and honestly controlling Supreme Court and Tenth Circuit precedent, and it will do so here.")

Manzanares v. Roosevelt County Adult Det. Ctr., 331 F.Supp.3d 1260, 1294 n.10 (D.N.M. 2018) (Browning, J.) ("If a district court in New Mexico is trying -- as it does diligently and faithfully -- to receive and read the unwritten signs of its superior courts, it would appear that the Supreme Court has signaled through its per curiam qualified immunity reversals that a nigh identical case must exist for the law to be clearly established. As former Tenth Circuit judge, and now Stanford law school professor, Michael McConnell, has noted, much of what lower courts do is read the implicit, unwritten signs that the superior courts send them through their opinions. . . Although still stating that there might be an obvious case under *Graham* that would make the law clearly established without a Supreme Court or Circuit Court case on point, . . . the Supreme Court has sent unwritten signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established, and the Tenth Circuit is now sending those unwritten signals to the district courts[.] . . . Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. . . The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case. It 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*?' Thus, when the Supreme Court grounds its clearly-established jurisprudence in the language of what a reasonable officer or a 'reasonable official' would know, . . . yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers,' *Kisela v. Hughes*, 138 S.Ct. at 1162 (Sotomayor, J. dissenting). The Court concludes that the Supreme Court is doing the latter, crafting its recent qualified immunity jurisprudence to effectively eliminate § 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong. . . 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. As the Cato Institute noted in a recent amicus brief, 'qualified immunity has increasingly diverged from the statutory and historical framework on

which it is supposed to be based.' *Pauly v. White*, No. 17-1078 Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 2, 2018 WL 1182773 (U.S. Supreme Court, filed Mar. 2, 2018)( )("Cato Brief"). 'The text of 42 U.S.C. § 1983 ... makes no mention of immunity, and the common law of 1871 did not include any across-the-board defense for all public officials.' Cato Brief at 2. 'With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification.' Cato Brief at 2. *See generally* William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45 (2018)(arguing that the Supreme Court's justifications for qualified immunity are incorrect). Further, as Justice Clarence Thomas has argued, the Supreme Court's qualified immunity analysis 'is no longer grounded in the common-law backdrop against which Congress enacted [§ 1983], we are no longer engaged in interpret[ing] the intent of Congress in enacting the Act.' *Ziglar v. Abbasi*, ––– U.S. ––––, 137 S.Ct. 1843, 1871, 198 L.Ed.2d 290 (2017)(Thomas, J., concurring). . . .The judiciary should be true to § 1983 as Congress wrote it. Moreover, in a day when police shootings and excessive force cases are in the news, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive. If the citizens of New Mexico decide that state actors used excessive force or were deliberately indifferent, the verdict should stand, not be set aside because the parties could not find an indistinguishable Tenth Circuit or Supreme Court decision. Finally, to always decide the clearly established prong first and then to always say that the law is not clearly established could be stunting the development of constitutional law. . . And while the Tenth Circuit -- with the exception of now-Justice Gorsuch, *see* Shannon M. Grammel, *Justice Gorsuch on Qualified Immunity*, Stan. L. Rev. Online (2017) -- seems to be in agreement with the Court, *see, e.g., Casey*, 509 F.3d at 1286, the Supreme Court's per curiam reversals appear to have the Tenth Circuit stepping lightly around qualified immunity's clearly established prong, *see, e.g, Perry v. Durborow*, 892 F.3d 1116, 1123-27 (10th Cir. 2018); *Aldaba II*, 844 F.3d at 874; *Rife v. Jefferson*, ––– Fed.Appx. ––––, ––––– – ––––, 2018 WL 3660248, at *4-10 (10th Cir. 2018)(unpublished); *Malone v. Board of County Comm'rs for County of Dona Ana*, 707 Fed.Appx. at 555–56; *Brown v. The City of Colorado Springs*, 709 Fed.Appx. 906, 915–16 (10th Cir. 2017), and willing to reverse district court decisions should the district court conclude that the law is clearly established, *but see Matthews v. Bergdorf*, 889 F.3d 1136, 1149-50 (10th Cir. 2018)(Baldock, J.)(holding that a child caseworker was not entitled to qualified immunity, because a caseworker would know that 'child abuse and neglect allegations might give rise to constitutional liability under the special relationship exception'); *McCoy v. Meyers*, 887 F.3d 1034, 1052-53 (10th Cir. 2018)(Matheson, J.)(concluding that there was clearly established law even though the three decisions invoked to satisfy that prong were not 'factually identical to this case,' because those cases 'nevertheless made it clear that the use of force on effectively subdued individuals violates the Fourth Amendment'). [*See also* ***Ward v. City of Hobbs,*** No. CIV 18-1025 JB\KRS, 2019 WL 3464835, at *27 (D.N.M. July 31, 2019); ***Favela v. City of Las Cruces***, No. CIV 17-0568 JB\SMV, 2019 WL 2648322, at *13 n.11 (D.N.M. June 27, 2019) (same)]

III. Qualified Immunity:Preliminary Principles

A. Basic Doctrine

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). The immunity is "immunity from suit rather than a mere defense to liability." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985).

B. Affirmative Defense

Although qualified immunity is an affirmative defense, *see* ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), once the defendant asserts qualified immunity, a number of circuits hold that the burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.*, ***Lachance v. Town of Charlton***, 990 F.3d 14, 20 (1st Cir. 2021) ("'The plaintiff bears the burden of demonstrating that the law was clearly established at the time of the alleged violation, and it is a heavy burden indeed.' *Mitchell v. Miller*, 790 F.3d 73, 77 (1st Cir. 2015)."); ***Joseph on behalf of Estate of Joseph v. Bartlett***, 981 F.3d 319, 328-31 & n.19 (5th Cir. 2020) ("A plaintiff suing for a constitutional violation has the ultimate burden to show that the defendant violated a constitutional right—that is, the plaintiff must make this showing whether or not qualified immunity is involved. . . But when qualified immunity is involved, at least in this circuit, a plaintiff has the additional burden to show that the violated right was 'clearly established' at the time of the alleged violation.[19] . . . **[fn. 19:** The First, Second, Third, Fourth, Ninth, and D.C. Circuits place the burden on the defendant, while the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits place it on the plaintiff. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U. L.J. 135, 145 (2012). In the Fourth Circuit, the defendant has the burden to show that the law was clearly established, and the plaintiff has the burden to show violation of a constitutional right. . . In the Eighth Circuit, the opposite rule applies.**]** This expanded substantive burden isn't the only special feature of qualified immunity. Burden shifting changes, too. Under the ordinary summary-judgment standard, the party who moves for summary judgment bears the initial burden to show 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'. . The movant satisfies this burden by showing that a reasonable jury could not find for the nonmovant, based on the burdens that would apply at trial. . . For a defendant, this means showing that the record cannot support a win for the plaintiff—either because the plaintiff has a failure of proof on an essential element of its claim or because the defendant has insurmountable proof on its affirmative defense to that claim. . . The defendant can show this by introducing undisputed evidence or by 'pointing out ... an absence of evidence to support the [plaintiff's] case.'. . If the defendant succeeds on that showing, the burden shifts to the plaintiff to demonstrate that there *is* a genuine issue of material fact and that the evidence favoring the plaintiff permits a jury verdict in the plaintiff's favor. . .But that changes with qualified immunity. When a public official makes 'a good-faith assertion

of qualified immunity,' that 'alters the usual summary-judgment burden of proof, shifting it to the plaintiff to show that the defense is not available.'. . In other words, to shift the burden to the plaintiff, the public official need not show (as other summary-judgment movants must) an absence of genuine disputes of material fact and entitlement to judgment as a matter of law. . .Once the burden is on the plaintiff, things briefly sound familiar again: The plaintiff must show that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury. That would be the same if the plaintiff did not face qualified immunity. But, to overcome qualified immunity, the plaintiff's version of those disputed facts must also constitute a violation of clearly established law. This requires the plaintiff to 'identify a case'—usually, a 'body of relevant case law'—in which 'an officer acting under similar circumstances ... was held to have violated the [Constitution].'. . While there need not be 'a case directly on point,' the unlawfulness of the challenged conduct must be 'beyond debate.'. . This leaves the 'rare' possibility that, in an 'obvious case,' analogous case law 'is not needed' because 'the unlawfulness of the [challenged] conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . Moving from the bar to the bench, qualified immunity similarly changes the court's normal task on summary judgment. A court decides whether summary judgment is appropriate by 'view[ing] the facts in the light most favorable to the nonmoving party and draw[ing] all reasonable inferences in its favor' (so far normal), then determining whether the plaintiff can prove a constitutional violation (still normal) that was clearly established (not normal). . . Things change for appellate courts, too—we review earlier than we otherwise would, and we review less than we otherwise would. An official who unsuccessfully moves for summary judgment on qualified-immunity grounds may immediately appeal the denial of qualified immunity, which would otherwise not be final and appealable. . . An official can take multiple immediate appeals because the official can raise qualified immunity at any stage in the litigation—from Rule 12(b)(6) motions to dismiss, to Rule 12(c) motions for judgment on the pleadings, to Rule 56 motions for summary judgment, to Rule 50(b) post-verdict motions for judgment as a matter of law—and continue to raise it at each successive stage. . . Our review is de novo, as summary-judgment review usually is. . . But we only review a denial of summary judgment based on qualified immunity 'to the extent that it turns on an issue of law.'. . Both steps—the constitutional merits and the 'clearly established law' inquiry—are questions of law. That means we do not second-guess the district court's determination that there are genuine disputes of material fact, as we otherwise might. . . When the district court identifies a factual dispute, as it did here, we consider only whether the district court correctly assessed 'the legal significance' of the facts it 'deemed sufficiently supported for purposes of summary judgment.'. . But we do not evaluate whether the district court correctly deemed the facts to be 'sufficiently supported'; that is, whether the 'evidence in the record' would permit 'a jury to conclude that certain facts are true.'. . In short, we may evaluate whether a factual dispute is *material* (i.e., legally significant), but we may not evaluate whether it is *genuine* (i.e., exists).")

See also ***Slater v. Deasey***, 943 F.3d 898, 909 (9th Cir. 2019) (Collins, J., with whom Bea, Ikuta, and Bress, JJ., join, dissenting from the denial of rehearing en banc) ("The panel committed a further, related error in suggesting that *Defendants* bear the burden of proof on the

disputed qualified-immunity issues presented in this appeal. In reciting the general standards governing qualified immunity, the panel stated that 'Defendants bear the burden of proving they are entitled to qualified immunity. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).'. . But on the cited page, *Moreno* merely recites the boilerplate summary judgment point that, '[b]ecause the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must *produce sufficient evidence to require the plaintiff to go beyond his or her pleadings*.'. . That, of course, is not the relevant burden of proof on the qualified-immunity issues presented in this appeal. Rather, the applicable—and well-settled—rule is that '[t]he *plaintiff* bears the burden of proof that the right allegedly violated was *clearly established* at the time of the alleged misconduct.' *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991) (emphasis added); *see also Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). Other circuits follow the same rule. *See, e.g.*, *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) ("When a defendant raises the defense of qualified immunity, the plaintiff bears the burden to demonstrate that the defendant violated his constitutional rights and that the right was clearly established."); *Findlay v. Lendermon*, 722 F.3d 895, 900 (7th Cir. 2013) (plaintiff failed to "carry his burden of showing a clearly established right" when he failed to identify precedent showing that "any reasonable officer would know [the conduct at issue] violated the constitution"). The panel's error on this point is significant, because it underscores that Plaintiffs had the burden to find a controlling precedent that squarely governs the specific facts of this case. They failed to carry that burden, and the district court's grant of summary judgment on qualified immunity grounds should have been affirmed. I respectfully dissent from the denial of rehearing en banc."); ***Perry v. Spencer***, No. 16-2444, 2018 WL 4182452, at *2 (1st Cir. Aug. 29, 2018) (per curiam) (not reported) ("[T]o avoid summary judgment for the defendant based on qualified immunity, a plaintiff must show that the defendant's actions violated a specific statutory or constitutional right, and that the right allegedly violated was clearly established at the time of conduct in issue. *See Mitchell v. Miller*, 790 F.3d 73, 77 (1st Cir. 2015) ("The plaintiff bears the burden of demonstrating that the law was clearly established at the time of the alleged violation, and it is a heavy burden indeed")."); ***Felarca v. Birgeneau***, 891 F.3d 809, 815 (9th Cir. 2018) ("A plaintiff must prove both steps of the inquiry to establish the officials are not entitled to immunity from the action. *Marsh v. County of San Diego*, 680 F.3d 1148, 1152 (9th Cir. 2012)."); ***Matthews v. Bergdorf,*** 889 F.3d 1136, 1143 (10th Cir. 2018) ("Because the caseworkers have asserted the defense of qualified immunity, the burden is on Plaintiffs to establish their right to proceed."); ***Mayfield v. Harvey County Sheriff's Dep't***, 732 F. App'x 685, ___ (10th Cir. 2018) ("When a defendant raises qualified immunity at the summary judgment stage, the burden shifts to the plaintiff, who must show (1) the defendant violated his constitutional rights and (2) the rights were clearly established. . . To satisfy the second requirement, the plaintiff must show it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation.' *Maresca v. Bernalillo Cty.*, 804 F.3d 1301, 1308 (10th Cir. 2015) (internal quotation marks omitted). Only after 'the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'"); ***Cotropia v. Chapman***, 721 F. App'x 354, ___ (5th Cir. 2018) ("In her appellate brief, Chapman merely asserts

that qualified immunity should be granted because it was Cotropia's burden to show that physicians' offices are not closely regulated. We reject this assertion. While 'we sometimes short-handedly refer to only one party's burden, the law [with respect to the qualified immunity defense] is that both bear a burden.' *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992). The defendant must first 'plead his good faith and establish that he was acting within the scope of his discretionary authority.'. . Next, 'the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.'. . In showing that the defendant's actions violated clearly established law, the plaintiff need not rebut every conceivable reason that the defendant would be entitled to qualified immunity, including those not raised by the defendant."); ***Becker v. Bateman***, 709 F.3d 1019, 1022 (10th Cir.2013) ("This court reviews summary judgments based on qualified immunity differently than other summary judgments. When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff ...." (internal quotation marks omitted)); ***Crosby v. Monroe Cnty.,*** 394 F.3d 1328, 1332 (11th Cir.2004) ("Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity."); ***Gardenhire v. Schubert***, 205 F.3d 303, 311(6th Cir. 2000) ("The defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to refrain from such conduct."); ***Pierce v. Smith***, 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law); ***Magdziak v. Byrd***, 96 F.3d 1045, 1047 (7th Cir. 1996); ***Dixon v. Richer***, 922 F.2d 1456, 1460 (10th Cir. 1991).

See also ***Stanley v. Finnegan***, 899 F.3d 623, 626 n.2 (8th Cir. 2018) ("On the merits, to defeat a qualified immunity defense, plaintiff has the burden of proving that defendant's conduct violated a clearly established constitutional right. . . But at the Rule 12(b)(6) stage, the issue is whether plaintiff 'pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' . . Thus, the district court's statement that Finnegan 'has not established' the defense, though imprecise, was not error."); ***Sayed v. Virginia***, 744 F. App'x 542, ___ (10th Cir. 2018) ("Defendants first challenge the district court's determination that they forfeited qualified immunity. They assert the court improperly required them to show that they were entitled to the defense rather than require Mr. Sayed to show that qualified immunity was inappropriate. They point out that '[o]nce the defense of qualified immunity is raised, as it was in this case, a "heavy [two-part] burden" is then shifted to the plaintiff to show that qualified immunity is not appropriate.'. . .The flaw in this argument, however, as revealed by defendants' citation to *Buck*, is that it employs the summary judgment standard for analyzing the qualified immunity defense. . . But defendants did not file a summary judgment motion—they raised qualified immunity in a motion to dismiss, which, as we have said, 'subjects the defendant to a more challenging standard of review than would apply on summary

judgment,' *Peterson*, 371 F.3d at 1201. Again, on a motion to dismiss, we evaluate 'the defendant's conduct *as alleged in the complaint*.'. . Thus, the district court did not improperly shift the burden to defendants to show they were entitled to qualified immunity; they assumed the more challenging standard by raising the defense at the motion-to-dismiss stage rather than at summary judgment. Although the district court faulted defendants for failing to argue in favor of qualified immunity, the court correctly recognized that defendants did not address the dual qualified immunity inquiry—*viz.*, whether the complaint plausibly alleged a constitutional violation and whether the rights at issue were clearly established. Indeed, defendants merely recited general qualified immunity principles in a five-sentence paragraph. They then proceeded with a *Heck* analysis, but they did not discuss the allegations in the complaint or dispute whether there was a constitutional violation or whether the rights asserted were clearly established. Nor did they address qualified immunity in their reply brief. This certainly suggests defendants forfeited qualified immunity, at least for purposes of Rule 12(b)(6). Nevertheless, we have discretion to overlook a potential forfeiture. . . Therefore, assuming without deciding that defendants failed to preserve qualified immunity, we exercise our discretion to consider it on the merits and proceed to evaluate defendants' qualified immunity arguments.")

But see ***Alston v. Town of Brookline***, 997 F.3d 23, 50 (1st Cir. 2021) ("Because qualified immunity is an affirmative defense to liability, the burden is on the defendants to prove the existence of circumstances sufficient to bring the defense into play. *See DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001)."); ***Mays v. Sprinkle***, 992 F.3d 295, 302 n.5 (4th Cir. 2021) ("Plaintiffs bear the burden of proof to show that a constitutional violation occurred. But, at least in our Circuit, defendants bear the burden of showing that the violation was not clearly established, and they are therefore entitled to qualified immunity. *Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007); *see also id.* at 378 nn.4–5 (collecting cases that place the qualified-immunity burden on plaintiffs). Even so, where defendants raise a qualified-immunity defense at the motion-to-dismiss stage we must ask whether a reasonable officer could have believed that their actions or omissions, as alleged in the complaint, were lawful (that is, the violation was not clearly established at the time). . . If so, defendants are entitled to dismissal before discovery."); ***Vasquez v. Maloney***, 990 F.3d 232, 238 n.5 (2d Cir. 2021) ("At the pleading stage, the plaintiff must plausibly allege that the defendants violated clearly established law. . . 'Because qualified immunity is an affirmative defense,' however, at the summary judgment stage 'the defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at that time.' *Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (quoting *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997))."); ***Outlaw v. City of Hartford***, 884 F.3d 351, 356 (2d Cir. 2018) ("On the cross-appeal, we conclude that Allen's contentions are without merit given that, as qualified immunity is an affirmative defense, the burden was on Allen to prove by a preponderance of the evidence any factual predicates necessary to establish that defense[.]"); ***Halsey v. Pfeiffer***, 750 F.3d 273, 288 (3d Cir. 2014) ("Unlike some other courts, . . . we follow the general rule of placing the burden of persuasion at a summary judgment proceeding on the party asserting the affirmative defense of qualified immunity. *See, e.g., Reedy v. Evanson*, 615 F.3d 197, 223 (3d Cir.2010) ("The burden of establishing entitlement to qualified

immunity is on [the defendant-movant]."); *Bailey v. Pataki*, 708 F.3d 391, 404 (2d Cir.2013) ("Qualified immunity is an affirmative defense and the burden is on the defendant-official to establish it on a motion for summary judgment."); *see also Harlow*, 457 U.S. at 812, 102 S.Ct. at 2735 ("The burden of justifying *absolute* immunity rests on the official asserting the claim." (emphasis added)). Thus, appellees either had to show that there was no genuine dispute of material fact to refute their contention that they did not violate Halsey's constitutional rights as he asserted them, or show that reasonable officers could not have known that their conduct constituted such a violation when they engaged in it."); ***DiMarco-Zappa v. Cabanillas***, 238 F.3d 25, 35 (1st Cir. 2001) ("Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-appellants."); ***Estate of Montanez v. City of Indio***, No. 517CV00130ODWSHK, 2018 WL 1989533, at *12 (C.D. Cal. Apr. 25, 2018) ("Because qualified immunity is an affirmative defense, the burden of proving the absence of a clearly established right initially lies with the official asserting the defense.").

IV. Qualified Immunity: "Order of Battle"

A. *Pearson v. Callahan*

In ***Pearson v. Callahan***, 129 S. Ct. 808 (2009), the Court reviewed a decision of the Court of Appeals of the Tenth Circuit that had held the "consent-once-removed" doctrine which permits a warrantless entry into the home by police when consent has been given to an undercover officer who has observed contraband in the home–did not apply when the person to whom consent was given was a police informant rather than a police officer. The Court of Appeals also denied qualified immunity to the officers involved, noting that "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Callahan v. Millard County*, 494 F.3d 891, 898 (10th Cir. 2007), *rev'd by Pearson v. Callahan*, 129 S. Ct. 808 (2009). In granting certiorari, the Supreme Court directed the parties to brief and argue whether *Saucier* should be overruled.

In an unanimous opinion authored by Justice Alito, the Court reexamined the mandatory constitutional-question-first procedure required by *Saucier* and concluded "that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained." 129 S. Ct. at 817. The Court acknowledged much of the criticism that had been leveled at the "rigid order of battle" by lower court judges and by members of the Court. *Id.* The Court justified its overruling of precedent by highlighting the various criticisms that have been directed at *Saucier's* two-step protocol: (1) Deciding the constitutional question first often results in substantial expenditures of resources by both the parties and the courts on "questions that have no effect on the outcome of the case." *Id.* at 818. (2) The development of constitutional doctrine is not furthered by decisions that are often "so fact-bound that the decision provides little guidance for future cases." *Id.* at 819. (3) It makes little sense to have lower courts forced to decide a constitutional question that is pending in a higher court or before an en banc panel. *Id.* (4) It likewise does little to further

the development of constitutional precedent to force a decision that depends on "an uncertain interpretation of state law." *Id.* (5) Requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact or one at the summary judgment stage resting on "woefully inadequate" briefs creates a risk of "bad decisionmaking." *Id.* at 820. (6) The mandated two-step analysis often shields constitutional decisions from appellate review when the defendant loses on the "merits" question but prevails on the clearly-established-law prong of the analysis. Such unreviewed decisions may then have "a serious prospective effect" on conduct. *Id.* (7) Finally, the approach requires unnecessary determinations of constitutional law and "departs from the general rule of constitutional avoidance." *Id.* at 821.

While abandoning the mandatory nature of two-step analysis, the Court continued to recognized that the approach can be beneficial in promoting "the development of constitutional precedent[,]"*Id.* at 818, and "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what "order of decisionmaking will best facilitate the fair and efficient disposition of each case." *Id.* at 821. The Court addressed expressed "misgivings" about its decision. First, the *Saucier* approach is not prohibited; it is simply no longer mandated. Second, constitutional law will continue to develop in other contexts, such as criminal cases, cases involving claims against government entities and cases involving claims for injunctive relief. Third, the Court does not predict a flood of suits against local governments by plaintiffs pursuing novel claims. *Id.* at 821, 822. Nor does the Court anticipate a new "cottage industry of litigation" over the proper standards to use in deciding whether to reach the merits in a given case. *Id.* at 822.

Without addressing or overruling the constitutional holding of the Court of Appeals, the Court reversed the Tenth Circuit on the grounds that the law on the "consent-once-removed" doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful. As the Court explained:

> When the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. [citing cases] It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul*, 808 F.2d, 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon*, 398 F.3d 802, 806-808, cert. denied, 546 U.S. 977, 126 S. Ct. 548, 163 L.Ed.2d 460 (2005), and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries. The principles of qualified immunity

> shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . .[H]ere, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

129 S. Ct. at 822, 823.

B. Post-*Pearson* : Supreme Court Decisions

Kisela v. Hughes, 138 S. Ct. 1148, 1152-54 (2018) (per curiam) ("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. . . .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.' [*citing Plumhoff*] That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way. Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. 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. . . . [N]ot one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), *Glenn v. Washington County*, 673 F.3d 864 (C.A.9 2011), and *Harris v. Roderick*, 126 F.3d 1189 (C.A.9 1997)—supports denying Kisela qualified immunity." [majority discusses and distinguishes *Deorle*, *Glenn*, and *Harris*])

District of Columbia v. Wesby, 138 S. Ct. 577, 589 & n.7 (2018) ("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.'. . We exercise that discretion here because the D. C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'. . .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. . . 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.")

District of Columbia v. Wesby, 138 S. Ct. 577, 593 (2018) (Sotomayor, J. 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. . . It is possible that our qualified-immunity decision alone will resolve those claims. . . 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.")

District of Columbia v. Wesby, 138 S. Ct. 577, 593-94 (2018) (Ginsburg, J., concurring in the judgment in part) ("This case. . .leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. . . 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. . . 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. . . 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 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. . . 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.")

Mullenix v. Luna, 136 S. Ct. 305, 308-12 (2015) (per curiam) ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and now reverse. . . . In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not '"use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."'. . Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context. [discussing *Brosseau*] In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.'. . The general principle that deadly force requires a sufficient threat hardly settles this matter. . . Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. . . . The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. . . By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location. This Court has considered excessive force claims in connection with high-speed chases on only two occasions since *Brosseau*. [discussing *Scott* and *Plumhoff*] The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. Leija in his flight did not pass as many cars as the drivers in *Scott* or *Plumhoff*; traffic was light on I–27. At the same time, the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did. . . . Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'. . .More fundamentally, the dissent repeats the Fifth Circuit's error. It defines the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in 'the specific context of the case.'. . . Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's. . . .Finally, respondents argue that the danger Leija represented was less substantial than the threats that courts have found sufficient to justify deadly force. But the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the

police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the ' "hazy border between excessive and acceptable force.'" . . Because the constitutional rule applied by the Fifth Circuit was not ' "beyond debate,"'. . . we grant Mullenix's petition for certiorari and reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity. It is so ordered.")

Mullenix v. Luna, 136 S. Ct. 305, 312-13 (2015) (per curiam) (Scalia, J., concurring in the judgment) ("I join the judgment of the Court, but would not describe what occurred here as the application of deadly force in effecting an arrest. Our prior cases have reserved that description to the directing of force sufficient to kill *at the person* of the desired arrestee. See, *e.g.*, *Plumhoff* v. *Rickard*, 572 U. S. ___ (2014); *Brosseau* v. *Haugen*, 543 U. S. 194 (2004) (*per curiam*); *Tennessee* v. *Garner*, 471 U. S. 1 (1985). It does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force. . . . [I]t stacks the deck against the officer, it seems to me, to describe his action as the application of deadly force. It was at least arguable in *Scott* that pushing a speeding vehicle off the road is targeting its occupant for injury or death. Here, however, it is conceded that Trooper Mullenix did not shoot to wound or kill the fleeing Leija, nor even to drive Leija's car off the road, but only to cause the car to stop by destroying its engine. That was a risky enterprise, as the outcome demonstrated; but determining whether it violated the Fourth Amendment requires us to ask, not whether it was reasonable to kill Leija, but whether it was reasonable to shoot at the engine in light of the risk to Leija. It distorts that inquiry, I think, to make the question whether it was reasonable for Mullenix to 'apply deadly force.'")

Mullenix v. Luna, 136 S. Ct. 305, 313-16 (2015) (per curiam) (Sotomayor, J., dissenting) ("Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix's rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent from the grant of summary reversal. . . . Here, then, the clearly established legal question—the question a reasonable officer would have asked—is whether, under all the circumstances as known to Mullenix, there was a governmental interest in shooting at the car rather than waiting for it to run over spike strips.The majority does not point to *any* such interest here. . . . It is clearly established that there must be some governmental interest that necessitates deadly force, even if it is not always clearly established what level of governmental interest is sufficient. Under the circumstances known to him at the time, Mullenix puts forth no plausible reason to choose shooting at Leija's engine block over waiting for the results of the spike strips. I would thus hold that Mullenix violated Leija's clearly established right to be free of intrusion absent some governmental interest. . . . By granting Mullenix qualified immunity, this Court goes a step further than our previous cases and does so without full briefing or argument. . . . When Mullenix confronted his superior officer after the shooting, his first words were, 'How's that for proactive?'. . . The glib comment does not impact our legal analysis; an officer's actual intentions are irrelevant to the Fourth Amendment's

'objectively reasonable' inquiry. . . But the comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow. For the reasons discussed, I would deny Mullenix's petition for a writ of certiorari. I thus respectfully dissent.")

Taylor v. Barkes, 135 S. Ct. 2042, 2044-45 (2015) (per curiam) ("The Third Circuit concluded that the right at issue was best defined as 'an incarcerated person's right to the proper implementation of adequate suicide prevention protocols.'. . This purported right, however, was not clearly established in November 2004 in a way that placed beyond debate the unconstitutionality of the Institution's procedures, as implemented by the medical contractor. . . . In short, even if the Institution's suicide screening and prevention measures contained the shortcomings that respondents allege, no precedent on the books in November 2004 would have made clear to petitioners that they were overseeing a system that violated the Constitution. Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity. The judgment of the Third Circuit is reversed.")

City & Cnty. of San Francisco, Cal. v. Sheehan, 135 S. Ct. 1765, 1775-78 (2015) ("The real question. . . is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. . . Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not. To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor*,. . . but *Graham* holds only that the ' "objective reasonableness"' test applies to excessive-force claims under the Fourth Amendment. . . That is far too general a proposition to control this case. 'We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures. Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction. . . and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter. Moving beyond *Graham*, the Ninth Circuit also turned to two of its own cases. But even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman*, 574 U.S. —

—, —— (2014) (*per curiam*) (slip op., at 4), it does not do so here. The Ninth Circuit first pointed to *Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue 'an emotionally disturbed' person who 'was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense.'. . The officer there, moreover, 'observed Deorle at close proximity for about five to ten minutes before shooting him' in the face. . . Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight. The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (C.A.9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home 'for the primary purpose of arresting him' even though they lacked an arrest warrant. . . Quade, in response, fired a handgun; police officers 'shot back, and Quade died from gunshot wounds shortly thereafter.'. . The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no 'exigent circumstances' excusing their entrance. . .*Alexander* too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. . . Under Ninth Circuit law. . . an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. . Courts must not judge officers with 'the 20/20 vision of hindsight.'. . When *Graham, Deorle,* and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases 'would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.'. . But even assuming that is true, *no precedent clearly established that there was not 'an objective need for immediate entry' here*. No matter how carefully a reasonable officer read *Graham, Deorle,* and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that 'fair notice,' an officer is entitled to qualified immunity. . . Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. . . .Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'. . Considering the specific situation confronting Reynolds and Holder, they had

sufficient reason to believe that their conduct was justified. Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, . . . no such consensus exists here. . . .In sum, we hold that qualified immunity applies because these officers had no 'fair and clear warning of what the Constitution requires.'. . Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness. * * * For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.")

Carroll v. Carman, 135 S. Ct. 348, 350-52 (2014) (per curiam) ("Carroll petitioned for certiorari. We grant the petition and reverse the Third Circuit's determination that Carroll was not entitled to qualified immunity. . . .In concluding that Officer Carroll violated clearly established law in this case, the Third Circuit relied exclusively on *Marasco*'s statement that 'entry into the curtilage after not receiving an answer at the front door might be reasonable.'. . In the court's view, that statement clearly established that a 'knock and talk' must begin at the front door. But that conclusion does not follow. *Marasco* held that an unsuccessful 'knock and talk' at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. Thus, *Marasco* simply did not answer the question whether a 'knock and talk' must begin at the front door when visitors may also go to the back door. Indeed, the house at issue seems not to have even had a back door, let alone one that visitors could use. . .Moreover, *Marasco* expressly stated that 'there [was] no indication of whether the officers followed a path or other apparently open route that would be suggestive of reasonableness.' *Ibid.* That makes *Marasco* wholly different from this case, where the jury necessarily decided that Carroll 'restrict[ed] [his] movements to walkways, driveways, porches and places where visitors could be expected to go.'. . To the extent that *Marasco* says anything about this case, it arguably supports Carroll's view. In *Marasco*, the Third Circuit noted that '[o]fficers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may.'. .The court also said that, ' "when the police come on to private property ... and restrict their movements to places visitors could be expected to go (*e.g.*, walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment."'. . Had Carroll read those statements before going to the Carmans' house, he may have concluded—quite reasonably—that he was allowed to knock on any door that was open to visitors. . . The Third Circuit's decision is even more perplexing in comparison to the decisions of other federal and state courts, which have rejected the rule the Third Circuit adopted here. [citing cases from 2d, 7th, and 9th circuits and New Jersey Supreme Court] We do not decide today whether those cases were correctly decided or whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door. 'But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate."' *Stanton v. Sims*, 571 U.S. ——, —— – (2013) (*per curiam*) (slip op., at 8) (quoting *al-Kidd*, 563 U.S., at —— (slip op., at 9)). The Third Circuit therefore erred when it held that Carroll was not entitled to qualified immunity. The

petition for certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.")

Lane v. Franks, 134 S. Ct. 2369, 2377-79 & n.4, 2381-83 (2014) ("We granted certiorari. . . to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities. . . .Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment. In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. . . Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. . . . In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. . . . It is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings. . . For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. . . We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today. . . . In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. . . . Respondent Franks argues that even if Lane's testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree. . . .The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent. . . . *Morris, Martinez,* and *Tindal* represent the landscape of Eleventh Circuit precedent the parties rely on for qualified immunity purposes. If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony. But both cases must be read together with *Morris,* which reasoned—in declining to afford First Amendment protection—that the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena. The same could be said of Lane's decision to testify. Franks was thus entitled to rely on *Morris* when he fired Lane. . . . Lane argues

that *Morris* is inapplicable because it distinguished *Martinez*, suggesting that *Martinez* survived *Morris*. . . But this debate over whether *Martinez* or *Morris* applies to Lane's claim only highlights the dispositive point: At the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity. Finally, Lane argues that decisions of the Third and Seventh Circuits put Franks on notice that his firing of Lane was unconstitutional. See *Reilly*, 532 F.3d, at 231(CA3) (truthful testimony in court is citizen speech protected by the First Amendment); *Morales v. Jones*, 494 F.3d 590, 598 (C.A.7 2007) (similar). But, as the court below acknowledged, those precedents were in direct conflict with Eleventh Circuit precedent. . . There is no doubt that the Eleventh Circuit incorrectly concluded that Lane's testimony was not entitled to First Amendment protection. But because the question was not 'beyond debate' at the time Franks acted, *al-Kidd*, 563 U.S., at —— (slip op., at 9), Franks is entitled to qualified immunity.")

Wood v. Moss, 134 S. Ct. 2056, 2061, 2066-70 (2014) ("The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination. . . But safeguarding the President is also of overwhelming importance in our constitutional system. . . Faced with the President's sudden decision to stop for dinner, the Secret Service agents had to cope with a security situation not earlier anticipated. No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President. . . . The particular question before us is whether the protesters have alleged violation of a clearly established First Amendment right based on the agents' decision to order the protesters moved from their original location in front of the Inn, first to the block just east of the Inn, and then another block farther. . . .[W]e address the key question: Should it have been clear to the agents that the security perimeter they established violated the First Amendment? . . . .No decision of which we are aware. . . would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation 'to ensure that groups with different viewpoints are at comparable locations at all times.'. .Nor would the maintenance of equal access make sense in the situation the agents confronted. . . .It may be, the agents acknowledged, that clearly established law proscribed the Secret Service from disadvantaging one group of speakers in comparison to another if the agents had 'no objectively reasonable security rationale' for their conduct, but acted solely to inhibit the expression of disfavored views. . . We agree with the agents, however, that the map itself . . . undermines the protesters' allegations of viewpoint discrimination as the sole reason for the agents' directions. The map corroborates that, because of their location, the protesters posed a potential security risk to the President, while the supporters, because of their location, did not. . . .This case comes to us on the agents' petition to review the Ninth Circuit's denial of their qualified immunity defense. . . Limiting our decision to that question, we hold, for the reasons stated, that the agents are entitled to qualified immunity.")

Plumhoff v. Rickard, 134 S. Ct. 2012, 2016, 2017, 2020-23 (2014) ("The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a

dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law. . . .Heeding our guidance in *Pearson*, we begin in this case with the question whether the officers' conduct violated the Fourth Amendment. This approach, we believe, will be 'beneficial' in 'develop[ing] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense. . . . In this case, respondent advances two main Fourth Amendment arguments. First, she contends that the Fourth Amendment did not allow petitioners to use deadly force to terminate the chase. . . Second, she argues that the 'degree of force was excessive,' that is, that even if the officers were permitted to fire their weapons, they went too far when they fired as many rounds as they did. . . We address each issue in turn. . . . Rickard's outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse 'in an attempt to escape.' Thus, the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point. In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk. . . .We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, 'if lethal force is justified, officers are taught to keep shooting until the threat is over.'. . .This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened. In arguing that too many shots were fired, respondent relies in part on the presence of Kelly Allen in the front seat of the car, but we do not think that this factor changes the calculus. Our cases make it clear that 'Fourth Amendment rights are personal rights which ... may not be vicariously asserted.'. . Thus, the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. If a suit were brought on behalf of Allen under either § 1983 or state tort law, the risk to Allen would be of central concern. . . But Allen's presence in the car cannot enhance Rickard's Fourth Amendment rights. After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit. . . . We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, petitioners would still be entitled to summary

judgment based on qualified immunity. An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was '"clearly established"' at the time of the challenged conduct. . . And a defendant 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. . . . In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'. . In addition, '[w]e have repeatedly told courts ... not to 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. We think our decision in *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. . . .*Brosseau* makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they 'could not have given fair notice to [the officer].'. . To defeat immunity here, then, respondent must show at a minimum either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either '"controlling authority"' or a 'robust "consensus of cases of persuasive authority,"'. . . that would alter our analysis of the qualified immunity question. Respondent has made neither showing.")

Stanton v. Sims, 134 S. Ct. 3, 5, 7 (2013) (per curiam) ("There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was 'plainly incompetent' in entering Sims' yard to pursue the fleeing Patrick. . . The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. . . .To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided. We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.' *al–Kidd, supra,* at ——, 131 S.Ct., at 2083. Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'") **[*See Lange v. California***, 141 S. Ct. 2011 (2021) ("The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.")**]**

Reichle v. Howards, 132 S. Ct. 2088, 2093-97 (2012) ("We granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards' arrest so held. . . . If the answer to either question is 'no,' then the agents are entitled to qualified immunity. We elect to address only the second question. We conclude that, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment. We, therefore, reverse the judgment of the Court of Appeals denying petitioners qualified immunity. . . .The 'clearly established' standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest. . . .Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right. . . . We next consider Tenth Circuit precedent. Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here. . . .At the time of Howards' arrest, *Hartman*'s impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests. . . . A reasonable official also could have interpreted *Hartman*'s rationale to apply to retaliatory arrests. . . . Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case. Such evidence could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. . . . To be sure, we do not suggest that *Hartman*'s rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman*'s rationale could apply to retaliatory arrests. *Hartman* concluded that the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily involve the animus of one person and the injurious action of another, 547 U.S., at 262, but in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest. Moreover, *Hartman* noted that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the 'presumption of regularity accorded to prosecutorial decisionmaking.'. .That presumption does not apply here. Nonetheless, the fact remains that, for qualified immunity purposes, at the time of Howards' arrest it was at least arguable that *Hartman*'s rule extended to retaliatory arrests. . . . *Hartman* injected uncertainty into the law governing retaliatory arrests, particularly in light of *Hartman*'s rationale and the close relationship between retaliatory arrest and prosecution claims. This uncertainty was only confirmed by subsequent appellate decisions that disagreed over whether the reasoning in *Hartman* applied similarly to retaliatory arrests. Accordingly, when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Petitioners Reichle and Doyle are thus entitled to qualified immunity.")

Reichle v. Howards, 132 S. Ct. 2088, 2097, 2098 (2012) (Ginsburg, J., with whom Breyer, J., joins, concurring in the judgment) ("Were defendants ordinary law enforcement officers, I would hold that *Hartman v. Moore* . . . does not support their entitlement to qualified immunity. . . . A similar causation problem will not arise in the typical retaliatory-arrest case. Unlike prosecutors, arresting officers are not wholly immune from suit. As a result, a plaintiff can sue the arresting officer directly and need only show that the officer (not some other official) acted with a retaliatory motive. Because, in the usual retaliatory arrest case, there is no gap to bridge between one government official's animus and a second government official's action, *Hartman*'s no-probable-cause requirement is inapplicable. Nevertheless, I concur in the Court's judgment. Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge. Whatever the views of Secret Service Agents Reichle and Doyle on the administration's policies in Iraq, they were duty bound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security. Retaliatory animus cannot be inferred from the assessment they made in that regard. If rational, that assessment should not expose them to claims for civil damages.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1244-51 (2012) ("The validity of the warrant is not before us. The question instead is whether Messerschmidt and Lawrence are entitled to immunity from damages, even assuming that the warrant should not have been issued. . . . Under these circumstances—set forth in the warrant—it would not have been unreasonable for an officer to conclude that there was a 'fair probability' that the sawed-off shotgun was not the only firearm Bowen owned. . . And it certainly would have been reasonable for an officer to assume that Bowen's sawed-off shotgun was illegal. . . Evidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned. [footnote omitted] . . . .Given the foregoing, it would not have been 'entirely unreasonable' for an officer to believe, in the particular circumstances of this case, that there was probable cause to search for all firearms and firearm-related materials. . . . It would . . . not have been unreasonable—based on the facts set out in the affidavit—for an officer to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly. . . . Not only would such evidence help to establish motive, either apart from or in addition to any domestic dispute, it would also support the bringing of additional, related charges against Bowen for the assault. . . . Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence would aid in the prosecution of Bowen by, for example, demonstrating Bowen's connection to other evidence found there. . . . Whatever the use to which evidence of Bowen's gang involvement might ultimately have been put, it would not have been 'entirely unreasonable' for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue. . . . Whether any of these facts, standing alone or taken together, actually

establish probable cause is a question we need not decide. Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.' *al-Kidd,* 563 U.S., at —— (slip op., at 12). The officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.'. . . On top of all this, the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. . . . In light of the foregoing, it cannot be said that 'no officer of reasonable competence would have requested the warrant.'. . Indeed, a contrary conclusion would mean not only that Messerschmidt and Lawrence were 'plainly incompetent,'. . . but that their supervisor, the deputy district attorney, and the magistrate were as well. . . . [B]y holding in *Malley* that a magistrate's approval does not automatically render an officer's conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers' determination that the warrant was valid. . . . The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause. . . . In contrast to *Groh,* any defect here would not have been obvious from the face of the warrant. Rather, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. This is not an error that 'just a simple glance' would have revealed. . . Indeed, unlike in *Groh,* the officers here did not merely submit their application to a magistrate. They also presented it for review by a superior officer, and a deputy district attorney, before submitting it to the magistrate. The fact that none of the officials who reviewed the application expressed concern about its validity demonstrates that any error was not obvious. *Groh* plainly does not control the result here. . . . The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise. . . The judgment of the Court of Appeals denying the officers qualified immunity must therefore be reversed.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1252 (2012) (Kagan, J., concurring in part and dissenting in part) ("*Malley* made clear that qualified immunity turned on the officer's own 'professional judgment,' considered separately from the mistake of the magistrate. . . . And what we said in *Malley* about a magistrate's authorization applies still more strongly to the approval of other police officers or state attorneys. All those individuals, as the Court puts it, are 'part of the prosecution team.'. . To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct—like applying for a warrant without anything resembling probable cause.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1253-61 (2012) (Sotomayor, J., with whom Ginsburg, J., joins, dissenting) ("In this case, police officers investigating a specific, non-gang-related assault committed with a specific firearm (a sawed-off shotgun) obtained a warrant to search for all evidence related to 'any Street Gang,' '[a]ny photographs ... which may depict evidence of criminal activity,' and 'any firearms.'. . They did so for the asserted reason that the search might lead to evidence related to other gang members and other criminal activity, and that other '[v]alid warrants commonly allow police to search for "firearms and ammunition."'. . That kind of general warrant is antithetical to the Fourth Amendment. . . .The Court's analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis. For all these reasons, I respectfully dissent. . . . The operative question in this case, therefore, is whether—given that, as petitioners comprehended, the crime itself was not gang related—a reasonable officer nonetheless could have believed he had probable cause to seek a warrant to search the suspect's residence for all evidence of affiliation not only with the suspect's street gang, but 'any Street Gang.' He could not. . . . The majority has little difficulty concluding that because Bowen fired one firearm, it was reasonable for the police to conclude not only that Bowen must have possessed others, but that he must be storing these other weapons at his 73–year–old former foster mother's home.[footnote omitted] Again, however, this is not what the police actually concluded, as Detective Messerschmidt's deposition makes clear. . . .Even assuming that the police reasonably could have concluded that Bowen possessed other guns and was storing them at the Millenders' home, I cannot agree that the warrant provided probable cause to believe any weapon possessed in a home in which 10 persons regularly lived—none of them the suspect in this case—was either 'contraband or evidence of a crime.'. . . The majority asserts, without citation, that the magistrate's approval is relevant to objective reasonableness. . . .In cases in which it would be not only wrong but unreasonable for any well-trained officer to seek a warrant, allowing a magistrate's approval to immunize the police officer's unreasonable action retrospectively makes little sense. . . .To the extent it proposes to cut back upon *Malley,* the majority will promote the opposite result—encouraging sloppy police work and ex-acerbating the risk that searches will not comport with the requirements of the Fourth Amendment. The Court also makes much of the fact that Detective Messerschmidt sent his proposed warrant application to two superior police officers and a district attorney for review. Giving weight to that fact would turn the Fourth Amendment on its head. This Court made clear in *Malley* that a police officer acting unreasonably cannot obtain qualified immunity on the basis of a neutral magistrate's approval. It would be passing strange, therefore, to immunize an officer's conduct instead based upon the approval of other police officers and prosecutors. [footnote omitted] . . . . The effect of the Court's rule. . . is to hold blameless the 'plainly incompetent' action of the police officer seeking a warrant because of the 'plainly incompetent' approval of his superiors and the district attorney. . . .Qualified immunity properly affords police officers protection so long as their conduct is objectively reasonable. But it is not objectively reasonable for police investigating a specific, non-gang-related assault committed with a particular firearm to search for all evidence related to 'any Street Gang,' 'photographs ... which may depict evidence of criminal activity,' and all firearms. The Court reaches a contrary result not because it thinks that these police officers' stated

reasons for searching were objectively reasonable, but because it thinks different conclusions might be drawn from the crime scene that reasonably might have led different officers to search for different reasons. That analysis, however, is far removed from qualified immunity's proper focus on whether *petitioners* acted in an objectively reasonable manner. Because petitioners did not, I would affirm the judgment of the Court of Appeals.")

Ryburn v. Huff, 132 S. Ct. 987, 990-92 (2012) (per curiam) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction. . . . A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. . . . The panel majority—far removed from the scene and with the opportunity to dissect the elements of the situation—confidently concluded that the officers really had no reason to fear for their safety or that of anyone else. As the panel majority saw things, it was irrelevant that the Huffs did not respond when the officers knocked on the door and announced their presence and when they called the home phone because the Huffs had no legal obligation to respond to a knock on the door or to answer the phone. The majority attributed no significance to the fact that, when the officers finally reached Mrs. Huff on her cell phone, she abruptly hung up in the middle of their conversation. And, according to the majority, the officers should not have been concerned by Mrs. Huff's reaction when they asked her if there were any guns in the house because Mrs. Huff 'merely asserted her right to end her conversation with the officers and returned to her home.'. . Confronted with the facts found by the District Court, reasonable officers in the position of petitioners could have come to the conclusion that there was an imminent threat to their safety and to the safety of others. The Ninth Circuit's contrary conclusion was flawed for numerous reasons. . . . [T]he panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. . . . Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was imminently reasonable. In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court. The petition for certiorari is granted, the judgment of the Ninth Circuit is reversed, and the case is remanded for the entry of judgment in favor of petitioners.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 2083, 2085 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'. .

When, however, a Court of Appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction. . . . Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. . . . A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'. . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . The constitutional question in this case falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011) (Kennedy, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., concurring) ("The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful. . . . The scope of the statute's lawful authorization is uncertain.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086, 2087 (2011) (Kennedy, J., concurring) ("The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case. . . .[T]he Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals has approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue.When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken. . . .The Court of Appeals for the Ninth Circuit appears to have reasoned that a Federal District Court sitting in New York had authority to establish a legal rule binding on the Attorney General and, therefore, on federal law-enforcement operations conducted nationwide. . . . Of course, district court decisions are not precedential to this extent. . . But nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2087 (2011) (Ginsburg, J., joined by Breyer, J., and

Sotomayor, J., concurring in the judgment) ("Is a former U.S. Attorney General subject to a suit for damages on a claim that he instructed subordinates to use the Material Witness Statute, 18 U.S.C. § 3144, as a pretext to detain terrorist suspects preventively? Given *Whren* . . . I agree with the Court that no 'clearly established law' renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. . . But I join Justice SOTOMAYOR in objecting to the Court's disposition of al-Kidd's Fourth Amendment claim on the merits; as she observes, . . . that claim involves novel and trying questions that will 'have no effect on the outcome of th[is] case.'")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089, 2090 (2011) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in the judgment) ("I concur in the Court's judgment reversing the Court of Appeals because I agree with the majority's conclusion that Ashcroft did not violate clearly established law. I cannot join the majority's opinion, however, because it unnecessarily 'resolve[s][a] difficult and novel questio[n] of constitutional ... interpretation that will "have no effect on the outcome of the case."'. .Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's opinion suggests. Although the majority is correct that a government official's subjective intent is generally 'irrelevant in determining whether that officer's actions violate the Fourth Amendment,'. . . none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law. The majority's constitutional ruling is a narrow one premised on the existence of a 'valid material-witness warran[t],' *ante*, at 1–a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd's complaint. Based on those allegations, it is not at all clear that it would have been 'impracticable to secure [al-Kidd's] presence ... by subpoena' or that his testimony could not 'adequately be secured by deposition.'. . Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. . . The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an unnecessary holding on the constitutional question. I also join Part I of Justice KENNEDY's concurring opinion. As that opinion makes clear, this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case. Indeed, nothing in the majority's opinion today should be read as placing this Court's imprimatur on the actions taken by the Government against al-Kidd.")

Camreta v. Greene, 131 S. Ct. 2020, 2026-36 & n.11 (2011) ("We conclude that this Court generally may review a lower court's constitutional ruling at the behest of a government official granted immunity. But we may not do so in this case for reasons peculiar to it. The case has become

moot because the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue. We therefore do not reach the Fourth Amendment question in this case. In line with our normal practice when mootness frustrates a party's right to appeal, see *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we vacate the part of the Ninth Circuit's opinion that decided the Fourth Amendment issue. . . . S.G. . . . alleges two impediments to our exercise of statutory authority here, one constitutional and the other prudential. First, she claims that Article III bars review because petitions submitted by immunized officials present no case or controversy. . . Second, she argues that our settled practice of declining to hear appeals by prevailing parties should apply with full force when officials have obtained immunity. . . We disagree on both counts. . . . [T]he critical question under Article III is whether the litigant retains the necessary personal stake in the appeal . . . .This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials' behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. . . . If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. . . . Article III aside, an important question of judicial policy remains. As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so. . . . On the few occasions when we have departed from that principle, we have pointed to a 'policy reaso[n] ... of sufficient importance to allow an appeal' by the winner below. . . We think just such a reason places qualified immunity cases in a special category when it comes to this Court's review of appeals brought by winners. The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or 'statements in opinions.'. . They are rulings that have a significant future effect on the conduct of public officials–both the prevailing parties and their co-workers–and the policies of the government units to which they belong. . . And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity–and observance–of constitutional rules. . . . [W]e have permitted lower courts to avoid avoidance–that is, to determine whether a right exists before examining whether it was clearly established. . . . In general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence–defining constitutional rights and only then conferring immunity–is sometimes beneficial to clarify the legal standards governing public officials. . . . Here, the Court of Appeals followed exactly this two-step process, for exactly the reasons we have said may in select circumstances make it 'advantageous.'. . To that end, the court adopted constitutional standards to govern all in-school interviews of suspected child abuse victims. . . . Given its purpose and effect, such a decision is reviewable in this Court at the behest of an immunized official. No mere dictum, a constitutional

ruling preparatory to a grant of immunity creates law that governs the official's behavior. . . This Court, needless to say, also plays a role in clarifying rights. Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support this Court in reviewing the correctness of the lower court's decision. . . . We emphasize, however, two limits of today's holding. First, it addresses only our own authority to review cases in this procedural posture. The Ninth Circuit had no occasion to consider whether it could hear an appeal from an immunized official: In that court, after all, S.G. appealed the judgment in the officials' favor. We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds. . . Second, our holding concerns only what this Court *may* review; what we actually will choose to review is a different matter. That choice will be governed by the ordinary principles informing our decision whether to grant certiorari–a 'power [we] ... sparingly exercis[e].'. . Although we reject S.G.'s arguments for dismissing this case at the threshold, we find that a separate jurisdictional problem requires that result: This case, we conclude, is moot. . . . When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review. . . Time and distance combined have stymied our ability to consider this petition. . . . In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school. We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue, and remand for further proceedings consistent with this opinion. . . . We leave untouched the Court of Appeals' ruling on qualified immunity and its corresponding dismissal of S.G.'s claim because S.G. chose not to challenge that ruling. We vacate the Ninth Circuit's ruling addressing the merits of the Fourth Amendment issue because, as we have explained, . . . that is the part of the decision that mootness prevents us from reviewing but that has prospective effects on Camreta.")

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (Scalia, J., concurring) ("I join the Court's opinion, which reasonably applies our precedents, strange though they may be. The alternative solution, as Justice KENNEDY suggests, . . . is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. . . The parties have not asked us to adopt that approach, but I would be willing to consider it in an appropriate case.")

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (2011) (Sotomayor, J., joined by Breyer, J., concurring in the judgment) ("I agree with the Court's conclusion that this case is moot and that vacatur is the appropriate disposition; unlike the majority, however, I would go no further. As the exchange between the majority and Justice KENNEDY demonstrates, the question whether Camreta, as a prevailing party, can obtain our review of the Ninth Circuit's constitutional ruling is a difficult one. There is no warrant for reaching this question when there is clearly no longer a genuine case or controversy between the parties before us.")

Camreta v. Greene, 131 S. Ct. 2020, 2038, 2040-45 (2011) (Kennedy, J., joined by Thomas, J., dissenting) ("[T]he Court today, in an altogether unprecedented disposition, says that it vacates not a judgment but rather 'part of the Ninth Circuit's opinion.'. . The Court's conclusion is unsettling in its implications. Even on the Court's reading of our cases, the almost invariable rule is that prevailing parties are not permitted to obtain a writ of certiorari. . . After today, however, it will be common for prevailing parties to seek certiorari based on the Court's newfound exception. . . . As today's decision illustrates, our recent qualified immunity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication. . . . The goal was to make dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants. . .The present case brings the difficulties of that objective into perspective. In express reliance on the permission granted in *Pearson*, the Court of Appeals went out of its way to announce what may be an erroneous interpretation of the Constitution; and, under our case law, the Ninth Circuit must give that dictum legal effect as precedent in future cases. . . . [T]he Court's standing analysis will be inapplicable in most qualified immunity cases. . . When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision on the merits will again influence that officer's conduct. The officer, like petitioner Alford or the petitioner in *Bunting*, would have no interest in litigating the merits in the Court of Appeals and, under the Court's rule, would seem unable to obtain review of a merits ruling by petitioning for certiorari. . . This problem will arise with great frequency in qualified immunity cases. Once again, the decision today allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review. The Court thus fails to solve the problem it identifies. . . . It is most doubtful that Article III permits appeals by any officer to whom the reasoning of a judicial decision might be applied in a later suit. Yet that appears to be the implication of the Court's holding. The favorable judgment of the Court of Appeals did not in itself cause petitioner Camreta to suffer an Article III injury entitling him to appeal. . . . On the contrary, Camreta has been injured by the decision below to no greater extent than have hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals. . . .It is revealing that the Court creates an exception to the prevailing party rule while making clear that the Courts of Appeals are not to follow suit, in any context. . . . If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect. . . . If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of constitutional avoidance would apply. So would conventional rules regarding dictum and holding. Judicial observations made in the course of explaining a case might give important instruction and be relevant when assessing a later claim of qualified immunity. . . But as dicta those remarks would not establish law and would not qualify as binding precedent. . . . The distance our qualified immunity jurisprudence has taken us from foundational principles is made all the more apparent by today's decision. The Court must construe two of its precedents in so broad a manner that they are taken out of their proper and logical confines. To vacate the reasoning of the decision below, the Court accepts that *obiter dictum* is not

just binding precedent but a judgment susceptible to plenary review. I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment.")

C. Post-*Pearson*: Recent Circuit Decisions

D.C. CIRCUIT

Jones v. Kirchner, 835 F.3d 74, 85-88 (D.C. Cir. 2016) ("In this case the magistrate, as clearly indicated on the face of the warrant, affirmatively denied the Defendants permission to search Jones's house before 6:00 AM. The plaintiff alleges the Defendants nonetheless executed the warrant at 4:45 AM. Just as a warrant is 'dead,' and a search undertaken pursuant to that warrant invalid, after the expiration date on the warrant, *Sgro v. United States*, 287 U.S. 206, 212 (1932), a warrant is not yet alive, and a search is likewise invalid, if executed before the time authorized in the warrant. If the Defendants executed the warrant when the magistrate said they could not, then they exceeded the authorization of the warrant and, accordingly, violated the Fourth Amendment. . . .Nevertheless, we agree with the district court that the Defendants are entitled to qualified immunity, albeit for a different reason: It was not clearly established in Maryland in 2005 that the Fourth Amendment prohibits the nighttime execution of a daytime-only warrant. Although two of our sister circuits had by then so held, s*ee O'Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961), the Fourth Circuit, within which this search occurred, did not come to the same conclusion until after the search in this case. *See Yanez-Marquez v. Lynch*, 789 F.3d 434, 466 (2015). Indeed, as the Fourth Circuit noted in that case, an unpublished Fourth Circuit opinion from 2009 had treated 'a nighttime search under the aegis of a daytime warrant as a mere Rule 41 violation, rather than as an unconstitutional search.'. . To repeat, qualified immunity shields an officer from liability unless he reasonably should have known his conduct would violate the law. . . If our learned colleagues on the Fourth Circuit believed as recently as 2009 that the nighttime execution of a daytime-only warrant is not a constitutional violation, then the police officers who work in that jurisdiction cannot be faulted for failing to appreciate in 2005 that their conduct was unconstitutional. Until 2009 the Supreme Court 'required courts considering qualified immunity claims to first address the constitutional question, so as to promote "the law's elaboration from case to case."'. . Today, which part of the qualified immunity analysis to address first is within the 'sound discretion' of the court. . . Where 'it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right,' it may make sense to avoid the constitutional question. . . This is not such a case, however. It seems to us an unremarkable proposition that an officer must respect a time limitation imposed by a magistrate and, indeed, the three other circuits to consider the question reached the same conclusion. In light of the Government's argument to the contrary, . . . we think it important to clarify this point of law. Since *Pearson*, our court has often granted qualified immunity without reaching the constitutional question, but both the constitutional question and the answer are more clear in this case than in any of those. Here we need only follow the teaching of the Supreme Court, as have three other circuits, in order to protect the public from a particular type of unreasonable

search. One of those circuits – the Fourth – surrounds the District of Columbia on all sides, and officers from Maryland and Virginia frequently cooperate with officers from D.C. on investigations. Resolving the constitutional question here ensures that officers will take care to abide by a magistrate's limitations regardless where in the Washington area the search is executed. Conservation of judicial resources, *see* Dissent at 11, is a risible justification for avoiding a straightforward question such as this, . . . especially in view of the dramatic reduction in the caseload per judge of our court in recent years. Nor is doubt about the actual time of entry a relevant consideration in this case. That the facts of the case are as yet unsettled is neither surprising nor unique; this appeal is from the grant of a pre-answer motion to dismiss. There is nothing improper about deciding a constitutional question at this stage. . . Indeed, we ordinarily decide questions of qualified immunity early in order to avoid burdening officers with protracted litigation, *see Pearson*, 555 U.S. at 232; under our dissenting colleague's approach, in contrast, we would never reach a constitutional question as long as the defendant's attorney remembered to raise qualified immunity as a defense. Although well-founded doubt about the veracity of a plaintiff's factual allegations might steer us toward constitutional avoidance in some circumstances (*e.g.*, where the plaintiff's account of the facts on summary judgment is 'utterly discredited by the clear [video] evidence,' *Lash v. Lemke*, 786 F.3d 1, 6 (D.C. Cir. 2015)), those circumstances are not present here, where the Defendants have not submitted contrary evidence nor even filed an answer denying Jones's allegations. . .As the Supreme Court has warned, perpetually addressing only the clearly-established question 'may frustrate the development of constitutional precedent and the promotion of law-abiding behavior.'. . We see no need to avoid the constitutional question here. . . .We affirm the district court's holding that the Defendants have qualified immunity for the timing of the search, reverse its dismissal of Jones's claims for unlawful seizure and no-knock entry, and remand this matter for further proceedings consistent with this opinion.")

Jones v. Kirchner, 835 F.3d 74, 95-97 (D.C. Cir. 2016) (Randolph, J., dissenting in part and concurring in the judgment in part) ("Ever since *Pearson*, this court has developed not a page, but a volume of history following the Supreme Court's decision. In these cases, we have almost invariably declined to decide constitutional questions in qualified immunity cases when it was unnecessary to do so. The majority has made no attempt to distinguish the cases embodying our established practice. [collecting cases] It is no answer to say that this is a matter within the court's discretion. . . . The nearly uniform practice of this court has established such sound legal principles, and the majority has offered no reason to depart from them. I repeat that we are deciding this case on a complaint alone. The defendant officers have yet to file their answer to the complaint. As the Supreme Court recognized in *Pearson*, courts should not proceed to a constitutional question if the answer depends on undeveloped facts. . . Still less should a court decide a constitutional question when developed facts show that the question is not presented. The evidence in the criminal proceedings proved that the search of Jones' premises eleven years ago complied with the warrant's timing requirement. . . The defendants in this case have won a dismissal on this Fourth Amendment issue; they have no reason to seek rehearing en banc or certiorari in the Supreme Court on that issue. . . The answer to the constitutional question here is by no means certain. . . And it is hardly pressing. The majority cites not a single reported case in this jurisdiction

in which officers, federal or local, executed a daytime warrant at night. And this is not such a case, in light of Judge Huvelle's findings and the evidence supporting her findings. . . . Whatever case the majority is writing about, it is not this one.")

FIRST CIRCUIT

Alston v. Town of Brookline, 997 F.3d 23, 50-51 (1st Cir. 2021) ("To the extent the remaining Town officials focus on the first prong of qualified immunity in their appellate brief, that reliance is mislaid. They have made, at most, generalized and non-specific arguments with respect to each individual defendant. Since we already have held that Alston has survived summary judgment on the merits of his First Amendment retaliation claims, . . . such arguments are insufficient to ground a conclusion that Alston's version of the facts falls short of working a violation of his constitutional rights. . . We also think it useful to comment upon the second prong of the qualified immunity inquiry. In their appellate brief, the Town officials cite that prong and state that 'the law must have been sufficiently clear that "any reasonable official in the defendant's position would have known that the challenged conduct is illegal 'in the particular circumstances that he or she faced.'"' They also discuss the *Pickering* balancing of the interests . . . and their claimed justifications for the termination of Alston's employment. But they do not explain why these elements of Alston's First Amendment retaliation claims fail one or more components of the second prong. Given the lack of clarity as to the arguments actually being made, we cannot now conclude that the remaining Town officials are entitled to qualified immunity. The entry of summary judgment in their favor on Alston's section 1983 free-speech retaliation claims, in both their individual and official capacities, must, therefore, be vacated. This does not mean, of course, that the district court cannot explore the qualified immunity issue in all its aspects on remand. For instance, the district court may entertain successive motions for summary judgment, . . . or address the issue at a subsequent stage of the litigation[.]. . We leave these matters to the district court's informed discretion, and we take no view of the future disposition of the issue.")

Justiniano v. Walker, 986 F.3d 11, 27-30 (1st Cir. 2021) ("We can tackle these components of the qualified-immunity test in any order we like… Here, we'll assume without deciding the first pieces have been shown -- Walker's use of the pepper spray violated Justiniano's right to be free from that force, and that right was clearly established and on the books in June 2013 -- and resolve the matter on the question of whether a reasonable, similarly situated officer would understand that Walker's conduct violated Justiniano's constitutional right. . . As we do so, we keep in mind that, because 'c]ourts penalize officers for violating bright lines, not for making bad guesses in gray areas,'. . . if the pertinent 'legal principles are clearly established only at a level of generality so high that officials cannot fairly anticipate the legal consequences of specific actions, then the requisite notice is lacking[.]'. . We are also mindful that deciding qualified immunity at the summary-judgment stage can be tricky. . . . [A]s we've observed, '[t]he doctrinal intersection of qualified immunity principles and summary judgment principles is not well mapped,' and '[p]lotting that intersection can present thorny analytic problems -- problems that are magnified because of the desire to resolve claims of qualified immunity at the earliest practicable stage of

litigation.'. . Furthermore, in qualified-immunity summary-judgment cases, it's a tug-of-war, really, between who gets the benefit of the doubt: summary judgment 'requires absolute deference to the nonmovant's factual assertions,' while qualified immunity 'demands deference to the reasonable, if mistaken, actions of the movant.'. .We aim to resolve all of this tension by framing the factual events according to summary judgment's traditional leeway to the nonmoving party's version of events, and then asking whether, given that story, 'a reasonable officer should have known that his actions were unlawful.'. . . Justiniano contends that the record contains enough conflicting testimony about material facts to raise a genuine dispute over whether Walker can be shielded by qualified immunity, i.e., whether Walker's use of pepper spray was an inappropriate and excessive use of force in violation of Justiniano's clearly established right to be free from that use of force. . . . In Justiniano's view, since there's no witness who testifies that Justiniano was doing anything other than simply approaching Walker when the pepper spray was deployed, it is valid to infer the nature of his movement was nonthreatening, and thus it was not reasonable for Walker to use the spray. Walker, in turn, argues that none of the facts to which Justiniano points lead to the conclusion that he is not shielded by qualified immunity, and this is so even if all of Walker's uncorroborated testimony is removed from consideration. So now, as we leapfrog the initial elements of the qualified-immunity analysis (recall that we're assuming arguendo that the use of the pepper spray was unreasonable and Justiniano had a clearly established right to be free from that use of force), we confront the question of whether a reasonable officer in Walker's shoes would have understood Walker's conduct to violate Justiniano's constitutional right. . . Even viewing the facts in the light most favorable to Justiniano, removing from consideration any of Walker's uncorroborated testimony, and drawing all reasonable inferences in Justiniano's favor, the record here does not support a finding that a reasonable officer would have clearly understood Walker's conduct to be an unreasonable violation of Justiniano's rights. Our careful review of the record here leaves us with these undisputed facts to sketch the contours of what happened. Kyriakides observed Justiniano driving erratically, and when they both pulled over, he was confused, distraught, and spoke unintelligibly. She was scared for Justiniano's wellbeing, as well as her own and that of passersby. After Walker hit the scene, all three civilian witnesses (Kyriakides, Silva-Winbush, and MacKeen) observed Walker at various points trying to calm down and/or stop Justiniano from approaching him by using hand gestures. They also described Justiniano as appearing distraught, even mad; none observed Justiniano heeding Walker's hand gestures to calm down or stop his approach. Silva-Winbush, who witnessed each instance of pepper-spraying, indicated that the first use of the spray (the complained-of rights-violation here) came only after Walker had 'jumped' into the highway as he continued to retreat from Justiniano. And each of these witnesses described various instances of Justiniano lunging or at least engaging in forward motion towards Walker. From an objective standpoint, a reasonable officer could have believed Justiniano posed a threat, and thus that same reasonable officer, in Walker's position, would not have believed that the initial use of pepper spray (a generally non-lethal deployment) against Justiniano constituted a violation of Justiniano's rights. A contrary finding, even a contrary inference, is simply not supportable on the evidence here. True, witnesses describe Justiniano's movements differently, and movement alone wouldn't necessarily justify the use of pepper spray. And yes, the key here is Justiniano's movements (or lack thereof, if that was the case) in the

moments before and as the pepper spray was used -- Justiniano being stationary, or approaching Walker in a decidedly nonaggressive fashion, for example, because that's what a jury could rely on to make inferences that Justiniano's behavior did not warrant the use of force he received because Walker couldn't have reasonably thought Justiniano posed a threat. But there is no witness testimony that Justiniano was stationary in the moment before the pepper spray was used; rather, all the evidence points to Justiniano steadily moving towards Walker in one fashion or another. . . . Even framing the facts as favorably as we can according to Justiniano's version of events (no pen-as-weapon in the narrative, no threats issued to Walker by Justiniano), we cannot conclude on this record that a reasonable officer in Walker's position would have known his conduct (using the pepper spray) was unlawful under these circumstances. . . Accordingly, the magistrate judge was correct that Walker is entitled to qualified immunity. . . . Before we go, we note that Justiniano also briefed an argument urging us to abandon the application of qualified immunity in cases resulting in death. As we acknowledged at the outset of today's decision, we do not disagree that the issue of qualified immunity's role in our jurisprudence is topical, to say the least. But we are constrained by the precedent that led to today's outcome, and until that precedent changes, we are dutybound to apply it.")

Castagna v. Jean, 955 F.3d 211, 213-14, 217-24 (1st Cir. 2020) ("Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'. . As such, a typical § 1983 defendant raises the qualified immunity defense in a motion to dismiss or motion for summary judgment. . . The officers in this case did not raise their specific qualified immunity defense until they filed a motion for judgment as a matter of law at the end of the jury trial, to which the jury ruled for the officers. But this case's 'unusual posture does not affect the viability of the qualified immunity defense.'. . '[W]hen a qualified immunity defense is pressed after a jury verdict, the evidence must be construed in the light most hospitable to the party that prevailed at trial.'. . . As to the unlawful entry claim, the district court declined to instruct the jury on the community caretaking exception to the warrant requirement over the defense's objections, explaining that it was not adequately defined in the law. Instead the jury was instructed on the exigent circumstances exception only, and the court stated that it would consider arguments about community caretaking in the context of qualified immunity after the jury returned its verdict. . . Before the jury returned with its verdict, Edwards, Jean, and Kaplan filed a motion for judgment as a matter of law, in which they argued that their entry into both the apartment and the bedroom was justified by the community caretaking exception to the warrant requirement. Further, they argued that were entitled to qualified immunity on the same grounds and because the law on community caretaking in 2013 did not clearly establish that their entry violated either brother's constitutional rights. The jury reached a unanimous verdict in favor of all of the defendants on all counts. As to the unlawful entry claim under § 1983, the jury was asked on the verdict form if Christopher or Gavin had proven by a preponderance of the evidence that Edwards, Kaplan, or Jean had violated their constitutional rights by entering either Christopher's apartment or specifically his bedroom on March 17, 2013. The jury responded 'no' to each question for each of the three officers. The district court denied as moot Edwards, Jean, and Kaplan's motion for judgment as a matter of law on the unlawful entry claim in light of the jury verdict in their

favor. On July 20, 2018, the Castagnas moved for a new trial, arguing that 'the jury's finding that Defendants Kaplan, Edwards and Jean are not liable to Plaintiffs under 42 U.S.C. § 1983 for the unlawful entry into Christopher Castagna's home, or, at the very least, into Christopher Castagna's bedroom,' is 'against the law, the weight of credible evidence and constitutes a miscarriage of justice.'. .On January 17, 2019, the district court granted the Castagnas' motion for a new trial, finding 'that the verdict is against the law as to the warrantless entry into the home and that the warrantless entry on the facts at trial is not protected by qualified immunity.' The court said the entry into the bedroom claim was merely a subset of the entry into the home claim, thereby saying it was not an independent claim. Because the only issues still to be resolved at that point in the proceedings were legal issues, instead of holding a new trial, the court instructed the Castagnas to move orally under Fed. R. Civ. P. 52 for the court to amend the judgment so that Edwards, Jean, and Kaplan would be liable for the unlawful entry claim. Without conceding their liability, the three officers moved for a ruling that the Castagnas had not proven a right to any damages beyond nominal damages. On June 28, 2019, the district court amended its judgment under Fed. R. Civ. P. 52 so that it reflected a judgment in favor of Christopher and Gavin and against Edwards, Jean, and Kaplan as to the § 1983 unlawful entry claim. The court awarded the two brothers one dollar in nominal damages from each of the three officers. The court did not disturb any of the other jury verdicts. This timely appeal followed. . . . Edwards, Jean, and Kaplan were entitled to qualified immunity for the unlawful entry claim under a community caretaking theory. . . As we explain below, neither part of the test for defeating qualified immunity has been met: the officers' entry into the home was in fact constitutional under the community caretaking exception and it was not clearly established at the time of their entry that the community caretaking exception would not give them an immunity defense. . . . Edwards, Jean, and Kaplan are entitled to qualified immunity for entering Christopher's apartment under the first prong of the test for qualified immunity. . . The entry did not violate the Castagnas' constitutional rights because the officers were allowed to enter the apartment through the open door under the community caretaking exception to the warrant requirement. . . .This year, after the district court in this case issued its decision, this court held that the community caretaking exception could be used to justify police officers' entry into homes as well. *Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020). **[Note: *See Caniglia v. Strom*, 141 S. Ct. 1596 (2021) ("What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly 'declined to expand the scope of ... exceptions to the warrant requirement to permit warrantless entry into the home.'. . We thus vacate the judgment below and remand for further proceedings consistent with this opinion.")]** Police are entitled to enter homes without a warrant if they are performing a community caretaking function and their actions are 'within the realm of reason.'. . We apply the analysis laid out in *Caniglia* and hold that the officers' entry was justified under the community caretaking exception to the warrant requirement. . . . The officers are entitled to qualified immunity under the second prong of the qualified immunity test as well. . . In 2013, there was no clearly established law that the officers' entrance into the apartment fell outside of the scope of the community caretaking exception. As said, this circuit had not explicitly held until this year that the community caretaking exception could be applied to homes. Before 2013, some circuits had held that *Cady*'s community caretaking exception applies

only to automobiles, not homes. . . But three other circuits before that date had applied the exception to homes as well as automobiles. . . And neither the First Circuit nor the Supreme Court had held that the exception was limited to automobiles. . . . There was no consensus of persuasive authority at the time of the officers' entry that the community caretaking exception could only apply to automobile searches. We reached the same conclusion in *MacDonald v. Town of Eastham*, 745 F.3d 8 (1st Cir. 2014), an opinion that post-dates the Castagnas' party by a year but relies on precedents that all pre-date the party. . . . Nor was there a consensus of authority in 2013 that the specific circumstances surrounding the officers' entry into Christopher's apartment made their entry an unreasonable application of the community caretaking doctrine. This circuit's pre-2013 community caretaking decisions had established a framework for when the exception might apply to officers' searches. These decisions were the basis for the law applied in *Caniglia*. . . . Given this legal background, the officers could not have been on notice that their actions would clearly violate the Castagnas' constitutional rights. The officers testified that they were not intending to arrest anyone at the party; as in *Rohrig*, they merely wanted to make sure the music was turned down so it would stop disturbing the neighbors. As in *York*, they were concerned with mitigating the risk of harm of excessive drunkenness. Like the officer in *Quezada*, the police officers here knocked on the door and announced themselves before entering. Their actions were at least arguably within the scope of the community caretaking exception. And for many of the same reasons discussed earlier in the opinion, their actions were at least arguably reasonable under the law in 2013. As this circuit held in *MacDonald*, a similar case in which officers announced their presence at an open door, received no reply, and entered a home without a warrant, 'neither the general dimensions of the community caretaking exception nor the case law addressing the application of that exception provides the sort of red flag that would have semaphored to reasonable police officers that their entry into the plaintiff's home was illegal.'. . 'Qualified immunity is meant to protect government officials where no such red flags are flying, and we discern no error in the application of the doctrine to this case.'")

See also ***Castagna v. Jean***, No. 19-1677, 2021 WL 2765949, at *1 (1st Cir. July 2, 2021) ("In the decision the Castagnas seek to revisit, we held that three Boston police officers were entitled to qualified immunity when, without a warrant, they entered the open door to Christopher Castagna's apartment after observing apparently underage drinkers exiting the premises. . . We reached this conclusion because at the time of the search, 'there was no clearly established law that the officers' entrance into the apartment fell outside of the scope of the community caretaking exception' to the Fourth Amendment's warrant exception. . . We cited a number of cases predating the search that held such searches were in fact lawful. . .The Supreme Court's decision in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), which held that police officers may not always enter a home without a warrant to engage in community caretaking functions, . . . does not alter our holding. To defeat the officers' assertion of qualified immunity, the Castagnas must show that the officers' conduct was clearly established as unlawful in 2013. . . . As controlling authority in this Circuit establishes, in 2013 there was no clearly established rule preventing the officers from entering the apartment. . .The Castagnas have not shown that our decision was erroneous, much less demonstrated their entitlement to extraordinary relief. The motion is *denied*.")

Caniglia v. Strom, 953 F.3d 112, 118, 122-33 (1st Cir. 2020), *vacated and remanded*, 141 S. Ct. 1596 (2021) ("There are widely varied circumstances, ranging from helping little children to cross busy streets to navigating the sometimes stormy seas of neighborhood disturbances, in which police officers demonstrate, over and over again, the importance of the roles that they play in preserving and protecting communities. Given this reality, it is unsurprising that in *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Supreme Court determined, in the motor vehicle context, that police officers performing community caretaking functions are entitled to a special measure of constitutional protection. . . We hold today — as a matter of first impression in this circuit — that this measure of protection extends to police officers performing community caretaking functions on private premises (including homes). Based on this holding and on our other conclusions, we affirm the district court's entry of summary judgment for the defendants in this highly charged case. . . . The defendants seek to wrap both of the contested seizures in the community caretaking exception to the warrant requirement. Notably, they do not invoke either the exigent circumstances or emergency aid exceptions to the warrant requirement. . . Nor do the defendants contend that their seizures of the plaintiff and his firearms were carried out pursuant to a state civil protection statute. . . . Since *Cady*, the community caretaking doctrine has become 'a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities.'. . In accordance with 'this evolving principle, we have recognized (in the motor vehicle context) a community caretaking exception to the warrant requirement.'. . Elucidating this exception, we have held that the Fourth Amendment's imperatives are satisfied when the police perform 'noninvestigatory duties, including community caretaker tasks, so long as the procedure employed (and its implementation) is reasonable.'. . Police officers enjoy wide latitude in deciding how best to execute their community caretaking responsibilities and, in the typical case, need only act 'within the realm of reason' under the particular circumstances. . . Until now, we have applied the community caretaking exception only in the motor vehicle context. . . . To be sure, the doctrine's reach outside the motor vehicle context is ill-defined and admits of some differences among the federal courts of appeals. . . A few circuits have indicated that the community caretaking exception cannot justify a warrantless entry into a home. [citing cases] Several other circuits, though, have recognized that the doctrine allows warrantless entries onto private premises (including homes) in particular circumstances. [citing cases] So, too, a handful of circuits — including our own — have held that police may sometimes seize individuals or property other than motor vehicles in the course of fulfilling community caretaking responsibilities. [citing cases] Today, we join ranks with those courts that have extended the community caretaking exception beyond the motor vehicle context. In taking this step, we recognize what we have termed the 'special role' that police officers play in our society. . . After all, a police officer — over and above his weighty responsibilities for enforcing the criminal law — must act as a master of all emergencies, who is 'expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.'. . At its core, the community caretaking doctrine is designed to give police elbow room to take appropriate action when unforeseen circumstances present some transient hazard that requires immediate attention. . . Understanding the core purpose of the doctrine leads

inexorably to the conclusion that it should not be limited to the motor vehicle context. Threats to individual and community safety are not confined to the highways. Given the doctrine's core purpose, its gradual expansion since *Cady*, and the practical realities of policing, we think it plain that the community caretaking doctrine may, under the right circumstances, have purchase outside the motor vehicle context. We so hold. This holding does not end our odyssey. It remains for us to determine whether the community caretaking doctrine extends to the types of police activity that the defendants ask us to place under its umbrella. First, we must consider the involuntary seizure of an individual whom officers have an objectively reasonable basis for believing is suicidal or otherwise poses an imminent risk of harm to himself or others. Second, we must consider the temporary seizure of firearms and associated paraphernalia that police officers have an objectively reasonable basis for thinking such an individual may use in the immediate future to harm himself or others. Third, we must consider the appropriateness of a warrantless entry into an individual's home when that entry is tailored to the seizure of firearms in furtherance of police officers' community caretaking responsibilities. For several reasons, we conclude that these police activities are a natural fit for the community caretaking exception. . . . The short of it is that the classes of police activities challenged in this case fall comfortably within the ambit of the community caretaking exception to the warrant requirement. But that exception is not a free pass, allowing police officers to do what they want when they want. Nor does it give police carte blanche to undertake any action bearing some relation, no matter how tenuous, to preserving individual or public safety. Put bluntly, activities carried out under the community caretaking banner must conform to certain limitations. And the need to patrol vigilantly the boundaries of these limitations is especially pronounced in cases involving warrantless entries into the home. . . . The acid test in most cases will be whether decisions made and methods employed in pursuance of the community caretaking function are 'within the realm of reason.'. . . Because the summary judgment record shows that a reasonable officer could have found that an immediate threat of harm was posed by the plaintiff and his access to firearms, . . . we need not decide whether the community caretaking exception may ever countenance a police intrusion into the home or a seizure (whether of a person or of property) in response to some less immediate danger. . . . Here, the police intrusions at issue — specifically, the seizures of an individual for transport to the hospital for a psychiatric evaluation and of firearms within a dwelling — are of a greater magnitude than classic community caretaking functions like vehicle impoundment. In such circumstances, it may be that some standard more exacting than reasonableness must be satisfied to justify police officers' conduct. Once again, though, we need not definitively answer this question: the record makes manifest that an objectively reasonable officer would have acted *both* within the realm of reason and with probable cause by responding as the officers did in this instance. . . . We conclude that no rational factfinder could determine that the defendant officers strayed beyond the realm of reason by deeming the plaintiff at risk of imminently harming himself or others. Consequently, the officers' seizure of the plaintiff was a reasonable exercise of their community caretaking responsibilities. Thus, that seizure did not offend the Fourth Amendment. . . . On this record, an objectively reasonable officer remaining at the residence after the plaintiff's departure could have perceived a real possibility that the plaintiff might refuse an evaluation and shortly return home in the same troubled mental state. . . Such uncertainty, we think, could have led a reasonable officer to continue to regard the

danger of leaving firearms in the plaintiff's home as immediate and, accordingly, to err on the side of caution. . . .To close the circle, the record establishes that the methods employed by the police to effectuate the seizure of the firearms were reasonable. The officers did not ransack the plaintiff's home, nor did they engage in a frenzied top-to-bottom search for potentially dangerous objects. Instead — relying on Kim's directions — they tailored their movements to locate only the two handguns bearing a close factual nexus to the foreseeable harm (one of which the plaintiff had admitted throwing the previous day and the other of which had been specifically called to the officers' attention). We add a coda. In upholding the defendants' actions under the community caretaking doctrine, we in no way trivialize the constitutional significance of warrantless entries into a person's residence, disruption of the right of law-abiding citizens to keep firearms in their homes, or involuntary seizures of handguns. By the same token, though, we also remain mindful that police officers have a difficult job — a job that frequently must be carried out amidst the push and pull of competing centrifugal and centripetal forces. Police officers must sometimes make on-the-spot judgments in harrowing and swiftly evolving circumstances. Such considerations argue persuasively in favor of affording the police some reasonable leeway in the performance of their community caretaking responsibilities. In the circumstances of this case, we think that no rational factfinder could deem unreasonable either the officers' belief that the plaintiff posed an imminent risk of harm to himself or others or their belief that reasonable prudence dictated seizing the handguns and placing them beyond the plaintiff's reach. Consequently, the defendants' actions fell under the protective carapace of the community caretaking exception and did not abridge the Fourth Amendment.")

Caniglia v. Strom, 953 F.3d 112, 134 (1st Cir. 2020), *vacated and remanded*, 141 S. Ct. 1596 (2021) ("Regardless of whether the seizure of particular firearms can ever infringe the Second Amendment right — a matter on which we take no view — it was by no means clearly established in August of 2015 that police officers seizing particular firearms in pursuance of their community caretaking functions would, by doing so, trespass on the Second Amendment. Here, the plaintiff has wholly failed to identify either binding precedent or a chorus of persuasive authority 'sufficient to send a clear signal' to reasonable officers . . . that seizures of individual firearms pursuant to the community caretaking exception fell outside constitutional bounds. The doctrine of qualified immunity is by now familiar. We previously set forth the parameters of that doctrine. . . In general terms, the doctrine is designed to shield government officials from suit when no 'red flags [were] flying' at the time of the challenged action — red flags sufficient to alert reasonable officials that their conduct was unlawful. . . Because this is such a case, the defendant officers in their individual capacities are entitled to qualified immunity with respect to the plaintiff's Second Amendment claims. We therefore hold that the district court did not err in granting them summary judgment on those claims.")

Penate v. Hanchett, 944 F.3d 358, 366-69 (1st Cir. 2019) ("Courts need not engage in the first inquiry and may choose, in their discretion, to go directly to the second. . . We do so here. The 'clearly established' inquiry itself has two elements. . . 'The first focuses on the clarity of the law at the time of the violation. The other aspect focuses more concretely on the facts of the particular

case and whether a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights.'. . The inquiry is context-dependent; rights cannot be established 'as a broad general proposition.'. .This test is refined further in supervisory liability cases. The 'clearly established' inquiry as to supervisors is bifurcated and is satisfied only when '(1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context.' *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998). If the constitutional right and the availability of supervisory liability that underlie a plaintiff's § 1983 claim are both clearly established, the qualified immunity analysis 'reduces to the test of objective legal reasonableness.'. . Under this latter test, we ask 'whether, in the particular circumstances confronted by [the] appellant, [the] appellant should reasonably have understood that his conduct jeopardized those rights,' whether through deliberate indifference or otherwise. . . This question involves merits-like analysis but is analytically distinct and confined to the qualified immunity inquiry. . . Although we harbor grave doubts about both propositions, we will assume, without deciding, that it was clearly established as early as 2012 that lab chemists could be held liable for withholding exculpatory evidence under *Brady* and that a deliberately indifferent lab supervisor could be held liable for *Brady* violations perpetrated by subordinate chemists.[5] As in *Camilo-Robles*, then, our inquiry centers on whether Hanchett, under the specific facts alleged in this case, should have 'understood that his conduct jeopardized' Penate's constitutional rights. . . We hold that Hanchett is entitled to qualified immunity because, under the circumstances alleged, an objectively reasonable lab supervisor would not have discerned that his acts and omissions threatened to violate the constitutional rights of criminal defendants whose suspected narcotics were being tested at the Lab. . . . Penate argues that Hanchett is liable for Farak's actions because Farak's behavior, coupled with Hanchett's general lack of supervision in the Lab, must have given him constructive notice that there was a substantial risk that Farak was abusing drugs while testing the drug samples in Penate's case. His complaint points to three discrete events which, according to Penate, should have put Hanchett on notice. We disagree that these events, singly or in combination, provided sufficient warning to Hanchett to constitute constructive notice that his actions or inactions amounted to a violation of Penate's rights, so as to make him deliberately indifferent to Penate's constitutional rights. . . . Penate pleads many facts about the Lab's lax security protocol and Hanchett's failure to oversee meaningfully the chemists under his supervision. But even if Hanchett were negligent in his supervisory duties, that does not suffice. These general allegations do not show Hanchett was on notice that his supervisory failings amounted to a violation of '*the constitutional rights of others*.'. . . In sum, Penate has not shown that, under the facts alleged, Hanchett clearly acted with deliberate indifference to Farak's alleged *Brady* violations or otherwise should have understood that his acts or omissions jeopardized Penate's constitutional rights. Accordingly, Hanchett is entitled to qualified immunity, and we reverse the district court's denial of Hanchett's motion to dismiss the § 1983 claim.")

SECOND CIRCUIT

Hurd v. Fredenburgh, 984 F.3d 1075, 1084 n.3 (2d Cir. 2021) ("Our qualified immunity analysis 'is guided by two questions: first, whether the facts show that the defendants' conduct violated plaintiffs' constitutional rights, and second, whether the right was clearly established at the time of the defendants' actions.'. . 'We may address these questions in either order,' and '[i]f we answer either question in the negative, qualified immunity attaches.'. . Although it has become the virtual default practice of federal courts considering a qualified immunity defense to assume the constitutional violation in the first question and resolve a case on the clearly established prong, 'it is often beneficial' to analyze both prongs of the qualified immunity analysis. . . '[T]he two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . This is such a case.")

Bacon v. Phelps, 961 F.3d 533, 542-545 (2d Cir. 2020) ("The Supreme Court has recognized that courts should exercise their 'sound discretion in deciding which of the two prongs of the qualified immunity analysis [to] address[ ] first in light of the circumstances in the particular case at hand.'. . Our court has taken the position that 'there remains a role for courts to rule on constitutional questions even in cases where qualified immunity ultimately determines the result.'. . There is value in making constitutional determinations, which 'have a significant future effect on the conduct of public officials ... and the policies of the government units to which they belong,' because such rulings 'establish[ ] controlling law and prevent[ ] invocations of immunity in later cases.'. .Accordingly, and noting that the district court did the same, we elect to begin by considering whether prison officials violated Bacon's constitutional rights. . . . Bacon argues that the letter he sent to his sister was an exercise of his right to speech under the First Amendment for which he suffered retaliation by being sent to the SHU. . . . We . . . hold that the district court erred by deeming Bacon's statement in his letter to be the sort of 'threatening or otherwise inappropriate language' that 'does not constitute protected ... speech.'. . Our holding does not undermine prison authorities' ability to discipline prisoners pursuant to prison regulations that are 'reasonably related to legitimate penological interests.'. . Where a prisoner makes a sexual proposal or threat in a letter in violation of Prohibited Act Code 206 or a similar regulation, he may properly be disciplined. . . . But the mild language at issue here, coupled especially with the fact that it was made in a letter to a member of Bacon's family, rather than to a correctional official or another prisoner, simply does not meet this standard. Significantly, defendants concede that the cases they cite in support of their argument that Bacon's statement constituted unprotected speech all involve speech that was communicated directly to the person the comments were about, and not to a third party outside the prison. . . . Although Bacon adequately alleged that prison officials violated his First Amendment rights, the officials nevertheless are entitled to qualified immunity if the rights were not 'clearly established' at the time. . . . In this case, the right at issue is not the general proposition that a prisoner has a First Amendment right to send mail and cannot be punished for its contents. . . Instead, the issue is whether, at the time Bacon sent a letter to a third party expressing his desire for a woman later identified as a female correctional officer, precedent from the Supreme Court or

this court put prison officials on notice that they could not punish him for his statements in that correspondence. It did not. The right therefore was not 'clearly established' and the defendants hence are entitled to qualified immunity. . . . We hold that the First Amendment protects a prisoner's right to express non-threatening sexual desire in communications with a third party outside the prison. Nonetheless, we conclude that the defendants are entitled to qualified immunity.")

Francis v. Fiacco, 942 F.3d 126, 140-41, 145-49 (2d Cir. 2019) ("This case implicates the 'sound discretion' that *Pearson* authorized. Because we ultimately resolve this appeal in favor of the State Defendants on qualified immunity grounds, we must also decide whether to reach the merits of Francis's constitutional claims along the way. We recognize compelling arguments against doing so. As the Supreme Court noted in *Pearson*, addressing constitutional arguments where qualified immunity applies 'sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.'. . Standard principles of constitutional avoidance also weigh against the practice. . . Moreover, we acknowledge the Court's latest pronouncement on this issue: that 'courts should think hard, and then think hard again, before turning small cases into large ones.'. . Nevertheless, there remains a role for courts to rule on constitutional questions even in cases where qualified immunity ultimately determines the result. As the Court explained in *Camreta*, such rulings 'have a significant future effect on the conduct of public officials ... and the policies of the government units to which they belong ... by establishing controlling law and preventing invocations of immunity in later cases.'. . For instance, *Camreta* invoked the hypothetical scenario of a court repeatedly rejecting a novel constitutional claim on qualified immunity grounds, adhering to traditional principles of constitutional avoidance but potentially licensing a government official's unconstitutional conduct in perpetuity. Courts taking that approach 'fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements.'. . And an exclusive focus on qualified immunity in such contexts 'may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior.'. . Under the circumstances of this case, we think the arguments weigh in favor of considering the merits of one of Francis's constitutional claims, notwithstanding the ultimate qualified immunity bar. For the reasons explained below, while the law was not clearly established on this point, we conclude that the State Defendants failed to provide Francis with procedural protections that the Due Process Clause required. Were we to proceed directly to the qualified immunity question, and confine our entire analysis to that subject, the State Defendants could continue to withhold those procedural protections—and thus continue to violate the Constitution—*ad infinitum*. What's more, the State Defendants have represented that in the absence of a constitutional holding, they will do exactly that. . . Therefore, having thought hard and then thought hard again, we now exercise our *Pearson*-conferred discretion in proceeding to resolve one of Francis's constitutional claims, before ultimately concluding that the State Defendants are entitled to qualified immunity from all of them. . . . The Supreme Court has lately emphasized the breadth of qualified immunity protection. . . . With that standard in hand, we now consider whether qualified immunity protects the State Defendants from Francis's constitutional

claims. [court discusses precedents] *Sudler* expressly declined to resolve the question whether *Wampler* and *Earley* 'should apply not only with regard to a single sentence, but also in the context of a sentencing judge's pronouncement as to the relationship between the sentence he is imposing and another sentence imposed in a separate proceeding.'. . Instead, the Court held that qualified immunity protected the State Defendants because the answer to that question had not been clearly established. . . No case since *Sudler* has provided further guidance on the extent of *Wampler* and *Earley*'s reach, so Defendants-Appellants should receive qualified immunity again here. As in *Sudler*, the facts 'are sufficient to convince us that the asserted unlawfulness of the State Defendants' conduct in calculating [the plaintiff's] release date would not have been apparent to reasonable prison officials.'. . In short, in light of the distinctions we have identified above, along with the reasoning we applied in *Sudler*, we cannot say that 'every reasonable official would interpret [*Wampler* and *Earley*] to establish' the unconstitutionality of the State Defendants' conduct in *this* case. . .We concluded above, without relying on *Wampler* and *Earley*, that the State Defendants violated the Due Process Clause pursuant to the traditional three-factor balancing test from *Mathews v. Eldridge*. *See supra* Part II. We held that the Due Process Clause required the State Defendants to notify the sentencing court, as well as the attorneys for both parties at sentencing, prior to implementing Francis's sentence in a manner that deviated from the sentencing court's original pronouncement. We now consider whether *Mathews* and its progeny had 'clearly established' those constitutional requirements at the time when the State Defendants engaged in the course of conduct at issue here. The Supreme Court has repeatedly emphasized that ' "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'. . . The traditional *Mathews* balancing test embodies that flexibility, requiring courts to weigh three highly fact-bound considerations with respect to any potential procedural innovation that the parties might propose. 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. . .With respect to this case in particular, precedent had not clearly established the due process requirements we identified above at the time of the State Defendants' conduct. Indeed, no case of which we are aware has even hinted that the Constitution might require the specific procedural protections we have now prescribed. Once again, the most closely analogous precedent is *Sudler*, where we affirmed a grant of qualified immunity to prison officials faced with a similar claim. . . No case before or after *Sudler* has even considered whether prison officials implementing a state sentence violate the Constitution by failing to provide notice to the sentencing court and attorneys, let alone subjected such a claim to a *Mathews* analysis. Accordingly, though we identify a constitutional violation pursuant to such an analysis, we conclude that qualified immunity protects the State Defendants from damages liability under the circumstances of this particular case.")

Cugini v. City of New York, 941 F.3d 604, 608, 611-17 (2d Cir. 2019) ("We conclude that the plaintiff has sufficiently established her constitutional claim for purposes of surviving a motion

for summary judgment. A reasonable jury could find that Palazzola's actions were objectively unreasonable in light of, *inter alia*, the minor nature of the plaintiff's alleged crime, the circumstances of her arrest, and the fact that the plaintiff posed no apparent risk of flight or physical threat to the police or others. The defendant was also reasonably made aware of the plaintiff's pain, both as a result of her signs of distress—her repeated audible, if not verbal, expressions of pain—and because the unreasonableness of the force used by the defendant was apparent under the circumstances. Nevertheless, because at the time of the defendant's actions it was not clearly established law that a plaintiff who did not verbally complain or request to have her handcuffs adjusted or removed, or both, could nevertheless recover on a handcuffing-based excessive force claim, the defendant was entitled to qualified immunity. The district court therefore correctly granted the defendants' motion for summary judgment on that ground. . . . The plaintiff asserts that Palazzola violated her constitutional rights by using excessive force in handcuffing her while she was in custody. The district court declined to decide the plaintiff's constitutional claim, moving directly to its analysis of qualified immunity instead. Addressing that issue on review nonetheless, as we are permitted to do under *Pearson*, we conclude that the plaintiff has sufficiently established a constitutional claim for excessive force. . . . [W]e decided long ago that the objective reasonableness standard established in *Graham* applies to actions taken with respect to a person who asserts, as does the plaintiff here, a claim for excessive force after she has been arrested and detained, but 'prior to the time when [she] is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.'. . . [A] plaintiff asserting a claim for excessive force need not always establish that she alerted an officer to the fact that her handcuffs were too tight or causing pain. The question is more broadly whether an officer reasonably should have known during handcuffing that his use of force was excessive. A plaintiff satisfies this requirement if either the unreasonableness of the force used was apparent under the circumstances, or the plaintiff signaled her distress, verbally or otherwise, such that a reasonable officer would have been aware of her pain, or both. . . . We conclude that where an officer's use of force in handcuffing is plainly unreasonable under the circumstances *or* where a plaintiff manifests clear signs of her distress—verbally or otherwise—a fact finder may decide that the officer reasonably should have known that his use of force was excessive for purposes of establishing a Fourth Amendment violation. . . . We conclude, then, that a reasonable jury could find that the defendant's actions were objectively unreasonable under the circumstances and that Cugini has therefore established a Fourth Amendment violation for present purposes. . . . At the time of the plaintiff's arrest, the use of excessive force in handcuffing was prohibited by clearly established constitutional law. While we had yet to formally hold that a defendant may violate a plaintiff's Fourth Amendment rights in a handcuffing-based excessive force claim, we had long rejected the principle that handcuffing is '*per se* reasonable.'. . And a consensus existed among our sister circuits that unduly tight handcuffing can constitute excessive force in violation of the Fourth Amendment. . . That was enough to clearly establish in this Circuit that an officer's use of excessive force during handcuffing could give rise to a Fourth Amendment claim for excessive force. . .Even assuming that the right to be free from excessive force during handcuffing was then clearly established, however, we cannot rest our ultimate conclusion as to immunity on a right that was clearly established only at 'a high level of generality.'. . Our analysis must instead be 'particularized' to

the facts of the case. . . We must therefore focus more narrowly on whether, at the time of Cugini's arrest, clearly established law required an officer to respond to a complaint by a person under arrest where, as here, that person exhibited only non-verbal aural and physical manifestations of her discomfort. We conclude that at the time of the plaintiff's arrest, there was no such clearly established law. It remained an open question in this Circuit whether a plaintiff asserting an excessive force claim was required to show evidence that an officer was made reasonably aware of her pain by means of an explicit verbal complaint. And our limited case law on the subject appeared to look to the presence or absence of such a complaint as a significant factor, if not a prerequisite to liability, in our Fourth Amendment analysis. . . . Similarly, there was no such consensus in federal circuits outside ours whether a verbal complaint was necessary, so we need not—we cannot—come to a conclusion as to the consequences of any such consensus had indeed there been one. . .Before today, then, the law at least left room for reasonable debate as to whether the plaintiff was required to alert the defendant to her pain, and, if so, whether her non-verbal behavior was sufficient to do so. . . Although the plaintiff has persuasively argued that the defendant used undue force in handcuffing her, a reasonable officer under these circumstances could have concluded *at the time of her arrest* that he was not required to respond to her non-verbal indications of discomfort and pain. We therefore conclude that the plaintiff has failed to establish that the defendant violated a clearly established constitutional right and that the district court therefore correctly granted the defendants' motion for summary judgment on that basis. . . We also conclude, however, that officers can no longer claim, as the defendant did here, that they are immune from liability for using plainly unreasonable force in handcuffing a person or using force that they should know is unreasonable based on the arrestee's manifestation of signs of distress on the grounds that the law is not 'clearly established.'")

THIRD CIRCUIT

Johnson v. Pennsylvania Department of Corrections, 846 F. App'x 123, ___ (3d Cir. 2021) ("The argument for a procedural due process right is even stronger for Johnson, given that he alleges he was held in solitary confinement after both his death sentence *and his underlying conviction* were vacated. And although Johnson claims he was in solitary confinement for 13 fewer years than Porter, spending 20 years in confinement without hope for relief is equally violative of procedural due process requirements. Defendants attempt to assert the defense of qualified immunity, but we also rejected that argument in *Porter*, holding that the prisoner's procedural due process rights had been clearly established since 2017 when we decided *Williams*. . . The same conclusion applies here. Accordingly, Defendants are not entitled to qualified immunity on Johnson's procedural due process claim, and we vacate the District Court's dismissal of that claim. . . . Johnson argues that his decades in solitary confinement were so cruel and unusual as to violate the Eighth Amendment. . . We agree Johnson stated a viable claim, though we ultimately affirm its dismissal because Defendants have a valid qualified immunity defense. . . . Johnson's complaint states an Eighth Amendment claim. However, we are also bound by our holding in *Porter* that the Eighth Amendment right in this context was not clearly established at the time of Porter's (and Johnson's) solitary confinement, so the Defendants can assert a qualified immunity defense. . . Johnson

attempts to distinguish *Porter* by emphasizing that his case was dismissed at the pleading stage, rather than on summary judgment, and argues that a more developed record would help him prove the right was clearly established. This procedural distinction is unavailing, as the facts and law are too similar to *Porter*. Additional discovery could not overcome the lack of binding, precedential opinions clearly establishing the Eighth Amendment right at issue at the time of Johnson's solitary confinement. Accordingly, we must affirm the dismissal of Johnson's Eighth Amendment claim. We emphasize, however, as we did in *Porter*, that going forward it is well established in our Circuit that solitary confinement of the sort alleged by Johnson and Porter satisfies the second prong of the Eighth Amendment test and supports an Eighth Amendment claim.")

Bletz v. Corrie, 974 F.3d 306, 310-11 & n.2 (3d Cir. 2020) ("In line with our precedent in *Brown* and the persuasive rulings of our sister circuits, we hold that the use of deadly force against a household pet is reasonable if the pet poses an imminent threat to the law enforcement officer's safety, viewed from the perspective of an objectively reasonable officer. . . . In conclusion, Trooper Corrie, while participating in a coordinated effort to serve an arrest warrant on an armed robbery suspect, reasonably used lethal force against a dog who, unrebutted testimony shows, aggressively charged at him, growled, and showed his teeth, as though about to attack. . . . Given our conclusion that the shooting of Ace did not violate the Fourth Amendment, we will not address whether the law was 'clearly established' for purposes of qualified immunity.")

Porter v. Pennsylvania Dep't of Corrections, 974 F.3d 431, 437-38, 449-51 (3d Cir. 2020) ("Because we are mindful that 'it is often appropriate and beneficial to define the scope of a constitutional right' to 'promote[ ] the development of constitutional precedent' before deciding whether the right was clearly established, we will begin by evaluating whether Defendants have violated Porter's constitutional rights. . . . Porter first argues that, according to our precedent in *Williams*, Defendants have violated his procedural due process rights by keeping him in solitary confinement for thirty-three years without any regular, individualized determination that he needs to be in solitary confinement, even though he has been granted a resentencing hearing. We agree. . . . *Williams* governs Porter's procedural due process claim. . . . Because Porter's procedural due process rights have been clearly established since we decided *Williams* in 2017, Defendants are not entitled to qualified immunity on this claim. In *Williams*, we explicitly stated:

> Our holding today that Plaintiffs had a protected liberty interest provides 'fair and clear warning' that, despite our ruling against Plaintiffs, qualified immunity will not bar such claims in the future. As we have explained, scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one's sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity.

848 F.3d at 574 (quoting *Lanier*, 520 U.S. at 271, 117 S.Ct. 1219).

We were not alone in reaching this conclusion. [collecting cases] . . . . There is therefore wide consensus that prolonged and indefinite solitary confinement gives rise to a due process liberty interest for inmates in Porter's circumstances. These cases gave Defendants 'fair warning' that keeping an inmate who has been in solitary confinement for thirty-three years on death row while

appeals of his vacatur order proceed violates his procedural due process rights. Defendants therefore are not entitled to qualified immunity as of our decision in *Williams*. . . .On Porter's Eighth Amendment claim, however, we reach a different conclusion. Unlike his procedural due process rights, Porter's Eighth Amendment right has not been clearly established. Porter has correctly pointed out that our Circuit and our sister circuits have held that inmates can bring Eighth Amendment claims based (at least in part) on conditions in solitary confinement. But only one circuit has done so in connection with solitary confinement on death row. Cases that challenge interpretation of death row policy and conditions on death row are distinct from cases brought by inmates in general population subject to solitary confinement. In *Williams*, for example, we considered whether our decision in *Shoats*, 213 F.3d 140, was sufficiently similar to the facts and claims raised by the *Williams* plaintiffs. We decided that, although *Shoats* is analogous and should have 'raised concerns' about whether the treatment of the *Williams* plaintiffs was constitutional, it was not sufficiently similar because Shoats was not on death row and did not directly dispute the death row isolation policy at issue in *Williams*. . . We have not found Eighth Amendment cases with sufficiently similar fact patterns, and the cases that Porter cites in support of his argument are inapposite. . . .The Fourth Circuit has held that solitary confinement conditions on death row violate the Eighth Amendment. *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019). But a single out-of-circuit case is insufficient to clearly establish a right. Defendants are therefore entitled to qualified immunity on Porter's Eighth Amendment claim. We emphasize, however, that from this point forward, it is well-established in our Circuit that such prolonged solitary confinement satisfies the objective prong of the Eighth Amendment test and may give rise to an Eighth Amendment claim, particularly where, as here, Defendants have failed to provide any meaningful penological justification.")

Porter v. Pennsylvania Dep't of Corrections, 974 F.3d 431, 466 (3d Cir. 2020) (Porter, J., concurring in part and dissenting in part) ("The majority holds that qualified immunity is unavailable to Defendants because Porter's procedural-due-process right was clearly established by *Williams*. . . I disagree for all of the reasons stated in Part II above. Rather, I believe the majority has created a new procedural-due-process right to be free from solitary confinement notwithstanding an active death sentence. Because that right was not clearly established, Defendants are entitled to qualified immunity on Porter's procedural due process claim. . . .Assuming for the sake of argument that Porter's Eighth Amendment right to be free from cruel and unusual punishments was violated, I agree that Defendants are entitled to qualified immunity.")

Sauers v. Borough of Nesquehoning, 905 F.3d 711, 715-20, 722-23 (3d Cir. 2018) ("Because we conclude that it was not clearly established at the time of the crash that Homanko's conduct, as alleged in the complaint, could give rise to constitutional liability under the Fourteenth Amendment, we will vacate the District Court's denial of qualified immunity. We hope, however, to establish the law clearly now. . . .We accordingly define the right at issue here as one not to be injured or killed as a result of a police officer's reckless pursuit of an individual suspected of a summary traffic offense when there is no pending emergency and when the suspect is not actively

fleeing the police. . . . The level of culpability required 'to shock the contemporary conscience' falls along a spectrum dictated by the circumstances of each case. . . Our case law establishes three distinct categories of culpability depending on how much time a police officer has to make a decision. . . In one category are actions taken in a 'hyperpressurized environment[.]'. . They will not be held to shock the conscience unless the officer has 'an intent to cause harm.'. . Next are actions taken within a time frame that allows an officer to engage in 'hurried deliberation.'. . When those actions reveal a conscious disregard of a great risk of serious harm' they will be sufficient to shock the conscience. . . Finally, actions undertaken with 'unhurried judgments,' with time for 'careful deliberation,' will be held to shock the conscience if they are 'done with deliberate indifference.'. . Our case law is clear that this 'shocks the conscience' framework for analysis applies to police-pursuit cases. . . The District Court rightly interpreted the complaint to allege that Homanko 'had at least some time to deliberate' before deciding whether and how to pursue the traffic offender. . . That places the fact-pattern in the second category of culpability, requiring inferences or allegations of a conscious disregard of a great risk of serious harm. . . . The liability question thus becomes whether deciding to pursue a potential summary traffic offender at speeds of over 100 miles-per-hour, after radioing for assistance from the neighboring jurisdiction where the potential offender was headed, demonstrates a conscious disregard of a great risk of serious harm. We have no difficulty in concluding that it does. . . . In sum, Sauers adequately pled that Homanko's conduct was conscience-shocking under our state-created danger framework. The complaint therefore contains a plausible claim that Homanko violated Sauers's and his wife's Fourteenth Amendment substantive due process rights. . . .At the time of the crash in May 2014, the state of the law was such that police officers may have understood they could be exposed to constitutional liability for actions taken during a police pursuit only when they had an intent to harm. Thus, it was not at that time clearly established that Homanko's actions could violate the substantive due process rights of Sauers and his wife. . . .There is, moreover, an important distinction between assessing whether a plaintiff has pled a 'clearly established theory of liability' and the question of whether that theory is fairly applied to a government official in light of the facts in a given case. . . It is only when both the theory of liability and its application to the established facts are sufficiently plain that the legal question of liability is beyond legitimate debate and a plaintiff can defeat a qualified immunity defense. . . In this instance, as discussed above, Sauers's complaint relies on the clearly established state-created danger theory of liability. The particular factual allegations, meanwhile, involve a police pursuit of a non-fleeing summary traffic offender. Accordingly, to assess whether the right to be free of the risk associated with a non-emergency but reckless police pursuit was clearly established in May 2014, we must ask whether Supreme Court precedent, our own precedent, or a consensus of authority among the courts of appeals placed that right beyond debate. . . . If any uncertainty existed in the law in May 2014 as to whether reckless police driving could give rise to constitutional liability in circumstances such as those alleged here, then we must afford Homanko the protections of qualified immunity. Our survey of the relevant cases reveals that the law was not so clear as to be 'beyond debate.'. . An officer on patrol in May 2014 could have reasonably understood, based on prevailing law, that he could pursue a potential traffic offender, even recklessly, without being subjected to constitutional liability. The Supreme Court, in *County of Sacramento v. Lewis*. . . had adopted an intent-to-harm

standard in a police pursuit case involving a high-speed chase of dangerously fleeing suspects. . . . In the years between that decision and the events at issue here, the courts of appeals were inconsistent in whether to apply the intent-to-harm standard in police-pursuit cases only when an exigency necessitated a chase, or whether to apply that standard in all police-pursuit cases, regardless of any exigencies. . . . *Lewis*, then, clearly established that an officer can be liable for a substantive due process violation resulting from a high-speed pursuit of a dangerously fleeing suspect only if the officer intended to cause harm. But it left open the possibility that a lower level of culpability could suffice in the right circumstances. In May 2014, the courts of appeals had not coalesced around what those circumstances might be in the police-pursuit context. [discussing cases in circuits] Given those decisions by the Eighth, Ninth, and Tenth Circuits, we cannot conclude that case law by May of 2014 had clearly established that an officer's decision to engage in a high speed pursuit of a suspected traffic offender could, in the absence of an intent to harm, give rise to constitutional liability. . . A police officer could have understood that, as long as he believed a pursuit was justified, constitutional liability would not follow based on recklessness alone. Our dissenting colleague disagrees, concluding that it was obvious in May 2014 that Homanko's conduct violated the Constitution. . . To the dissent, it is of high importance that the Tenth Circuit in *Green* applied a deliberate difference standard to a police driving case that, as here, involved neither an emergency nor an actively fleeing suspect. But the dissent discounts the fact that no court of appeals (until now) has joined the Tenth Circuit in distinguishing between those police pursuit cases in which a true exigency exists and those in which less is at stake. As we have described above, at least two courts of appeals have explicitly questioned the sort of distinction drawn by the Tenth Circuit. . .We agree with the Tenth Circuit's application of a culpability standard below that of 'intent to harm' in a non-emergency police pursuit case – indeed the entire panel here is in accord on that point. Where we part company with our dissenting colleague is at his rejection of the rest of the Tenth Circuit's decision. That court acknowledged that the law was not yet clearly established. We accept the accuracy of that assessment then and believe the law as of May 2014 still remained unsettled; our dissenting colleague disagrees. While he evidently views the legal conclusion about constitutional liability as obvious, we do not. Nor can we say that the Tenth Circuit's decision in *Green* alone amounts to the '"robust consensus of cases of persuasive authority" in the Court of Appeals' that we have held necessary to clearly establish a right in the absence of controlling precedent. . . That is especially so in light of the Eighth Circuit's post-*Green* decision in *Sitzes*. . . .Although the state of the law in May 2014 was unsettled as to whether police officers engaged in a police pursuit could be subject to constitutional liability for a level of culpability less than an intent to harm, our opinion today should resolve any ambiguity in that regard within this Circuit. Police officers now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to the full body of our state-created danger case law. That law clearly establishes that the level of culpability required to shock the conscience exists on a spectrum tied to the amount of time a government official has to act. In the police pursuit context, it is also necessary to take into consideration the officer's justification for engaging in the pursuit. We recognize that most high-speed police pursuits arise when officers are responding to emergencies or when they must make split-second decisions to pursue fleeing suspects. Our holding today does nothing to alter the longstanding principle that, in such cases,

constitutional liability cannot exist absent an intent to harm. But when there is no compelling justification for an officer to engage in a high-speed pursuit and an officer has time to consider whether to engage in such inherently risky behavior, constitutional liability can arise when the officer proceeds to operate his vehicle in a manner that demonstrates a conscious disregard of a great risk of serious harm.")

Sauers v. Borough of Nesquehoning, 905 F.3d 711, 724, 729 (3d Cir. 2018) (Vanaskie, J., concurring in part and dissenting in part) ("I agree with my colleagues that under our state-created danger framework, the facts alleged by Appellee Michael Sauers readily establish that Officer Homanko's conduct was conscience-shocking. I also agree that, going forward, [p]olice officers now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to the full body of our state-created danger case law.'. . I therefore join parts II.A and II.C of the majority's decision in full. However, because I believe that a reasonable officer in Homanko's position would have known on May 12, 2014, that the outrageous conduct alleged in this case was unconstitutional, I respectfully dissent from the majority's finding that Homanko is entitled to qualified immunity. . . .The unconstitutional nature of Homanko's actions, placing at substantial risk those traveling a two-lane, undivided highway in recklessly criminal pursuit of an unsuspecting motorist for a minor traffic infraction, was clearly established when he slammed into the Sauers' vehicle, mortally injuring Mrs. Sauer and severely injuring her husband. I respectfully dissent.")

FOURTH CIRCUIT

Robertson v. Anderson Mill Elementary School, 989 F.3d 282, 288 (4th Cir. 2021) ("It is left to the discretion of federal district and appellate courts to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . In this case, we will start with the first inquiry and need not proceed any further because the allegations underlying Appellant's amended complaint, even if true, do not substantiate a violation of R.R.S.'s constitutional rights.")

Dean for and on behalf of Harkness v. McKinney, 976 F.3d 407, 414-20 (4th Cir. 2020) ("The parties disagree as to what standard of culpability should apply in this case. McKinney argues that the district court should have applied the higher standard of 'intent to harm' to his actions because he was responding to what he believed to be an emergency, and the plaintiff presented no evidence that he intended to harm Harkness. But even if the lesser 'deliberate indifference' standard applies, he contends his actions did not demonstrate deliberate indifference and were not conscience-shocking. The plaintiff asserts that there was no emergency, and that McKinney's conduct was so egregious that it undoubtedly establishes that he acted with deliberate indifference to Harkness's life and safety. We have examined each standard in light of the facts and circumstances in this case and conclude that for purposes of summary judgment, deliberate indifference is the standard by which McKinney's conduct should be measured. . . . [U]nder *Lewis*, the intent-to-harm culpability standard applies to officers responding to an emergency call. . . . [W]hen an officer is able to make

unhurried judgments with time to deliberate, such as in the case of a non-emergency, deliberate indifference is the applicable culpability standard for substantive due process claims involving driving decisions. . . Under this legal framework and viewing the facts in the light most favorable to the plaintiff, . . . we find that a jury could conclude that McKinney was not responding to an emergency and had time to deliberate his actions. . . .An officer's actions demonstrate deliberate indifference where the evidence shows that the officer subjectively recognized a substantial risk of harm and that his actions were inappropriate in light of the risk. . . A defendant's subjective knowledge of the risk may be inferred from circumstantial evidence. . . . [A] reasonable jury could conclude that McKinney knowingly disregarded a substantial risk of serious harm, and that his deliberate indifference to life and safety was conscience-shocking, in violation of Harkness's Fourteenth Amendment substantive due process rights. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 718 (3d Cir. 2018) (responding to non-emergency call at over 100 mph demonstrates conscious disregard for a great risk of serious harm); *Browder*, 787 F.3d at 1081 (where off-duty officer was not chasing suspect or responding to an emergency, "a reasonable jury could infer ... a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right"). . . . That there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful. As then-Judge Gorsuch wrote for the panel in *Browder*:

[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Browder, 787 F.3d at 1082–83 (citations omitted). . . Further, this Court has found that 'we need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two.'. . With this legal framework in mind, the question to be resolved is whether a reasonable officer in McKinney's position would have known that his conduct—driving a police vehicle without activating his emergency lights and siren at over 80 miles per hour on a curved, unlit road at night while not responding to an emergency or pursuing a suspect—could give rise to a claim for a Fourteenth Amendment violation. As the district court noted, 'there is relatively scant caselaw imposing liability in these specific circumstances.'. . Neither the Supreme Court nor this Court has considered the exact conduct presented here. McKinney urges that the facts of this case are most similar to the circumstances presented in *Lewis*, where the Court declined to find a constitutional violation. But *Lewis*, . . . as well as this Circuit's opinion in *Temkin*, . . . involved officers who caused injuries while actively pursuing a fleeing suspect. We have already established here that the facts, viewed in the light most favorable to the plaintiff, do not support a conclusion that these circumstances are akin to a high-speed chase or that McKinney was responding to an emergency. Beyond this, the parties concede that no other court decisions have addressed the factual circumstances upon which we must make a determination. But while there is no case directly on point factually to inform our analysis, core constitutional principles set

forth in numerous cases lead us to the conclusion that Harkness's substantive due process right was clearly established. . . *Lewis* is not factually analogous to our case, but the Supreme Court did find that an officer not actively pursuing a suspect or responding to an emergency requiring quick decision-making, *i.e.*, where 'deliberation is practical,' may be liable based on a deliberate indifference standard for unintentional conduct. . . . After *Lewis*, two Tenth Circuit cases adopted the view that an officer can be liable for a substantive due process violation under a deliberate indifference standard when not responding to an emergency or chasing a suspect. . . .Thus, while the courts have yet to consider a case where an officer engaged in the same conduct as McKinney, he is not absolved of liability solely because the court has not adjudicated the exact circumstances of his case. We find that a reasonable officer in McKinney's position would have known, based on rights 'manifestly included within more general applications of the core constitutional principles invoked,'. . . that an officer may be subject to a claim under the Fourteenth Amendment under a deliberate indifference standard for unintentional injuries caused when not responding to an emergency or chasing a suspect. This substantive due process right was clearly established at the time McKinney engaged in the conduct that caused Harkness's injuries. A reasonable officer in McKinney's position would have known his conduct was not only unlawful, but that it created a substantial risk of serious harm to those around him. As the court stated in *Browder*, some conduct is so obviously unlawful that an officer does not need a detailed explanation. . . Thus, we affirm the district court's finding that 'in October 2016, it was clearly established that an officer driving more than 80 mph at night, on a curved section of an unlit road, in a non-emergency, non-pursuit situation could be subject to liability under the Fourteenth Amendment for deliberate indifference to a substantial risk of harm to those around him' and that '[a] reasonable officer in McKinney's position would have realized such conduct was unlawful.'. . Accordingly, taking the facts in the light most favorable to the plaintiff, we find that McKinney's actions were deliberately indifferent to Harkness's life and safety such that it shocks the conscience and rises to the level of a violation of a constitutional right that was clearly established at the time of the collision. We acknowledge that in the context of qualified immunity, officials are not liable for 'bad guesses in gray areas.'. . But McKinney's actions, construed in the light most favorable to the plaintiff, do not constitute a 'bad guess in a gray area' that qualified immunity protects. . . Thus, McKinney is not entitled to qualified immunity and his motion for summary judgment on that basis must be denied.")

Dean for and on behalf of Harkness v. McKinney, 976 F.3d 407, 421-22, 424-34 (4th Cir. 2020) (Richardson, J., dissenting) ("The majority dutifully recites the familiar rule that qualified immunity shields an officer from suit unless he violated a constitutional right that was 'clearly established.' Yet the majority fails to faithfully follow that rule—ignoring the Supreme Court's consistent admonition that it really must be *clearly established* that the officer's particular conduct was prohibited by the Constitution. Instead, the majority hangs its hat on a murky substantive-due-process claim. The governing constitutional standards are not clearly established. And the caselaw's application to the hurried, discrete, and torn conduct underlying this case is also not clearly established. Yet the majority ignores this compounded uncertainty to forge new law that it then finds had been 'clearly established.' The only course available to us as

inferior-court judges is to respect the Supreme Court's instructions and hold that the officer is immune from suit. I respectfully dissent. . . . The lack of clarity surrounding substantive due process—and the Court's admonishments in this area—cautions us to seek cases that address the specific circumstances at hand to find clearly established law. . . .Controlling authority from the Supreme Court and our Circuit fails to clearly establish that the deliberate-indifference standard applies in reviewing the officer's conduct here. . . . At their very most, our few precedents in this area offer far too little. There are some contexts that call for the deliberate-indifference standard (*Young*'s pretrial detention). But we also know that this standard is inappropriate in other contexts (*Temkin*'s high-speed car chases). Yet our law does nothing to firmly place the type of conduct here on the end of the spectrum that justifies applying deliberate indifference. If anything, it seems telling that in the closest *situation* to our case—the high-speed chase in *Temkin*—we rejected the very deliberate-indifference standard that the majority seeks to apply. . . . The closest cases the majority has—the Tenth Circuit's decisions in *Browder* and *Green* and the Third Circuit's decision in *Sauers*—do little to convince me that the conduct here falls under the rubric of the deliberate-indifference standard. While the *Browder* decision applied the deliberate-indifference standard, it did so where the officer was on his personal time, not pursuing any official business at all. . . And the *Green* decision, beyond whatever differences we might draw, is at most one dim point in a confused constellation that the majority calls on to answer the case before us today. *See Green*, 574 F.3d at 1301 n.8, 1310 (recognizing that whether there is sufficient time to deliberate is "elusive" and "context-specific," and holding that the deliberate-indifference standard was appropriate when an officer collided with another car while engaged in a high-speed chase of a car that had stolen gasoline). In fact, after finding that the officer did not act unconstitutionally, the Tenth Circuit in *Green* concluded that it was 'not clearly established what specific standard applied to the particular facts of this case—*i.e.*, where the officer was engaged in a high-speed non-emergency response.'. . The *Sauers* decision, also distinguishable, cuts the other way by refusing to apply the deliberate-indifference standard to a high-speed, long-lasting chase of a suspect for a minor traffic offense. . . Rather than provide clarity, the Third Circuit only muddied the waters further by applying its own unique standard—higher than deliberate indifference but lower than intent to harm. . . The Third Circuit has held that when officers have time to engage in 'hurried deliberation,' there will be liability when those actions 'reveal a conscious disregard of a great risk of serious harm.'. . The Third Circuit applied this higher standard rather than deliberate indifference where an officer lost control of his car and hit the plaintiff while engaged in a high-speed pursuit (sometimes exceeding 100-mph) over a non-emergency 'summary traffic offense.'. . The Third Circuit found that the officer violated the Constitution in this situation, but after surveying cases from across the country, including *Green*, the court held that the law had not been clearly established. After granting qualified immunity, the Third Circuit stated that its decision would establish the law for similar cases within that circuit. . . But *Sauers* cannot provide clearly established law here, as *Sauers* came two years after this crash. . . .Taking these cases together, no consensus, much less a robust one, emerges. Reasonable arguments exist that the conduct here—hurried, discrete, and torn between competing interests in responding quickly but safely to a newly downscaled call—falls either on the 'deliberate indifference' or 'intent to harm' side of the line (or perhaps somewhere in-between). The situation here required a quick (but not split-second)

response. It implicated important (but not compelling) interests. And it involved an urgent (but no longer an emergency) situation. So what to make of the precise conduct here is challenging. Without a clearly established general standard, the majority's case for stripping the officer of qualified immunity is off to a poor start. . . .Even were one to find a robust consensus requiring the officer act with only deliberate indifference and not an intent to harm, the application of that standard to the particular conduct here was not clearly established. . . . [W]hile I believe that the majority has stumbled at each step of its analysis, I also believe that the majority's decision today has created a more serious problem. That is, the majority apparently proposes that when engaged in a multi-step analysis in search of clearly established law, the doubts at each step of the analysis need not be aggregated at the end. Surely, there must be at least *some* relationship between how confident we are that we are using the right doctrinal yardstick and how confident we are that the officer's conduct falls short. But the majority, apparently, finds none. That is a mistake. . .What happened to Harkness was a tragedy (one for which state tort law provides a remedy). But there is no clearly established constitutional law here. This case arises at a seldom-visited crossroads in our doctrinal landscape—the rare rendezvous where the demanding requirement that the law must be 'clearly established' meets the famously malleable set of amorphous commitments that go by the name of 'substantive due process.' Sometimes, the common-law process, developing from one case to the next, can distill clear answers from even the murkiest fonts. But that is not the case here. As the majority itself seems to acknowledge, the cases in this area of law are scarce. And the more abstract and general the standard, the more concrete and specific the application must be. Yet what cases we have are distinguishable and countered by cases cutting the other way—leaving us with little guidance on what to do with the hurried, discrete, and torn conduct here. Without clear standards with clear application, the only thing that seems clearly established is that the majority has gone awfully far afield from the Supreme Court's instructions. What, then, to make of today's decision? With no clearly established law, perhaps it has less to do with the Supreme Court's qualified-immunity doctrine and more to do with misgivings about the wisdom of that doctrine. Those misgivings, to be sure, are understandable. Even after all these years, the doctrine of qualified immunity remains controversial, and there are thoughtful reasons for reconsidering or reforming it. But those are decisions for the Supreme Court (or Congress). Not us. And so, with respect for my colleagues, I cannot join an opinion that I fear will have the effect of quietly diluting and tacitly cheapening a doctrine that we are bound to apply so long as it remains standing. I respectfully dissent.")

FIFTH CIRCUIT

Jackson v. Gautreaux, No. 20-30442, 2021 WL 2678914, at *3–4 (5th Cir. June 30, 2021) ("*Fraire*, *Hathaway*, and *Ramirez* require us to find no Fourth Amendment violation here. That's for three independent reasons. First, like the drivers in *Fraire* and *Hathaway*, Stevenson was using his car as a weapon. . . It does not matter whether Stevenson (unlike the drivers in our precedents) 'ha[d] not threatened or attempted to harm any of the deputies.'. . Second, Stevenson and the drivers in our precedents exhibited volatile behaviors that contributed to the officers' 'justifi[cation] in firing to prevent ... death or great bodily harm.'. . Before the incident, Stevenson

was drinking and using drugs; he pepper sprayed his girlfriend and her daughter in a fit of rage; he stole his girlfriend's wallet and drove away while intoxicated; he repeatedly told his girlfriend and the officers that he was suicidal; he repeatedly yelled 'Kill me!' at one officer while ignoring commands from other officers; and he repeatedly rammed his car into a patrol unit and a concrete pillar while inches away from hitting Lieutenant Birdwell. Stevenson's immunity to reason was patent; the risk of injury or death to the Lieutenant was equally patent. Third, Plaintiffs have not produced any evidence that suggests the officers might've had a reasonable alternative course of action. *See Ramirez*, —– F.4th at ——–, 2021 WL 257199, at *4. When asked at oral argument for a reasonable alternative, Plaintiffs' counsel said that officers should've 'step[ped] back and allow[ed] Mr. Stevenson to finish the episode, and then they could have acted.'. . That's absurd. Lieutenant Birdwell was inches from the front left bumper of Stevenson's car while he was repeatedly driving it backwards and forwards and violently crashing into things. Whatever reasonable alternatives officers might've had, doing nothing and praying for the best is not one of them. And without a reasonable alternative to the officers' conduct, Plaintiffs are without a Fourth Amendment claim that the officers behaved 'unreasonably.'. .The district court therefore correctly held, in accordance with our precedent, that Plaintiffs' excessive-force claim fails as a matter of law.")

Batyukova v. Doege, 994 F.3d 717, 725-29 (5th Cir. 2021) ("The district court reached only the issue of whether any constitutional violation occurred. Because we review the grant of a summary judgment using the same standards as the district court, . . . we can and do resolve the appeal of Batyukova's excessive-force claim based on the other qualified-immunity consideration: whether the law was clearly established that the deputy's actions violated Batyukova's Fourth Amendment right to be free from excessive force. . . . In this case, Batyukova's deemed admissions conclusively establish the following facts. She ignored Deputy Doege's commands to show her hands and to place her hands on the hood of her vehicle. Instead, she gave him the middle finger and shouted expletives at him. She then started walking towards Deputy Doege, which prompted him to reverse his vehicle to maintain distance. She failed to comply with his subsequent command to 'get down.' Then, Batyukova reached for her waistband. Other uncontroverted summary-judgment evidence shows that Deputy Doege observed Batyukova reach behind her back, that her hand disappeared from view, and that Deputy Doege feared that she was reaching for a weapon. . . The district court determined that 'a reasonable officer in Doege's position would have believed Batyukova posed an immediate threat to his safety' and that his 'decision to use deadly force was objectively reasonable under the circumstances.' The court concluded that Batyukova failed to demonstrate a Fourth Amendment violation, a conclusion that resulted in the grant of qualified immunity without needing to consider whether the law supporting a violation was clearly established. We resolve the appeal of Batyukova's excessive-force claim on whether the right she claims was clearly established at the time of the alleged misconduct. . . Batyukova must show that the law was 'sufficiently clear' at that time 'that every reasonable official would have understood that what he [was] doing violate[d] that right.'. . There are two ways to demonstrate clearly established law. Under the first approach, the plaintiff may 'identify a case' or 'body of relevant case law' in which 'an officer acting under similar circumstances ... was held to have violated the [Constitution].'. .

This approach 'do[es] not require a case directly on point,' but 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . In the excessive-force context, 'officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue.'. . Under the second approach, '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.'. . As for the potential for an obvious violation of rights, Batyukova argues that all reasonable officers would have known they could not use deadly force against someone who clearly posed no threat. Because that does not describe the facts of this case, we will say no more about the category of an obvious constitutional violation. To overcome qualified immunity in this case, Batyukova must show that clearly established law prohibited using deadly force against a person who (1) repeatedly ignored commands, such as to show her hands, to place her hands on the hood of her vehicle, or to get down; and then (2) reached her hand behind her back towards her waistband, which the officer perceived to be a reach for a weapon to use against him. . . . Deputy Doege made a split-second decision to use deadly force against a non-compliant person who made a movement consistent with reaching for a weapon. We cannot say that Batyukova posed 'little to no threat' to Deputy Doege. We conclude that Batyukova failed to identify clearly established law prohibiting Deputy Doege's use of deadly force. The district court's grant of summary judgment on her excessive-force claim is affirmed.")

Cloud v. Stone, 993 F.3d 379, 383-87 (5th Cir. 2021) ("'We can analyze the prongs in either order or resolve the case on a single prong.'. . Here, prong one resolves the case. We address separately Luker's taser use and his subsequent shooting of Cloud, in that order. . . . Although Plaintiffs suggest that only a few seconds elapsed between Luker's initial tase and his drive-stun maneuver, the situation remained 'tense, uncertain, and rapidly evolving.'. . Under these circumstances, Luker's continued force to complete the arrest, like his initial tase, was reasonable. . . .Even drawing all inferences in Plaintiffs' favor, the record shows that Cloud was shot while moving toward the revolver and potentially seconds from reclaiming it. . . Plaintiffs contend Cloud was likely trying to flee, not to regain the revolver, but even if true, that would be irrelevant. Whatever Cloud's intentions, the circumstances warranted a reasonable belief that Cloud threatened serious physical harm. The lethal force was therefore not constitutionally excessive. . .Because we find no constitutional violation, we need not reach prong two of the qualified immunity defense and consider whether Luker violated any clearly established law.")

Roque v. Harvel, 993 F.3d 325, 332-36, 339 (5th Cir. 2021) ("Although qualified immunity raises two distinct questions (whether the conduct was unconstitutional and whether the unconstitutionality was clearly established), we have discretion 'to decline entirely to address the' first question. We can 'skip straight to the second question concerning clearly established law.' But we have repeatedly emphasized that there is value in addressing both questions 'to develop robust case law on the scope of constitutional right.' In that vein, we first address Plaintiffs' Fourth Amendment claim and then discuss the clearly established law at the time of the shooting. . . . When an officer uses deadly force, that force is considered excessive and unreasonable 'unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either

to the officer or to others.' Further, 'an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.' The parties do not dispute the district court's conclusion that, even though all of the officers claim they didn't see Jason point the gun in their direction, Harvel was justified in taking the first shot. The video evidence (from all angles) shows that right before the first shot, and after the officers shouted at Jason to put down his gun, Jason pointed the gun in the officers' general direction. It's also undisputed that Jason Roque suffered an injury (element one of his excessive-force claim). At issue, then, is whether Officer Harvel's second and third shots were excessive (element two) and objectively unreasonable (element three). These questions are 'often intertwined.' Because Officer Harvel used deadly force, the answer to these intertwined questions depends on whether Jason posed a threat of serious physical harm after the first shot struck him. Two factual disputes concerning the placement of the gun and Jason's movements prevent us from answering these questions. . . . Both fact disputes go to whether a reasonable officer would have known that Jason was incapacitated after the first shot. If Jason was incapacitated, he no longer posed a threat. And if he no longer posed a threat, Harvel's second and third shots were excessive and unreasonable. Whether Jason was incapacitated is therefore not only disputed but material to Plaintiffs' Fourth Amendment claim. . . . The district court implied that this was an obvious case under *Tennessee v. Garner*. . . Although the officer in *Garner* shot and killed a fleeing burglary suspect who was never armed, we have applied *Garner* to situations where a suspect has a weapon but is incapacitated or otherwise incapable of using it (functionally unarmed). The district court stated that, according to Plaintiffs' narrative, which is supported by video evidence, Jason never pointed the gun at anyone but himself. Before the first shot, Jason simply waved the gun in an arc as he turned around to look in the officers' direction right after they yelled at him to drop the gun. As Jason was turning around, Harvel took the first shot. The shot hit Jason, and he dropped the gun and stumbled into the street away from the officers and his mother. Thus, the district court concluded that under these facts, it was obviously unconstitutional to continue shooting at an unarmed suspect who was limping away from everyone present. . . .If the jury accepts Plaintiffs' narrative, which is supported by video evidence, then Harvel shot a suicidal, unarmed, wounded man who was a threat only to himself. That would make this case an 'obvious' one. But we need not rely on obviousness here, as multiple cases show that by May 2, 2017, the day that Harvel shot Jason, it was clearly established that after incapacitating a suspect who posed a threat, an officer cannot continue using deadly force. . . .To sum up, *Garner*, *Mason*, and *Graves* are the most pertinent cases. And those cases show that by 2017, it was clearly established—and possibly even obvious—that an officer violates the Fourth Amendment if he shoots an unarmed, incapacitated suspect who is moving away from everyone present at the scene. . . This is a tragic case that raises difficult questions about how police officers should respond to suicidal suspects. Those questions cannot be answered here without the resolution of several factual disputes. And if resolved in Plaintiffs' favor, Harvel is not entitled to qualified immunity.")

Ramirez v. Guadarrama, 844 F. App'x 710, ___ (5th Cir. 2021), redesignated as opinion, 2021 WL 2637199, at *4-5 (5th Cir. 2021) ("Although the employment of tasers led to a tragic outcome, we cannot suggest exactly what alternative course the defendant officers should have followed that

would have led to an outcome free of potential tragedy. We emphasize that the reasonableness of a government official's use of force must be judged from the perspective of a reasonable official on the scene, not with the benefit of 20/20 hindsight. . . The fact that Olivas appeared to have the capability of setting himself on fire in an instant and, indeed, was threatening to do so, meant that the officers had no apparent options to avoid calamity. If, reviewing the facts in hindsight, it is still not apparent what might have been done differently to achieve a better outcome under these circumstances, then, certainly, we, who are separated from the moment by more than three years, cannot conclude that Guadarrama or Jefferson, in the exigencies of the moment, acted unreasonably. While the preceding discussion applies to both officers, we now must distinguish between the actions of Guadarrama and those of Jefferson. . . Given that Guadarrama fired first, the most readily apparent justification for his use of his taser was to prevent Olivas from lighting himself on fire. . . Jefferson fired second, and while at one point he claimed to have fired instinctively, Plaintiffs allege that he did so intentionally. Accepting Plaintiffs' allegation as true, Jefferson still had good reason to try to immobilize Olivas, namely, to prevent him from spreading fire around the house. Moreover, at that point there was no risk that using a taser might ignite a fire since Olivas was already engulfed in flames. Accepting the pleaded facts as true and construing them in the light most favorable to Plaintiffs, neither officer's conduct was unreasonable, nor was the force they employed clearly excessive. We thus find that Plaintiffs' factual allegations do not make out a violation of Olivas's Fourth Amendment rights. The plaintiffs have asserted that Officers Guadarrama and Jefferson violated the Fourth Amendment rights of their deceased husband and father by using excessive and unreasonable force, causing his death. The officers have invoked qualified immunity from the lawsuit, arguing that there was no constitutional violation because their use of force was reasonable under the circumstances. We have found that, given the horrendous scene that the officers were facing, involving the immediate potential for the destruction of lives and property, the force used—firing tasers—was not unreasonable or excessive, and consequently we hold that the officers did not violate the Fourth Amendment and are thus entitled to qualified immunity.")

See also ***Ramirez v. Guadarrama***, No. 20-10055, 2021 WL 2690620, at *3 (5th Cir. June 25, 2021) (Jolly, J., concurring in denial of rehearing en banc) ("From purple prose, to the astonishment of what God has wrought, to images of nineteenth-century Justices in green eyeshades hovering over a telegraph transmitter tapping out opinions in Morse code, to the patriotic celebration of 42 U.S.C. § 1983, and finally to the sermonette that good can come even from the tragedy of the unanimous panel opinion, much as it did to Samuel F.B. Morse in the invention of the telegraph, the dissent packs it all in—except for a fair and complete rendition of the facts and law. Three years after the fact, the dissent is unable to articulate what the Fourth Amendment required Officer Guadarrama and Sergeant Jefferson to do in the circumstances they confronted. As for the 'obviousness' of the Fourth Amendment violation, if a distinguished United States Circuit Judge—after months of research, thought, and contemplation—does not now know what the Constitution then required, it seems 'obvious' that 'these officers had no "fair and clear warning of what the Constitution require[d]"' in the split-second, life-or-death encounter. . .In short, I write to say the dissent is quite unfair to the record, to the law, and to the officers.")

Ramirez v. Guadarrama, No. 20-10055, 2021 WL 2690620, at *3-6 (5th Cir. June 25, 2021) (Ho, J., joined by Jolly and Jones, JJ., concurring in denial of rehearing en banc) ("A robust majority of this court has voted to deny rehearing en banc in this matter. I concur and write separately to offer a brief response to the dissent authored by Judge Willett. . . .No one would deny that the threat of lethal violence in *Cole* was *less* imminent than the danger presented here. In *Cole*, the potential school shooter was merely on the way to the school when officers shot and killed him. . . Here, by contrast, the suspect was at home, in the very same room as—and in dangerously close proximity to—the officers and citizens he was endangering. So what is the dissent telling police officers in our circuit—that they can use lethal force, but only when the lethal threat is *less* imminent than the one presented here? What kind of rule is that? . . . Reasonable people can disagree with the doctrine of qualified immunity. . . But that debate has nothing to do with this appeal. As the dissent acknowledges, the panel decided this case based on the absence of a constitutional violation, not on whether any such violation was 'clearly established' for purposes of qualified immunity. Reasonable people can disagree with what the police officers did here. But assuming that the police had the duty to do *something* here to protect innocent lives, no one has explained: What should the officers have done instead? The dissent acknowledges that that is a 'perfectly sensible question.'. . But it offers no answer. Reasonable people can advocate in favor of greater restrictions on the police than what the Fourth Amendment requires. Our Nation is currently engaged in a rigorous debate over the need for police reform. Some argue the police should not use force, even in cases involving deadly threats—or that we should defund the police altogether. But that is a policy debate for the political branches, not the judiciary. As judges, we apply our written Constitution, not a woke Constitution. I am grateful for the overwhelming vote to leave the panel ruling intact. That includes Judge Smith, whose dissent notes that the panel 'got it exactly right.'. .But the fact remains that we are sending some awfully confusing and discomfiting signals to police officers. I fear that officers in our circuit will stop taking on these difficult and dangerous duties, if they have to worry about which panel of our court they will draw in the event tragedy strikes. I fear that officers will decline to put their careers and families on the line because they're unable to predict the outcome of our en banc votes. I fear that officers will choose to stand by and watch, rather than to protect and to serve, if the rules of engagement are unclear and unknowable at the time of the incident—determinable only after discovery is completed. I concur in the denial of rehearing en banc.")

Ramirez v. Guadarrama, No. 20-10055, 2021 WL 2690620, at *6-9 (5th Cir. June 25, 2021) (Oldham, J., joined by Jolly, Jones, Ho, and Engelhardt, JJ., concurring in the denial of rehearing en banc) ("This case is tragic, as so many of our cases are. But the question is not whether it's tragic. The question is whether the plaintiffs pleaded a violation of the Fourth Amendment. Judge Willett says the answer is obviously yes. I respectfully disagree for three reasons. . . .First, I do not understand how the dissent can say the officers' split-second decision was 'unreasonable'—much less plainly unreasonable—when no one can specify what reasonable alternative the officers had. . . .Second, the dissent says that none of this matters because the plaintiffs should be allowed to take discovery and only then (maybe) tell us what a reasonable

officer would've done in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. . . I doubt that ever has been the Rule 12(b)(6) standard, . . . but it's certainly not the standard today. (discussing *Twombly*) . . . . Third and finally, the dissent is quite right to focus on the Supreme Court's recent qualified-immunity orders. This Term, the Court summarily reversed one of our grants of qualified immunity and vacated another. (*Taylor* and *McCoy*) It's true that summary reversals can constitute sharp rebukes. . . And these summary orders are particularly remarkable because they are the Court's first- and second-ever invocations of the obvious-case exception to the clearly established law requirement. But *Taylor* and *McCoy* both tell us to look for 'particularly egregious facts' where there is 'no evidence' of 'necessity or exigency.'. . It's unclear how we should apply these orders where there *is* overwhelming evidence of dire, life-threatening exigencies. It's one thing to say, 'it should've been obvious that you cannot house prisoners in feces-covered cells for days' (*Taylor*), or 'it should've been obvious that you cannot gratuitously pepper-spray people who are no threat to anybody' (*McCoy*). But it's altogether different—and much harder—to figure out the 'obvious' answer in a split-second confrontation with a suicidal man doused in gasoline and holding a lighter in a room with innocent family members. . . This is a tragic case. But the Fourth Amendment is not an antidote to tragedy. It's a cornerstone of our Bill of Rights, with an august history and profound original meaning. We cheapen it when we treat it like a chapter from Prosser & Keeton. And we transmogrify it beyond recognition when we say officers act 'unreasonably' without any effort to say what a reasonable officer would've done.")

Ramirez v. Guadarrama, No. 20-10055, 2021 WL 2690620, at *10, *15-17 (5th Cir. June 25, 2021) (Willett, J., joined by Graves and Higginson, JJ., dissenting from the denial of rehearing en banc) ("In recent months, the Court has signaled a subtle, perhaps significant, shift regarding qualified immunity, pruning the doctrine's worst excesses. The Justices delivered that message in back-to-back cases, both from this circuit and both involving obvious, conscience-shocking constitutional violations. . . This case is of a piece—yet more troubling. Whereas the Supreme Court's two summary dispositions checked us for holding, on summary judgment, that there was no violation of 'clearly established' law, despite obvious constitutional violations, here we held, on a motion to dismiss, that there was no violation of law whatsoever, despite an obvious constitutional violation. By giving a premature pass to egregious behavior, we have provided the Supreme Court yet another message-sending opportunity. . . . [T]he panel opinion collides with recent warnings from the Supreme Court summarily negating grants of qualified immunity for obvious constitutional violations. . . Twice in recent months, the Supreme Court has vacated immunity grants. Both cases were from this circuit. And while these quiet, 'shadow docket' actions may not portend a fundamental rethinking of qualified immunity, the Court seems determined to dial back the doctrine's harshest excesses. If not reconsidering, the Court is certainly recalibrating. Most importantly here, the Court is warning us to tread more carefully when reviewing obviously violative conduct. . . . Indeed, *Taylor* was the first time in 16 years (and just the third time *ever*) that the Supreme Court expressly found official misconduct to violate 'clearly established' law. . . *Taylor* . . . declares that the obviousness principle has vitality and that egregiousness matters. In summarily reversing us without full briefing or argument. . . the Court

sent the message that not only were we wrong, we were *obviously* wrong—more specifically, we were obviously wrong about an obvious wrong. And though a rarity, *Taylor* was not a one-off. Just a few months ago, the Supreme Court doubled down in another case from our circuit, *McCoy v. Alamu*, involving an inmate gratuitously assaulted with pepper spray 'for no reason at all' by a prison guard who was angry with another inmate. . . The Court issued a 'grant, vacate, and remand' order directing us to reconsider in light of *Taylor*. The Supreme Court's reliance on *Taylor* confirms that the Court does not consider that case an anomaly, but instead a course correction signaling lower courts to deny immunity for clear misconduct, even in cases with unique facts. . . The message is low-key but loaded. These two orders make clear that the Court is earnest about reining in qualified immunity's severest applications. This doctrinal clarification may not amount to sweeping reexamination, but the upshot is plain: In cases with 'particularly egregious facts,' courts must not strain to absolve constitutional violations. Even if the precise fact pattern is novel, there is no need for a prior case exactly on point where the violation is obvious. . . And a conclusion of obviousness at step two necessarily means that step one has been satisfied; an obvious violation of a 'clearly established' right inescapably means that a right has been violated. The principle uniting these recent rebukes is that the qualified-immunity doctrine does not require judicial blindness. Courts need not be oblivious to the obvious. One can only speculate how the Supreme Court, having upended us in *Taylor* and *McCoy*, would evaluate today's case. For my part, this case is even clearer, and its holding more jolting, for two reasons: (1) *Taylor* and *McCoy* were appeals following summary judgment, after the cases had been factually developed, whereas this is a motion-to-dismiss case that requires us to take Plaintiffs' allegations as true; and (2) in *Taylor* and *McCoy*, we at least acknowledged there was a constitutional violation, whereas here we held there was no violation at all—not even a plausible one. Where is the bottom? In my judgment, nothing better captures the yawning rights-remedies gap of the modern immunity regime. . . than giving a pass to alleged conscience-shocking abuse at the motion-to-dismiss stage and step one of the immunity inquiry. . . This year America commemorates the sesquicentennial of our preeminent civil rights statute, 42 U.S.C. § 1983, the text of which promises a federal remedy for the violation of 'any' right—not just 'clearly established' ones. Nonetheless, the atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses, thus largely nullifying § 1983. The pages of F.3d abound with head-scratching examples . . . .But transformation is often born of tragedy. Samuel Morse's invention of the telegraph was spurred by heartbreak, the death of his wife, news of which arrived by letter, far too late for him to attend her burial. Morse set his mind to developing a way to deliver messages in minutes rather than days or weeks. And years later, in a hushed Supreme Court chamber, Morse transmitted his revolutionary message. The horrific death of Gabriel Olivas is also suffused in sorrow. And while qualified immunity has enjoyed special solicitude at the Supreme Court, perhaps these 'particularly egregious facts'. . . will prompt another meaningful message from the Court, one that marries law with justice (and common sense) and makes clear that those who enforce our laws are not above them.")

Joseph on behalf of Estate of Joseph v. Bartlett, 981 F.3d 319, 331-32, 336-46 (5th Cir. 2020) ("While we have discretion to leapfrog the merits and go straight to whether the alleged violation offended clearly established law, . . . we think it better to address both steps in order to provide clarity and guidance for officers and courts. . . We consider first the excessive-force claims against Officers Martin and Costa. We then address the claims against Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett. . . . Though Joseph was not suspected of committing any crime, . . . was in the fetal position, and was not actively resisting, Officers Martin and Costa inflicted twenty-six blunt-force injuries on Joseph and tased him twice, all while he pleaded for help and reiterated that he was not armed. Officers Martin and Costa are not entitled to summary judgment on the constitutional merits. Here, Plaintiffs may not be able to prove their claims, and the officers may well prevail at trial. But our task at this stage is to ascertain whether, viewing all facts and drawing all reasonable inferences in Plaintiffs' favor, there exist genuine disputes of material fact that a jury should suss out. Based on the record before us and our standard of review at this stage, there are genuine disputes of material fact, meaning that Plaintiffs are entitled to make their best case to a jury. If, that is, they can also demonstrate these facts amount to a violation of clearly established law, which we confront next. . . .On Plaintiffs' facts, Officers Martin and Costa violated Joseph's Fourth Amendment rights. But that does not defeat qualified immunity. Plaintiffs must also demonstrate that the law was 'clearly established'—that, as of February 7, 2017, the date of their encounter with Joseph, any reasonable officer would have known that Officer Martin's and Officer Costa's behavior was unlawful. . . Decades ago, *Graham* clearly established that the use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. . . But aside from 'rare,' 'obvious' cases, the allegedly violated right cannot be defined at this level of generality to overcome a qualified-immunity defense. . . . The Supreme Court has explained that for a court to deny qualified immunity based on 'clearly established' law, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . In other words, existing precedent must 'squarely govern[ ]' the specific facts at issue, such that only someone who is 'plainly incompetent' or who 'knowingly violates the law' would have behaved as the official did . . . Because this 'specificity' 'is "especially important in the Fourth Amendment context,"' the Supreme Court has 'stressed the need to "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment."'. . In this case, the district court found that a genuine dispute exists such that, under Plaintiffs' version of the facts, Officers Martin and Costa used force in a manner that violated clearly established law. The district court undertook the clearly established law analysis itself, as Plaintiffs had twice failed to identify a case putting the officers on notice that their conduct was unconstitutional. The court had ordered supplemental briefing specifically identifying this failure, giving Plaintiffs a second chance. Plaintiffs urged that this was an obvious case, but the court did not adopt that reasoning. The officers ask us to reverse on grounds of clearly established law, again arguing that the officers' actions were justified because Joseph was struggling and noncompliant. We have no more ability to review these factual disputes as to clearly established law than we did as to the constitutional merits—which is to say, none. The officers also ask us to reverse because the district court did not hold Plaintiffs to their burden to identify an analogous case, and this is not the rare obvious case for which no similar

case is needed. Plaintiffs now argue that *Newman*, *Deville*, and *Darden* clearly established that 'two taser strikes, baton strikes, punches to the head, and kicks to the groin and elsewhere' was excessive force because Joseph 'engaged in no violence, committed no crime, caused no harm, surrendered into the fetal position behind a store counter, and ... at all times presented with psychological disorientation.' The standard for obviousness is sky high, and this case does not meet it. We have nothing approaching the clarity we have perceived in other obvious cases. For example, we found that it was obviously unconstitutional for an officer to shoot—without warning, despite an opportunity to warn—a suspect who was pointing a gun to his own head and did not know the officer was there. . . We explained that it was an obvious case because *Tennessee v. Garner* prohibits the use of deadly force without an immediate threat and without a warning when one is feasible. . . In another case, we found that an officer obviously did not have reasonable suspicion to detain a man based on the following: The man briefly looked around a car in a well-lit parking lot, turned to get into another car, noticed the officer, got into that other car, and began to drive. . . The man exhibited no headlong flight or evasive behavior, and the officer had no prior tip or other information providing a reason to suspect the man of criminal activity. . . Here, the parties agree that the officers became involved because the assistant middle-school principal expressed concerns about Joseph being near the school. The parties agree that Joseph ran from the officers and disobeyed commands. The parties dispute how, if, and when Joseph resisted during the encounter in the store. The district court declined to find this case was obvious, and we are not persuaded otherwise. Therefore, we must 'identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. . While we needn't limit our analysis to the cases cited by Plaintiffs, . . . we must explain why the cases we identify prohibited the challenged conduct in this case. . . Surveying the state of the law as of February 7, 2017, we conclude that analogous facts from *Newman v. Guedry*, *Ramirez v. Martinez*, and *Cooper v. Brown* provided notice to any reasonable officer that it was unconstitutional to tase and strike Joseph as Officers Martin and Costa did here. . . . In sum, viewing the facts in Plaintiffs' favor, Officer Martin struck, punched, and tased Joseph, while Officer Costa repeatedly kicked and punched him—twenty-six blunt-force strikes and two rounds of tasing in total. All the while, Joseph was facedown in the fetal position, not suspected of committing any crime, not posing a threat to officers or others, and not actively resisting arrest. Officers Martin and Costa did not respond to Joseph with measured and ascending force that corresponded to his resistance. If Plaintiffs' facts are true, the actions of Officers Martin and Costa were disproportionate to the situation, in violation of the Fourth Amendment and the clearly established law. And thus, Officers Martin and Costa are not entitled to qualified immunity at this stage. . . . Roughly a dozen police officials stood around and behind the checkout counter observing the use of force against Joseph, and not one attempted to stop Officers Martin and Costa from applying the force they did. The officers facing bystander liability claims are Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett. . . An officer is liable for failure to intervene when that officer: (1) knew a fellow officer was violating an individual's constitutional rights, (2) was present at the scene of the constitutional violation, (3) had a reasonable opportunity to prevent the harm but nevertheless, (4) chose not to act. . . Bystander liability requires more than mere presence in the vicinity of the violation; 'we also consider whether an officer "acquiesced in" the alleged

constitutional violation.' . . The district court denied qualified immunity to the 'bystander officers,' determining that the officers' only argument against bystander liability depended on whether Officers Martin and Costa committed an underlying constitutional violation. . . The district court did not separately analyze the constitutional merits and the clearly established law. Before us, neither party engages in a separate analysis for each officer, as qualified immunity requires, and neither party briefed the clearly established law. As we did above, we will address the constitutional merits and then the clearly established law. . . . The video evidence does not eliminate Plaintiffs' narrative that the officers knew excessive force was being applied, had the opportunity to try to stop it, and did not. If the jury found those facts to be true, then Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett: (1) knew Officers Martin and Costa were violating Joseph's constitutional rights, (2) were present at the scene of that constitutional violation, (3) had a reasonable opportunity to prevent the harm, but (4) chose not to act. . . Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett have raised no argument that defeats Plaintiffs' claim that they violated Joseph's Fourth Amendment rights by failing to intervene. They are not entitled to summary judgment on the constitutional merits. . . .Plaintiffs do not identify a single case to support the argument that any reasonable officer would have known to intervene under these circumstances. We make no comment on whether Plaintiffs could have done so—the record in this case simply shows that they have not done so. In fact, they do not make any arguments as to the clearly established law. Nor do they argue that this case is obvious as to these nine officers. The officers don't identify cases or make arguments either, but that is not their burden. As we noted, Plaintiffs made the same mistake for the clearly established law proscribing the conduct of Officers Martin and Costa. The district court pointed out this shortcoming and gave Plaintiffs a second chance in supplemental briefing. Plaintiffs did not fix it; the district court fixed it for them. But the district court did not fix it here. The court did not assess the clearly established law applicable to the nine other officers. The Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy. . . With no briefing and no district-court analysis to review, we cannot justify a denial of qualified immunity on the grounds that clearly established law shows that every officer acted unconstitutionally in this case. Officers Leduff, Morvant, Thompson, Dugas, Varisco, Rolland, Faison, Verrett, and Bartlett are entitled to qualified immunity and summary judgment.")

Joseph on behalf of Estate of Joseph v. Bartlett, 981 F.3d 319, 346-47 (5th Cir. 2020) (Oldham, J., concurring in the judgment) ("I agree with the majority that police officers cannot beat an unresisting man. . . Under circuit precedent, that's enough to send Officer Costa and Officer Martin to trial. I also agree with the majority that an absence of clearly established law entitles the 'bystander officers' to qualified immunity. Where 'it is plain that a constitutional right is not clearly established,' the Supreme Court permits us not to reach the underlying constitutional merits. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). I would accept that invitation in this case. Doing so seems particularly wise here because the district court did not fully resolve the constitutionality of each bystander officer's conduct. And while I agree that 'Plaintiffs fail to identify any case' to support their constitutional claims against the bystander officers, . . . I think that militates in favor of avoiding those claims rather than adjudicating them. *See Pearson*, 555

U.S. at 239 (noting it makes sense to skip the constitutional merits where "the briefing of constitutional questions is woefully inadequate").")

Mayfield v. Currie, 976 F.3d 482, 487-88 (5th Cir. 2020) ("Officer Currie does not cite any cases holding that, in determining whether an officer would have known that her affidavit failed to establish probable cause, it is appropriate to consider other affidavits and applications submitted to the same judge regarding the same case. But in the context of qualified immunity, it is the plaintiff's burden to establish that an allegedly violated right was clearly established. . . Plaintiff-Appellees have not met that burden. Indeed, their own Amended Complaint acknowledges that the municipal judge signed the arrest warrant in question 'on the basis of the Currie affidavit and the Harrison affidavits,' and references the other warrants submitted by Officer Currie and her colleagues. The district court's conclusion that Plaintiff-Appellees adequately alleged a *Malley* wrong was therefore error.")

Mayfield v. Currie, 976 F.3d 482, 488-93 (5th Cir. 2020) (Willett, J., concurring) ("Stating the correct outcome is easy in this case; untangling a knotty constitutional inquiry to arrive at that outcome, less so. Today's bottom-line disposition is certainly correct: Reversing the denial of Officer Currie's *Malley*-based motion to dismiss, and remanding the *Franks* issue. I write separately only to point out that the Mayfields have not shown *any* constitutional violation, much less a clearly established one. . . The court begins (and ends) its immunity analysis on 'clearly established law' grounds, declining to address—let alone determine—whether Officer Currie violated the Fourth Amendment in the first place. True, the Supreme Court has blessed our 'sound discretion' to pivot solely on prong two of the qualified-immunity analysis. . . And 'clearly established law' is often outcome-determinative. But just because we *can* jump straight to prong two without undertaking the nettlesome task of determining if anyone's rights were violated doesn't mean we *should*. Leapfrogging the constitutional merits does make for easier sledding. . . But such skipping, jurists and scholars lament, leads to ' "constitutional stagnation"—fewer courts establishing law at all, much less *clearly* doing so.'. . The modern immunity regime, as with many judge-invented doctrines, could use greater precision. And one way to advance constitutional clarity is to give courts and public officials more matter-of-fact guidance as to what the law prescribes and proscribes. Yes, scrutinizing the alleged constitutional offense requires more work. More time. More resources. Overworked federal courts already resemble Lucy and Ethel in the chocolate factory. . .But since we require plaintiffs to prove a violation of clearly established law, it seems only fair that we do our part in establishing what that law is. How can a plaintiff produce precedent if fewer courts are producing precedent? How can a plaintiff show a violation if fewer courts are showing what constitutes a violation? The result: Section 1983 meets Catch-22.... Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. . .Ordinary citizens are told that ignorance of the law is no excuse. The judge-created rules of qualified immunity are, well, different. Accordingly, judges should, whenever possible, shrink the universe of uncertainty and 'clearly establish' which alleged

misdeeds violate the law, and which do not, thus narrowing the presumed knowledge gap between those who enforce our laws and those who live under them. . . .Officer Currie is shielded from civil liability 'insofar as [her] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . .Specifically, the Mayfields must show: '(1) that [Officer Currie] violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'. .As explained below, the Mayfields fall doubly short: There is no Fourth Amendment violation at all, clearly established or otherwise. . . . In sum, the record evidence establishes that the municipal court judge was presented with an arrest-warrant affidavit containing facts that were corroborated and supplemented by other arrest and search-warrant affidavits, which, considered together, establish probable cause and justify the warrant for Mr. Mayfield's arrest. . . Because the warrant was supported by probable cause, the Mayfields have not shown a constitutional violation. . . Turning to the second issue—'clearly established law'—the court rightly concludes that the Mayfields fail to establish that the alleged Fourth Amendment violation was 'clearly established' at the time of the challenged conduct. . . To be clearly established, a right must be sufficiently clear 'that every "reasonable official would [have understood] that what he is doing violates that right."'. . An officer is not eligible for qualified immunity under *Malley* when there is an 'obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant.'. . . We have held the standard in *Malley* is not satisfied when an officer proffers a facially invalid warrant affidavit—one devoid of any facts—one that 'states nothing more than the charged offense, accompanied by a conclusory statement' that the individual committed the offense. . . . And, while we have held that an officer is not entitled to qualified immunity under *Malley* when the warrant was based solely on a skimpy affidavit, the burden is on the Mayfields to cite a case holding that the Fourth Amendment required the affidavit to establish probable cause on its own, without consideration of other supporting documents. . . They have not done so. . . The Supreme Court has explicitly recognized our discretion to address the qualified-immunity prongs in whatever order we choose. In my judgment, the development of the law is best served by undertaking, wherever possible, the threshold constitutional analysis. Respectfully, courts should attempt to provide greater judicial guidance at the outset, explaining whether a right was in fact violated, not merely whether a rights violation was clearly established. In any event, because the Mayfields have failed to show a constitutional violation, let alone a clearly established one, Officer Currie cannot be liable under *Malley*. And the court is right to remand the *Franks* issue so that the district court can tackle it in the first instance.")

Walsh v. Hodge, 975 F.3d 475, 481-83, 485-88 (5th Cir. 2020) ("While courts should 'think hard' before addressing the constitutional question, 'it remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials.". . . The first prong of qualified immunity requires us to address whether Walsh suffered a deprivation of procedural due process by not being permitted to cross-examine his accuser. . . . Because we have concluded Walsh suffered a violation of his procedural due process rights, we proceed to the second prong of the qualified immunity analysis: was Walsh's constitutional right clearly established? . . . . Walsh

is correct that we have clearly established that due process for a terminated professor includes 'a meaningful opportunity to be heard in his own defense.'. . However, none of our case law speaks directly to the procedures necessary to protect a professor's interest in avoiding career-destruction after being accused of sexual harassment. . . . [A]s the above discussion makes clear, before today we have not explicitly held that, in university disciplinary hearings where the outcome depends on credibility, the Due Process Clause demands the opportunity to confront witnesses or some reasonable alternative. Our sister circuits, meanwhile, are split on this issue. . . And the Department of Education recently revised Title IX regulations to require universities to permit cross-examination of all witnesses, further demonstrating how in flux this right is. . . Nor can we hold, as Walsh contends, that 'a meaningful opportunity to be heard' should have put Defendants on notice that their actions were unlawful. The clearly established standard 'requires a high "degree of specificity."'. . Our case law does not make clear that the University's use of an investigator to interview the accused student and face cross-examination at the hearing violated Walsh's due process rights. Walsh presents us with no binding or persuasive authority for the proposition that the Committee was required to give Walsh the opportunity to test Student #1's version of the events more than it did. Because of our conflicting, inconclusive language in past cases, we cannot find that Defendants 'knowingly violate[d] the law.'. . And, because of all the opportunities Defendants afforded Walsh to be heard, we cannot conclude Defendants were 'plainly incompetent' in denying Walsh the right to cross-examine Student #1 or some substitute method to test her testimony. . . The district court, therefore, erred in denying Defendants' motion for summary judgment on the basis of qualified immunity for these claims.")

Garcia v. Blevins, 957 F.3d 596, 600-02 (5th Cir. 2020) ("Because it resolves the case, we begin and end with step two: was the alleged right clearly established at the time of the shooting? The district court determined it was not. We agree. . . . In excessive-force cases, 'police officers are entitled to qualified immunity unless existing precedent *squarely governs* the specific facts at issue.'. .The Garcias fail to show Blevins violated clearly established law. It is not enough to argue Garcia had a clearly established right 'to be free from deadly force where he was not attempting to flee and did not pose an immediate threat to the officers, nor anyone else.' That high level of generality cannot clearly establish the relevant law. . . The Garcias rely primarily on *Reyes v. Bridgwater*, 362 F. App'x 403 (5th Cir. 2010), to show the law was clearly established. *Reyes* is unpublished, however, and so cannot clearly establish the law. . . And *Reyes* would fail to do so in any event. In that decision, we concluded that officers violated clearly established law by shooting a man who held a kitchen knife, but who did not make a movement towards the officers or any other threatening gestures. . . We emphasized that a knife is a very different weapon than a gun, which is capable of causing fatal harm instantly at distance. . . We concluded that no reasonable officer could have concluded that the suspect posed an immediate danger of harm, and thus deadly force was excessive. . . Here, by contrast, Garcia was holding a gun, which he could at any time have turned on Blevins or any of the other individuals in the parking lot. *Reyes* thus provides no help to the Garcias' case. While not cited by the Garcias, our recent *en banc* decision in *Cole v. Carson* is also distinguishable. In that case, while searching in the woods, officers suddenly confronted a teenager holding a gun to his head and shot him. . . We explained that it violated

clearly established law in 2010 for police to shoot someone who—though pointing a gun at his own head—made no threatening movements toward the officers, was facing away from the officers, was not warned by the officers even though there was opportunity to do so, and may have been unaware of the officers' presence. . . Here, by contrast, it is undisputed Garcia was aware of Blevins' presence and that Blevins ordered Garcia to put down his weapon, but Garcia refused to do so. Those facts take this case beyond the contours of clearly established law at the time of the shooting. . . . Blevins, having just twice broken up fighting in the restaurant in which Garcia was involved, was told someone in the parking lot had a gun. He saw Garcia walking, gun in hand, towards other people in the parking lot. Garcia ignored Blevins' commands to drop the weapon, first ducking between parked vehicles and then trying to give the gun to someone else. Even under Plaintiffs' version of events, it is undisputed that—although he may have put his hands up at some point—Garcia refused to drop the gun when ordered to do so, and he could have quickly turned it on Blevins. '[W]e have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure their safety.'. . Here, we cannot say the law was '*so* clearly established that—in the blink of an eye ...—every reasonable officer would know it immediately.'. . We therefore hold Blevins is entitled to qualified immunity because he did not violate clearly established law.")

Voss v. Goode, 954 F.3d 234, 239-40 (5th Cir. 2020) ("Voss's second argument is that Goode is not entitled to qualified immunity because a reasonable officer would not have thought that he had probable cause to arrest her for interference with public duties. We need not determine whether Goode had probable cause under the first part of the qualified immunity test, because Goode's behavior was reasonable in light of the clearly established law at the time of the incident. An officer is entitled to qualified immunity even if he did not have probable cause to arrest a suspect, 'if a reasonable person in [his] position "would have believed that [his] conduct conformed to the constitutional standard in light of the information available to [him] and the clearly established law."'. . . Here, a reasonable officer could believe that Voss's conduct did not fall within the speech-only exception. While Voss maintains that she did not physically put K.V. in her car, she does not deny that she told K.V. to get in her car, contravening Goode's order that K.V. get in his patrol car. Importantly, her counsel acknowledged at oral argument that K.V. obeyed Voss and got in Voss's car after Voss ordered her to do so. A reasonable officer could think that this behavior gave rise to probable cause for interference. . . . Here, Goode had legal authority to place K.V. in protective custody, and Voss told her child to disobey a physical order. These circumstances are more similar to the facts of our cases upholding qualified immunity. . . Accordingly, Goode's conduct was not unreasonable in light of the prevailing law.")

Powers v. Northside Indep. Sch. Dist., 951 F.3d 298, 306-07 (5th Cir. 2020) ("Because of the uncertainty created by these decisions, our law on this issue remained unsettled until 2018 when the *Sims* court provided 'overdue clarification.'. . There, our court held that there is no absolute bar on liability for individuals who are not final decision-makers in a First Amendment retaliation claim. . . The *Sims* court further held that the 'causal link' standard in *Jett* controls and sets the causation requirement on such a claim. . . Nevertheless, like in *Sims*, this clarification of the law

provides no recourse to the plaintiffs in the instant case because the law was not clearly established at the time the incident occurred. . . When Powers and Wernli were terminated in April 2014, the inconsistency in our law as to whether First Amendment liability can attach to a public official who did not make the final employment decision had not yet been resolved. *See Culbertson*, 790 F.3d at 627 (concluding that the law remained unsettled in June 2015). Accordingly, the district court did not err in dismissing Plaintiffs' claims against Woods based on qualified immunity.")

Horvath v. City of Leander, Texas, 946 F.3d 787, 795, 800-03 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("I would welcome a principled re-evaluation of our precedents under both prongs. . . The second prong has been widely criticized, and for good reason: Neither the text nor the original understanding of 42 U.S.C. § 1983 supports the 'clearly established' requirement. . . In addition, courts too often misuse the first prong, finding constitutional violations where none exist as an original matter. . . In sum, we grant immunity when we should deny—and we deny immunity when we should grant. But be that as it may, I am duty bound to faithfully apply established qualified immunity precedents, just as I am duty bound to faithfully follow *Smith*. I concur in the judgment in part and dissent in part. . . .The 'clearly established' requirement is controversial because it lacks any basis in the text or original understanding of § 1983. Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement. . . By contrast, Congress has expressly adopted a 'clearly established' requirement in other contexts. For example, in the Antiterrorism and Effective Death Penalty Act of 1996, Congress imposed special burdens on habeas petitioners who seek relief from convictions. AEDPA requires habeas petitioners not only to establish a violation of law, but to identify '*clearly* established Federal law, as determined by the Supreme Court of the United States.'. . The qualified immunity doctrine imposes a similar 'clearly established' standard in § 1983 cases—but without any corresponding textual basis. That is troubling because, in other contexts, the Supreme Court has declined to read language into a statute if Congress explicitly included the same language in other statutes. . . Nor is there any other basis for imputing such a requirement to Congress, such as from the common law of 1871 or even from the early practice of § 1983 litigation. . . In sum, there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases. . . One of the primary justifications for the 'clearly established' requirement is that the fear of litigation not only deters bad conduct, but chills good conduct as well. That is a valid but, I believe, ultimately misplaced concern. For if courts simply applied the *first* prong of the doctrine in a manner more consistent with the text and original understanding of the Constitution, we might find that the second prong is unnecessary to prevent chilling, as well as unwarranted by the text. Law enforcement officials and other public officials who engage in misconduct should be held accountable. . . Public officials who violate the law without consequence 'only further fuel public cynicism and distrust of our institutions of government.'. . But there is also concern that the fear of litigation chills public officials from lawfully carrying out their duties. . . . Much of the chilling problem, however, stems from misuse of the first prong of the doctrine. Simply put, courts find constitutional violations where they do not exist. For example, the Fourth Amendment does not prohibit reasonable efforts to protect law-abiding citizens from violent criminals—it forbids only

‘*unreasonable* searches and seizures.’. . As those words were understood at the time of the Founding, the Fourth Amendment allows police officers to take the steps necessary to apprehend and prevent felons from harming innocent citizens. . . .So if chilling police conduct is the concern, there is no need for an atextual ‘clearly established’ requirement. The Constitution should be enough—if we get the substantive Fourth Amendment analysis right. Our court’s recent debates about qualified immunity illustrate this point. In *Winzer v. Kaufman County*, 916 F.3d 464 (5th Cir. 2019), no member of our court claimed that the officers violated ‘clearly established’ law. We all agreed that the officers involved in the death of a suspected active shooter were entitled to qualified immunity under the second prong. . . What divided us was the first prong—whether the plaintiff established a violation of the Fourth Amendment. Four members of our court dissented from the denial of rehearing en banc, writing that, ‘[i]f we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them’—echoing the same chilling concerns previously expressed by the Supreme Court. *Winzer v. Kaufman County*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J., dissenting from denial of rehearing en banc). But we did so under the first prong, not the second. . . So too in *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). There we again divided over whether the officers violated the Fourth Amendment—the first prong of the qualified immunity doctrine—in taking steps to prevent a distraught and armed teenager from shooting up a nearby school. . . Once again, so long as the substantive analysis under the first prong is right, there is no need for the second prong. . . . *Smith* does not foreclose Horvath’s Free Exercise claim against the city. But qualified immunity requires us to affirm the judgment as to the fire chief. I would vacate the judgment as to the Free Exercise claim against the city and remand to allow Horvath to proceed on that claim. I dissent in part for that reason. In all other respects, I concur in the judgment.”)

SIXTH CIRCUIT

Wilson on behalf of Huelsman v. Gregory, No. 20-4161, 2021 WL 2708863, at *6–9 (6th Cir. July 1, 2021) (“We may pick which prong to consider first. . . Here, we opt to start with whether the asserted violation of Mr. Huelsman’s rights was clearly established at the time. . . . The Huelsmans assert that the state-created-danger exception itself defines the clearly established right at issue: the Due Process Clause limits affirmative state actions that violate rights, and ‘[i]f there was an “affirmative act by the state which either created or increased the risk” to the plaintiff ... and a sufficiently culpable state of mind ... then that rule has been violated.’. . In return, the Deputies argue that ‘[t]he particularized law at issue here is whether a police officer can be found liable under the state created danger theory when they respond to a 911 call and the individual ultimately commits suicide.’. . .The Deputies’ conception is too vague, eliding many possible events between when an officer ‘respond[s] to a 911 call’ and when ‘the individual ultimately commits suicide.’ Instead, we formulate the ‘clearly established’ question here as follows: by the time of the September 19, 2015 events at issue, was the law clearly established that it was unconstitutional to take affirmative actions that created or increased the risk of a person’s suicide when the person was not in official custody? . . . .What matters most at this stage of the qualified immunity inquiry is whether the link between the state-created-danger doctrine and

fact patterns involving suicide by a person not in official custody was clearly established at the time of the events here. Our cases have considered suicide-related liability in the context of the state-created danger doctrine, and their application to this case raises questions, particularly about the conduct of Deputy Gregory. The Huelsmans question why suicide should be treated differently than any other harm that state action creates or makes more likely. But the fact remains that our cases have treated suicide differently. . . And we have not yet extended the state-created-danger exception to similar instances of suicide by someone not in official custody. If '[t]he "salient question" in determining if a defendant is entitled to qualified immunity is whether she had "fair warning" that her conduct was unconstitutional,'. . . then we cannot say that Deputies Gregory and Walsh had sufficient warning of the possible unconstitutionality of their conduct. Under governing precedent, they are entitled to qualified immunity. Therefore, we need not reach the issue of whether any conduct by the Deputies violated Mr. Huelsman's constitutional rights.")

Cunningham v. Shelby County, Tennessee, 994 F.3d 761, 764-67 (6th Cir. 2021) (" We will begin by considering the second prong, which asks whether on March 17, 2017, it was 'clearly established' that deputies Paschal and Wiggins' resort to lethal force violated a Fourth Amendment right 'of which a reasonable person would have known.'. . . None of the three cases relied upon by the district court identifies situations where officers acting under circumstances similar to those faced by deputies Paschal and Wiggins were held to have violated the Fourth Amendment. . . None of them involved the ultimate victim calling the police to declare that she possessed a firearm and intended to use it against anyone who came to her residence. And in none of them was it undisputed that the victim of the police shooting was brandishing a firearm in the manner Lewellyn displayed in the video. Deputy Paschal said in his deposition that he felt threatened by her display of the gun as he perceived her beginning to turn in the deputies' direction. The district court's reliance on a stop action 'screen shot' notwithstanding . . . , Paschal's perception is consistent with the video viewed in real time. . . . Because plaintiff cannot prevail on the second prong of the qualified immunity analysis, we need not delve deeply into the district court's conclusion with respect to the first prong: that material questions of fact precluded summary judgment in favor of deputies Paschal and Wiggins. Specifically, we are troubled by the district court's use of 'screen shots' to analyze the dashcam videos. By relying on screen shots, a court would violate the teaching of *Graham* against judging the reasonableness of a particular use of force based upon 20/20 hindsight. While the district court acknowledged that it 'spent much time pinpointing moments' to help it to establish what occurred, it conceded that such moments 'do not tell the full story' in light of 'how quickly the incident occurred.'. . We agree and therefore believe that the district court erred by including several screen shots in its opinion to support its conclusions. For example, directly below one screen shot, the court stated that '[b]ased on the video footage, the Court finds that a genuine dispute of material fact exists about whether Lewellyn pointed her gun in the deputies' direction when she reached the driveway.'. . To the extent that the district court relied upon screen shots, as it apparently did here, to decide whether it was objectively reasonable for the officers to use lethal force, it erred. The deputies' perspective did not include leisurely stop-action viewing of the real-time situation that they encountered. To rest a finding of reasonableness

on a luxury that they did not enjoy is unsupported by any clearly established law and would constitute reversible error.")

Bethel v. Jenkins, 988 F.3d 931, 945 (6th Cir. 2021) ("Because we find that there was no violation of Bethel's First Amendment or procedural due process rights, Defendants are entitled to qualified immunity as a matter of law. . . And even if there was a violation of a constitutional right, Bethel cannot show that a right to receive books withheld pursuant to a ban of third-party orders from unapproved vendors was clearly established, especially given precedent upholding 'publisher only' policies, . . . and the process provided following the withholding of books.")

Tlapanco v. Elges, 969 F.3d 638, 656-57 (6th Cir. 2020) ("Tlapanco claims that making a forensic mirror (i.e., copying) of his electronic devices, including his cell phone and laptops, after the trial court's oral decision to return his property was an unlawful search and that then retaining the forensic mirrors after returning the physical devices and dismissal of the criminal prosecution is a continuing unlawful seizure. We first note that it is not mandatory to address the qualified immunity prongs sequentially; rather, discussion of the first prong will in some cases result 'in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.'. .We decline to address the first prong of the qualified immunity analysis and proceed directly to the clearly established prong in assessing this claim against McCabe as that prong is dispositive here. This circuit has not previously addressed the Fourth Amendment implications of mirroring a suspect's electronic files prior to returning the physical device and maintaining the forensic mirror after dropping a criminal prosecution. Indeed, no circuit has assessed the constitutionality of this practice, let alone deemed it unlawful. The Second Circuit considered the issue in the context of a motion to suppress in *United States v. Ganias* (*Ganias I*), 755 F.3d 125 (2d Cir. 2014), but ultimately, after *en banc* rehearing, the full court decided not to reach the issue of whether the retention of copied hard drive data was a Fourth Amendment violation warranting suppression of the documents because it found the agents acted in good faith reliance on the basis of a valid warrant. . . Similarly, in the context of a motion to suppress, the First Circuit considered whether the retention of all copied emails collected pursuant to a warrant during the pendency of a defendant's criminal appeals warranted suppression and held that it was reasonable to interpret the warrant to permit retention of the data until the appeals were completed. *United States v. Aboshady*, 951 F.3d 1, 6–8 (1st Cir. 2020). The absence of any existing precedent on this issue is dispositive of Tlapanco's unlawful search and seizure claims against McCabe. In the absence of any guiding precedent, a reasonable officer in McCabe's position would not have known that he was committing a constitutional violation when he mirrored electronic devices seized pursuant to a search warrant and then retained the forensic mirrors after the charges had been dismissed and the devices returned to their owner. Therefore, we affirm the district court's grant of qualified immunity to McCabe on these claims.")

Gale v. O'Donohue, 824 F. App'x 304, ___ (6th Cir. 2020) (Donald, J., concurring) ("While I concur in the judgment, I write separately to address the constitutional claims Gale raises regarding Paramo's refusal to immediately allow Gale to exit the patrol vehicle upon Gale's request. Though

the majority correctly notes that Gale failed to establish that Paramo's actions violated clearly established law, Gale's inability to identify a case specifically addressing the constitutionality of Paramo's actions is not due to his failure to research the issue, but rather due to a lack of case law. Declining to address the constitutionality of an officer's actions simply because there is no clearly established law rendering those actions unconstitutional prevents future plaintiffs in Gale's position from seeking redress for similarly unconstitutional behavior. Providing that analysis in this opinion is an important step in the development of qualified immunity law, and I believe declining to do so in this instance is a mistake. . . . This case presents a unique consideration—if consent to a ride is given at the outset, at what point is it unreasonable for an officer to continue detaining an individual in his vehicle once that consent is withdrawn? Although Defendants contend that 90 seconds is a 'reasonable amount of time' to keep Gale detained in the vehicle after he requested to leave, the duration of an officer's interference with an individual's freedom of movement is not determinative as to whether a seizure has occurred, *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984), and 'an officer must have a reasonable suspicion of criminal activity to even briefly seize an individual,' *Crawford v. Geiger*, 656 F. App'x 190, 204 (6th Cir. 2016). As Paramo repeatedly assured Gale during the ride, he did not suspect Gale of criminal activity. Instead, Paramo explained that he was continuing to hold Gale in the vehicle because Paramo was concerned for Gale's safety due to Gale's intoxication, Gale's unfamiliarity with the area, and Paramo's concern that Gale would cause civil unrest while wandering a neighborhood late at night unable to contact anyone or find his way home. These reasons amount to, at best, a tenuous justification for continuing to seize an individual upon his revocation of consent. While it was reasonable for Paramo to continue driving until he was able to pull over and allow Gale to safely exit the vehicle, Paramo's speculation that Gale's presence in the residential area may cause civil unrest did not justify his continued captivity inside the vehicle. Thus, I believe Paramo's detainment of Gale in the vehicle despite Gale's unequivocal, repeated requests that he be permitted to exit ultimately amounted to an unconstitutional seizure. However, due to the lack of clearly established law rendering those 90 seconds an unlawful seizure in light of Paramo's stated concerns for Gale's safety and Gale's initial consent to the ride, Paramo is entitled to qualified immunity.")

Beck v. Hamblen County, Tennessee, 969 F.3d 592, 598-604 (6th Cir. 2020) ("To overcome a qualified-immunity defense, § 1983 plaintiffs must show two things: that government officials violated a constitutional right and that the unconstitutionality of their conduct was clearly established when they acted. . . The Supreme Court has told us that we may address these two issues in the order we think best. . . In this case, we think it best to resolve the appeal on the 'clearly established' prong alone without deciding whether Sheriff Jarnagin violated Beck's constitutional rights. . . Whether or not Jarnagin adequately attempted to remedy the problems at the jail within the meaning of the Fourteenth Amendment, the unconstitutionality of his conduct was not 'beyond debate'—as it must be to rebut his qualified-immunity defense. . . . [T]he fact pattern of the prior case must be 'similar enough to have given "fair and clear warning to officers" about what the law requires.'. . . The standard sets a high bar because it requires a plaintiff to identify with 'a high "degree of specificity"' the legal rule that a government official allegedly violated. . . The rule

'must be "particularized" to the facts of the case.'. . Given this requirement, the Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . Such an abstract framing 'avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'. .The Supreme Court has also told us how to decide if a plaintiff has identified a sufficiently specific legal rule: The plaintiff has identified a rule at too high a level of generality 'if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the identified rule] was firmly established."'. . . Sheriff Jarnagin is entitled to qualified immunity on Beck's deliberate-indifference claim. We begin with the governing legal principles. In the context of inmate-on-inmate violence, the Supreme Court has held that '[a] prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment' rights of convicted prisoners. . . To prove this type of deliberate-indifference claim, a prisoner first must establish an objective element: that the prisoner 'is incarcerated under conditions posing a substantial risk of serious harm.'. . The prisoner next must establish a subjective element: that the government official subjectively knew of this risk of harm. . . The prisoner must lastly show that the official failed to 'respond[ ] reasonably to the risk.'. . . Courts are split over whether *Kingsley*'s holding for excessive-force claims should also modify the subjective element from *Farmer* that we have traditionally applied to pretrial detainees' deliberate-indifference claims. . . We have yet to resolve this question. . . So *Kingsley*'s effect on Beck's deliberate-indifference claim (if any) cannot qualify as 'clearly established' law under the qualified-immunity test. . . Indeed, Beck does not even cite *Kingsley*. We thus assume that *Farmer*'s rules still apply in this pretrial-detainee context. . . . Even taking the facts in the light most favorable to Beck, we cannot find that the unconstitutionality of Sheriff Jarnagin's conduct was 'beyond debate' under *Farmer* at the time of the assault on Beck. . . . Beck has identified no evidence suggesting that Jarnagin had any personal knowledge of Beck's *specific* situation. Jarnagin, for example, did not help choose the cell in which Beck was detained. Jarnagin also had not heard the warnings about placing Beck in a cell with Cisneros. . . And he did not know of any of Beck's personal characteristics that might make him more susceptible to assault. . . Instead, Beck seeks to hold Jarnagin liable on a *general* theory that would apply just as much to any assault at the jail as it would to the assault on Beck. For the first deliberate-indifference element (a substantial risk of serious harm), Beck cites the reports by the Tennessee Corrections Institute describing the safety concerns at this overcrowded and understaffed jail. . . For the second deliberate-indifference element (knowledge of the risk), Beck notes that Jarnagin readily admits he knew of those general safety concerns. . . For the third deliberate-indifference element (unreasonably failing to reduce the risk), Beck argues that Jarnagin should have done more to reduce this general risk of violence. . . With regard to *Farmer*'s third element, however, Jarnagin did make *some* efforts 'to abate' this general risk of inmate-on-inmate violence. . . Starting from when he first became sheriff, he has repeatedly described the safety concerns to the Hamblen County Commissioners and stated his view that the commissioners should build a new jail. Jarnagin has also obtained increased funding, which has allowed him to hire more corrections officers. Not only that, the safety problems detailed by the Tennessee Corrections Institute largely fell outside Jarnagin's control because he was unable to limit the number of inmates at the jail. Sheriff Jarnagin also did not have the power to allocate more taxpayer dollars to the safety

problems—whether by building a new jail or by hiring more staff. Those budgetary decisions fell within the prerogative of the county commissioners. Under the qualified-immunity test, therefore, Beck must prove that it would have been 'clear to a reasonable officer' that Jarnagin's responses to the risk of inmate-on-inmate violence were so inadequate that we can describe him as 'plainly incompetent' in thinking they satisfy constitutional standards. . . Beck has not made that showing. For starters, *Farmer*'s reasonableness test—like the Fourth Amendment's reasonableness test—does not itself provide 'fair warning' to Jarnagin that his responses to the risk of inmate-on-inmate violence were constitutionally inadequate. . . And Beck has 'point[ed] to no Supreme Court or Sixth Circuit case' that would have 'given "fair and clear warning to [Jarnagin]" about what the law requires' in the situation in which he found himself: a resource-limited official who knew of general safety concerns arising from overcrowding and understaffing problems largely outside his control. . . Indeed, a pre-*Farmer* case found resource constraints relevant to defending against a deliberate-indifference claim. *See Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985). . . . All told, neither the Supreme Court nor our court has issued a decision concluding that a government actor responded unreasonably to a known risk of harm when the actor took actions similar to the actions that Jarnagin took here. Under the Supreme Court's precedent, therefore, Beck cannot overcome Jarnagin's qualified-immunity defense. . . . Just as the general right to be free from excessive force often will not clearly establish whether an officer used excessive force on a given occasion, . . . so too the general right to be free from inmate violence will often not clearly establish whether an official reasonably responded to the risk of violence on a given occasion. That is the case here. The general right against inmate violence does not answer 'the crucial question' whether Jarnagin responded reasonably to the general safety risks. . . That is because 'the unlawfulness of [Jarnagin's response] "does not follow immediately from the conclusion that [a right against inmate violence] was firmly established"' by *Farmer*. . . The district court next relied on an unpublished decision suggesting that '[a] case could be made as to the [constitutional] liability of a sheriff responsible for a jail where "inmate-on-inmate violence occurred regularly when the jail was overcrowded, as it was [when the incident in question occurred]."'. . But *Fisher*'s statement was pure dictum because we found the sheriff entitled to qualified immunity. . . In any event, *Fisher* did not clearly establish what such a 'case' for liability would require. . . The district court thus turned to two out-of-circuit decisions—*Lopez v. LeMaster*, 172 F.3d 756, 761–62 (10th Cir. 1999), and *Hale*, 50 F.3d at 1583–84. Yet 'our sister circuits' precedents are usually irrelevant to the "clearly established" inquiry.'. . They can create a clearly established rule only in extraordinary situations. . . . Sheriff Jarnagin's entitlement to qualified immunity does not leave Beck without any potential recourse for the assault that he claims to have suffered and the general safety concerns that he identified. After all, Beck also sued Hamblen County. He claims that individuals such as Sheriff Jarnagin and Chief Deputy Mize have repeatedly notified the county of the safety concerns at the jail, and that the county's longstanding failure to address the problem shows an unconstitutional custom of deliberately disregarding inmate safety. . . The district court allowed that claim to proceed to trial, along with other state-law tort claims against Jarnagin. We do not express an opinion on the viability of these other claims. But because the law did not clearly establish the unreasonableness of Jarnagin's responses to the general safety concerns that Beck alleges, Jarnagin is entitled to qualified immunity under §

1983. We reverse the district court's contrary decision and remand for proceedings consistent with this opinion.")

Schulkers v. Kammer, 955 F.3d 520, 533-43 (6th Cir. 2020) ("Plaintiffs . . . argue that Kammer (acting at the behest of Campbell) violated their Fourth Amendment rights by seizing them from their public-school classrooms and interviewing them without reasonable suspicion, a warrant, or consent. In response, Defendants argue that they are entitled to qualified immunity because it was not clearly established that social workers are bound by the Fourth Amendment when conducting in-school interviews pursuant to a child abuse investigation. They point out that neither the Supreme Court nor this Court has ever held that analogous conduct by a social worker violates the Fourth Amendment. For the reasons that follow, we find that Plaintiffs did not have a clearly established Fourth Amendment right to be free from warrantless, in-school interviews by social workers investigating child abuse at the relevant time. This is because our precedent is unclear about the role of the Fourth Amendment in the specific factual circumstances alleged here, *i.e.*, when social workers perform an in-school interview of a child pursuant to an abuse investigation. However, we also exercise our discretion to consider the second prong of the qualified immunity inquiry and conclude that Defendants' alleged conduct in this case was unconstitutional. . . We hold that, at a minimum, social workers investigating child abuse must have 'some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse' before seizing a child from his or her school classroom without a warrant and when no other exception to the warrant requirement applies. . . . The Supreme Court has never held that a social worker's warrantless in-school interview of a child pursuant to a child abuse investigation violates the Fourth Amendment. In 2011, the Supreme Court granted certiorari on this issue but its opinion did not reach the merits of the issue due to mootness. [citing *Camreta v. Greene*] . . . . In *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015), we held that a child's right to avoid warrantless, in-school interviews by social workers on suspicion of child abuse was not clearly established in 2011. . . . Because we granted qualified immunity to the social worker on the ground that the law was not clearly established, we did not reach the question of whether the social worker's warrantless in-school interviews of the child were in fact unconstitutional. . . . Following *Barber*, this Court has not had another occasion to consider the constitutionality of in-school interviews like the one at issue here. Therefore, we can find no reason to depart from *Barber*'s holding that the law surrounding in-school interviews by social workers is not clearly established in this circuit. . . . Because we find that the district court should have granted summary judgment in favor of Defendants Kammer and Campbell on Plaintiffs' Fourth Amendment claim, we do not need to decide whether their conduct was in fact unconstitutional. . . . However, after carefully considering the Supreme Court's guidance on when a court of appeals should exercise its discretion to reach the underlying constitutional question in a qualified immunity case, we decide to reach that question now in order to 'promote[ ] the development of constitutional precedent,'. . .and 'promote[ ] clarity in the legal standards for official conduct, to the benefit of both the officers and the general public[.]'. . . For the reasons that follow, we hold that under Plaintiffs' version of the facts, Kammer and Campbell violated the plaintiff children's Fourth Amendment rights by seizing them from their classrooms without a

warrant and without any reasonable suspicion of child abuse or neglect. . . . There is some disagreement in the circuits regarding whether the special needs exception applies to a social worker's in-school interview of a child pursuant to a child abuse investigation, and this Court has not yet spoken to the issue. As discussed above, in a decision that has since been vacated, the Ninth Circuit held that the Fourth Amendment's traditional probable cause standard applies to a social worker's seizure of a child from school pursuant to a child abuse investigation. . . Other circuits have indicated that the lesser, modified reasonableness standard of *New Jersey v. T.L.O.* may govern a social worker's seizure of a child from a public school pursuant to an abuse investigation. . . . In the present case, we do not need to decide which Fourth Amendment standard governs a social worker's in-school interview of a child pursuant to an abuse investigation because Defendants' alleged conduct fails even the modified reasonableness standard of *New Jersey v. T.L.O.* . . . We hold that the Fourth Amendment governs a social worker's in-school interview of a child pursuant to a child abuse investigation, and thereby clarify our decision in *Barber v. Miller* . . . . At a minimum, a social worker must have reasonable suspicion of child abuse before conducting an in-school interview without a warrant or consent. Therefore, Defendants' conduct in this case, as alleged by Plaintiffs, was unconstitutional because it failed to satisfy even the lesser modified reasonableness standard of *New Jersey v. T.L.O.* . . . Having determined that Defendants are immune from suit on Plaintiffs' Fourth Amendment claims, we next consider whether Defendants Campbell, Kammer, and Kara are entitled to qualified immunity from suit on Plaintiffs' Fourteenth Amendment claims. For the reasons that follow, we find that they are not. . . . [W]e find that Defendants had fair notice that the Schulkers had a protected liberty interest in 'the companionship, care, custody and management of [their] children,' *Lassiter*, 452 U.S. at 27, 101 S.Ct. 2153, and in the right 'to make decisions concerning the care, custody, and control of [their] children' without arbitrary government interference, *Troxel*, 530 U.S. at 66, 120 S.Ct. 2054. And we find that these cases placed Defendants on fair notice that depriving Plaintiffs of this liberty interest without a compelling governmental interest would be unlawful. . . . After finding that the Schulkers have a clearly established liberty interest in the companionship and management of their children, we next consider whether that substantive right triggered protections of the procedural due process clause. Again, this Court and others have consistently held that it does. . . .Because Defendants had fair notice that the alleged conduct was unconstitutional under the Fourteenth Amendment, we must determine whether Plaintiffs have demonstrated a genuine dispute of material fact as to each Defendant's individual liability. . . For the reasons that follow, we find that Plaintiffs have demonstrated a triable issue as to whether each Defendant's conduct in fact violated their substantive and procedural due process rights.")

J.H. v. Williamson County, Tennessee, 951 F.3d 709, 716-20 (6th Cir. 2020) ("Because we can answer the qualified immunity questions in any order, . . . we begin with the question of whether McMahan violated a constitutional right and then turn to whether that right was clearly established. . . . Under *Bell*, a pretrial detainee can demonstrate that he was subjected to unconstitutional punishment in either of two ways: (1) by showing 'an expressed intent to punish on the part of the detention facility officials,' or (2) by showing that a restriction or condition is not rationally related to a legitimate government objective or is excessive in relation to that purpose. *Id.* at 538–39, 99

S.Ct. 1861; *see also Kingsley v. Hendrickson*, —— U.S. ——, 135 S. Ct. 2466, 2473, 192 L.Ed.2d 416 (2015). . . .The 'expressed intent to punish' prong proscribes an intent to punish for the alleged crime causing incarceration prior to an adjudication of guilt. . . It also prohibits officials from subjectively seeking to punish detainees simply because they are detainees, . . or on the basis of vengeful or other illegitimate interests[.]. . This prong does not, however, categorically prohibit discipline imposed by jail officials for infractions committed while in pretrial detention. . . Here, J.H. alleges that he was placed in solitary confinement in direct response to the November 17 disciplinary incident. This alleged action, without more, does not run afoul of the first prong of *Bell*. The relevant question is thus under *Bell*'s second prong: whether J.H.'s placement in segregation was 'rationally related to a legitimate nonpunitive governmental purpose and whether [it] appear[s] excessive in relation to that purpose.'. . In answering the first part of this question, we agree that McMahan has put forth a legitimate governmental purpose: 'maintain[ing] safety and security in the facility.' . . As the Supreme Court explained in *Bell*, 'maintaining institutional security and preserving internal order and discipline are essential goals' of a detention facility. . .Temporary placement of J.H. in solitary confinement, given his accused disciplinary infraction, appears rationally related to this purpose. Yet where McMahan's argument falters is on the question of whether the discipline here was excessive. . . . In considering whether the discipline imposed on J.H. was excessive, we are mindful of J.H.'s age; his known mental health issues; and the duration and nature of his confinement. We weigh these factors against the disciplinary infraction of which J.H. was accused and the governmental purpose for which the discipline was imposed. When considering 'the totality of [these] circumstances,' we conclude that the discipline imposed was excessive relative to its purpose and thus violated J.H.'s Fourteenth Amendment rights as described in *Bell*. . . . As a 14-year-old, J.H. was uniquely vulnerable to the harmful effects of solitary confinement, and thus his placement in segregation was a particularly harsh form of discipline. Second, it was well-known to McMahan before placing J.H. in solitary confinement that J.H. had been diagnosed with and required treatment for PANDAS, which is associated with several psychiatric symptoms. . . . In sum, considering J.H.'s age, mental health, and the duration and nature of his confinement, we conclude that the punishment imposed on J.H. was excessive. When weighing the penalty imposed against his disciplinary infraction—in which he made verbal threats but did not physically injure another detainee—it is apparent that his punishment was disproportionate in light of the stated purpose of maintaining institutional security. . . Any momentary need to separate J.H. from the specific detainees whom he had threatened on November 17 does not justify the extended duration in which McMahan subjected J.H. to solitary confinement and completely isolated him from all contact with other juveniles. This discipline was excessive given the infraction that J.H. was accused of and the unique vulnerabilities he possessed—namely his age and mental health status. . . We therefore hold that, assuming J.H.'s allegations to be true, his Fourteenth Amendment substantive due process rights were violated when he was held in solitary confinement from November 17 to December 8, 2013. . . . The second question is whether the constitutional right in question was clearly established at the time of the alleged violation. . . .We cannot say that the right at issue was established with sufficient specificity as to hold it clearly established as of 2013, the time of these incidents. Many of the cases recognizing what a punishing experience placement in solitary confinement can be—especially for juveniles and those with

mental health issues—have been issued after 2013. Thus, McMahan is entitled to qualified immunity, and we are obliged to affirm the district court's grant of summary judgment on this claim.")

J.H. v. Williamson County, Tennessee, 951 F.3d 709, 724-28 (6th Cir. 2020) (Readler, J., concurring in part, and in the judgment) ("The public employees operating the Williamson County Juvenile Detention Center faced a dilemma. Responsible for the care of up to a dozen minors, those officials had under their supervision one minor, J.H., who, due to mental health concerns, was a threat to himself and others. To remedy the situation and protect the juvenile detainee population, the facility for a time housed J.H. away from other detainees, in a single cell. A state juvenile court judge approved that arrangement and ordered that it continue for an additional period to allow for further evaluation of J.H. I concur with much of the majority opinion, including its holding that the conduct of these public safety officials did not violate a clearly established constitutional right. But I respectfully disagree with the majority's assessment that the conduct nonetheless ran afoul of substantive due process principles. In reaching that conclusion, the majority tailors its analysis to the unique facts before us: the multi-week confinement of a fourteen-year-old suffering from mental illness, one so severe that it is 'associated with several psychiatric symptoms.' A heartbreaking episode, we all agree, for both J.H. and his family. As this case aptly demonstrates, however, ensuring safety in a detention facility sometimes requires difficult decisions. . . . [A] safety-based restriction must simply be legitimate and not excessive for that purpose. . . Where legitimate factors support the restriction, the 'limited scope of the judicial inquiry' is at an end. . . As well intentioned as is the majority, we nonetheless may not substitute our judgment for that of detention officials.")

Hernandez v. Boles, 949 F.3d 251, 259-62 (6th Cir. 2020) ("The Hernandez-Plaintiffs do not dispute that the Troopers had probable cause to have the dog climb into and sniff the interior of the car following its initial alert. So, the question is whether the Troopers *still* had probable cause to conduct a manual search after the dog failed to alert to the interior of the car. The Hernandez-Plaintiffs argue that the Troopers did not have probable cause for this search because, 'under the specific circumstances, the dog alert was unreliable.' They rely on *Florida v. Harris*, 568 U.S. 237, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013), for the proposition that 'officers must look at the specific circumstances before concluding that an alert has produced probable cause.' The Troopers respond that, even if there was a constitutional violation, they are entitled to qualified immunity because the Hernandez-Plaintiffs cannot 'point to any legal authority clearly establishing that a drug dog's alert to the outside but not the inside of a vehicle would not provide probable cause to search the vehicle.' The Hernandez-Plaintiffs' reliance on *Harris* does not resolve the legal issue. *Harris* stands for the proposition that a dog's alert only provides probable cause if, in 'controlled settings,' the 'dog performs reliably in detecting drugs.'. . The *Harris* Court did leave open the possibility that even if 'a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.'. . But that does not cover the situation here—where a dog first alerts to the exterior and then fails to alert to the interior

of a car. The unrebutted evidence in the record showed that the drug dog was generally reliable: The dog's handler testified at his deposition that 'she didn't do any false alerts since the time I got her till the time I retired.' And there is nothing in the record to suggest that the circumstances of the dog's alert undermine the dog's reliability in the sense meant by *Harris*. The issue is governed by our precedent addressing the circumstances under which probable cause dissipates. We held almost thirty years ago that the information acquired from a fruitless search can dissipate probable cause and render a subsequent search illegal. *See United States v. Bowling*, 900 F.2d 926, 932 (6th Cir. 1990). . . .Other circuits to treat the issue agree that the acquisition of new information can dissipate the probable cause for a search. . . .We have also held that the failure of a drug-sniffing dog to alert to a car dispels suspicion. *See United States v. Davis*, 430 F.3d 345, 356 (6th Cir. 2005) (holding that officers no longer had reasonable suspicion to detain a motorist on suspicion of drug possession and call a second drug-sniffing dog to the scene after the first drug-sniffing dog did not alert). . . . Based on *Bowling* and *Davis*, a reasonable jury could find in the Hernandez-Plaintiffs' favor. *Bowling* stands for the proposition that a fruitless search negates probable cause, if it is sufficiently thorough, and *Davis* stands for the proposition that a drug dog's failure to alert dispels suspicion. Viewing the evidence in the light most favorable to the Hernandez-Plaintiffs and drawing all reasonable inferences in their favor, a jury could determine that the dog's fruitless sniffing of the car interior was sufficiently thorough to dissipate the probable cause to search provided by its initial alert. . . . We therefore turn to whether the law was clearly established. . . . Here, neither *Bowling* nor *Davis* is specific enough to clearly establish that the manual car search was illegal. *Bowling* establishes that a fruitless search can dissipate probable cause and *Davis* establishes that the failure of a drug-sniffing dog to alert at all dispels suspicion. But neither governs the unusual circumstances of this case, where the same drug-sniffing dog first alerted and then failed to alert to a car during a subsequent search. At the time of these events, a reasonable officer would not have been on notice that the drug dog's failure to alert again to the interior of the car was the kind of new information that dissipated the probable cause provided by its initial alert to the car exterior. This case provides such notice for future searches. Accordingly, we affirm the district court's grant of qualified immunity to the Troopers.")

SEVENTH CIRCUIT

Calderone v. City of Chicago, 979 F.3d 1156, 1162-63 (7th Cir. 2020) ("The district court correctly held that the individual defendants are immune from Calderone's Second Amendment claim. Calderone argues 'there is absolutely a clearly-established right to carry and possess a firearm for self-defense in this jurisdiction.' However, the defendants did not fire Calderone for possessing a firearm in self-defense; they 'fired her for shooting Selene Garcia about the body.' Therefore, Calderone must demonstrate there is a clearly established right to discharge a gun under these circumstances, not to simply possess a gun in public. . . .[T]he parties have not provided—nor have we located—a single decision considering the circumstances in which discharging a firearm constitutes self-defense for purposes of the Second Amendment. Lacking any discernible standard, the scope of the right remains a matter of first impression. Qualified immunity is particularly appropriate in this situation. . . Furthermore, judicial restraint counsels in favor of

bypassing the constitutional question presented. . . The parties have not adequately briefed the contours of the right Calderone asserts, namely, (1) the circumstances under which a gun may be discharged in self-defense under the Second Amendment, or (2) whether such a right applies to Calderone's conduct. Calderone did not propose the contours of the right beyond her general assertion that *Moore* means it exists. On appeal, the City argued the 'right to armed self-defense codified in the Second Amendment is limited to the two narrow forms of common-law self-defense recognized when that Amendment was adopted' and that 'Calderone was not engaged in either of the two narrow forms of self-defense falling within the scope of the Second Amendment.' However, the City did not raise either argument at the district court below. 'In civil litigation, issues not presented to the district court are normally forfeited on appeal.'. . The prudent approach, therefore, is to decline to address whether Calderone's supervisors violated her constitutional rights. Calderone broadly declares that 'there is absolutely a clearly established right to carry and possess a firearm for self-defense' under the Second Amendment. The Supreme Court has repeatedly cautioned us to not identify a constitutional right at too high a level of generality. . . At the proper level of generality, just about the only thing that is clear about this case is that existing precedent did not establish whether Calderone's shooting of Garcia was constitutionally protected. The individual defendants are immune from suit on the Second Amendment claim.")

Siler v. City of Kenosha, 957 F.3d 751, 758-60 (7th Cir. 2020) ("In the case before us, we believe that our obligation to provide further guidance to the bench and bar and to the law enforcement community counsels that we employ the *Saucier* sequential protocol and address the merits of the constitutional question presented. . . . Law enforcement officers on the scene do not have the luxury of knowing the facts as they are known to us, with all the benefit of hindsight, discovery, and careful analysis. Officers must act reasonably based on the information they have. We must always keep in mind that encounters in the field require officers to make split-second decisions of enormous consequence. If a reasonable officer in Officer Torres's shoes would have believed that Mr. Siler posed an imminent threat of serious physical harm, or that he had committed a crime involving serious physical harm and was about to escape, the Officer's use of force was reasonable. . . . The obligation to consider the totality of the circumstances in these cases often makes resort to summary judgment inappropriate. . . Nevertheless, if a careful examination of the papers reveals that the *material facts* are undisputed, and if a court draws all inferences from those facts in favor of the nonmovant, reasonableness is a pure question of law. . . Of course, when *material* facts are disputed, a jury must resolve those disputes and determine whether the officer acted reasonably. . . .From the Officer's perspective, Mr. Siler was a significantly larger and younger man who had a reputation for physical violence. He had refused every opportunity to surrender during the chase, and, critically, had decided to change the status quo of a standoff. Despite the fact that the Officer had his service revolver in his hand, Mr. Siler chose to become the aggressor. To Officer Torres, the possibility of being overcome, or at the very least disarmed, was a real one. To have someone in Mr. Siler's aggressive state of mind—recall that Mr. Siler had just dared the Officer to shoot him—gain possession of the service revolver and be able to use it against the Officer or the two bystanders in the garage was, to put it mildly, an unacceptable outcome. The Officer had the right

to protect himself and the bystanders through the use of deadly force. . . Because his use of force was reasonable, Officer Torres did not violate Mr. Siler's Fourth Amendment rights.")

Torry v. City of Chicago, 932 F.3d 579, 586-88 (7th Cir. 2019) ("Qualified immunity protects government officials from liability for civil damages as long as their actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . Thus, to win, the plaintiffs must show not only that the stop was unlawful, but also that the unlawfulness of the stop was clearly established at the time that it occurred. Because the plaintiffs cannot make the latter showing, we need not consider whether the stop violated the Fourth Amendment. . . . The plaintiffs do not contend that this is the rare case in which the facts establish a blatant violation of *Terry*'s rule even though there is no case on point. . . Instead, they identify two cases that they say clearly established the illegality of this *Terry* stop: *Gentry v. Sevier*, 597 F.3d 838 (7th Cir. 2010), and *United States v. Packer*, 15 F.3d 654 (7th Cir. 1994). . . . Neither *Gentry* nor *Packer* speaks to a situation like this one, where the plaintiffs partially matched the description of suspects involved in a drive-by shooting. When the officers in this case stopped the plaintiffs, they knew that three black men in a grey car were suspected of committing a nearby shooting earlier that day. The plaintiffs matched this description in number, race, and car color. . . The plaintiffs argue that the reasonableness of the officers' suspicion was nevertheless undermined in two ways: first, the descriptions that the officers relied on identified the suspects' vehicle as an SUV, but the plaintiffs were in a sedan; and second, the shooting occurred too far away (half a mile) and too long before (four hours) to justify the stop. But while these discrepancies may weigh against the officers' suspicion, they don't clearly overcome it. . . . Taking all of this evidence together, a reasonable officer could have concluded that the investigative *Terry* stop of the plaintiffs comported with the Fourth Amendment.")

EIGHTH CIRCUIT

Graham v. Barnette, No. 19-2512, 2021 WL 3012338, at *8-9 (8th Cir. July 16, 2021) ("[W]e now make explicit that which has long been implicit in our case law and align our circuit with the unanimous consensus in all other circuits. We conclude that only probable cause that a person poses an emergent danger—that is, one calling for prompt action—to herself or others can tip the scales of the Fourth Amendment's reasonableness balancing test in favor of the government when it arrests an individual for a mental-health evaluation because only probable cause constitutes a sufficient 'governmental interest' to outweigh a person's 'interest in freedom.'. . . Second, we again conclude that the probable-cause standard was not clearly established in our jurisprudence, meaning the officers may still be entitled to qualified immunity even if they seized Graham without probable cause of dangerousness. . . . Here, Graham cannot point to existing Eighth Circuit precedent that clearly establishes the probable-cause standard because of the ambiguity in our case law highlighted above. Indeed, in her briefing, Graham conceded as much, arguing that *Pirch* clearly established the standard of probable cause but noting that our case law 'does create confusion.' And during oral argument, Graham's counsel specifically asked this court to 'make clear' that probable cause is required in this circuit because 'there hasn't been a case that

has directly stated what the requirement is for a mental health hold.' A right is not clearly established by 'controlling authority' merely because it may be 'suggested by then-existing precedent.'. . Neither is this an instance in which every reasonable officer would have known that his conduct was unlawful due to a robust consensus of authority from other circuits. Though, at the time the officers seized Graham, several other circuits had determined that probable cause was the constitutional standard required to justify a mental-health arrest, our case law was not merely silent on the issue; instead, we had created ambiguity concerning the answer, suggesting that reasonable belief might be sufficient to satisfy the demands of the Fourth Amendment. . . 'No matter how carefully a reasonable officer read' our precedent 'beforehand, that officer could not know that' the conduct at issue would violate our circuit's 'test.'. . This determination is enough to resolve this issue as the officers are entitled to qualified immunity unless the right is established 'beyond debate.'. .Third, we again conclude that the officers are entitled to qualified immunity because their actions did not violate clearly established law under the more lenient reasonable-belief standard that some of our precedents had suggested was the requisite standard governing warrantless mental-health seizures.")

Jacobsen v. Klinefelter, 992 F.3d 717, 722 (8th Cir. 2021) ("*Tatum* does not clearly establish that Klinefelter's use of force was unreasonable. Unlike the shoplifter in *Tatum*, Jacobsen shoved the deputy and physically resisted the deputy's efforts to remove him from the premises. Only after Jacobsen used force against Klinefelter did the deputy deploy the pepper spray. Jacobsen then seized the spray canister, and Klinefelter reasonably feared for his safety. Jacobsen eventually pinned Klinefelter to a wall before the arrest was completed. A reasonable officer could have believed that it was reasonable to strike the resisting Jacobsen in the head and take him to the ground for handcuffing. Jacobsen cites no authority in comparable circumstances that clearly establishes a right to be free from Klinefelter's use of force. Accordingly, Klinefelter is entitled to qualified immunity on Jacobsen's claim under the Fourth Amendment.")

Jacobsen v. Klinefelter, 992 F.3d 717, 723 (8th Cir. 2021) (Kelly, J., concurring) ("Even viewing the record in Jacobsen's favor, our precedent supports the conclusion that Klinefelter's use of force was not 'objectively unreasonable' in light of the particular circumstances of this case. . . Because there was no Fourth Amendment violation, I would not reach the question of whether the particular right Jacobsen is asserting was clearly established at the time of the incident.")

L.G. through M.G. v. Columbia Public Schools, 990 F.3d 1145, 1147-49 (8th Cir. 2021) ("We often describe the resolution of a qualified immunity issue as involving two questions—whether the official's conduct violated a constitutional or statutory right, and whether that right was clearly established. . . We may take up either question first, . . . and in this case we opt to consider whether any right violated here was clearly established, a matter that L.G. bears the burden to show. . . We've identified three ways in which a plaintiff can show that law is clearly established. She may identify existing circuit precedent involving sufficiently similar facts that squarely governs the situation. Or a plaintiff may point to 'a robust consensus of cases of persuasive authority' establishing that the facts of her case make out a violation of clearly established right. Finally, a

plaintiff may show, in rare instances, that a general constitutional rule applies with 'obvious clarity' to the facts at issue and carries the day for her. . . The principle at the heart of these approaches is that state actors are liable only for transgressing bright lines, not for making bad guesses in gray areas. . . We first consider whether existing circuit precedent squarely governs this case. The district court seemed to think so, but we disagree. In holding that Edwards had violated L.G.'s clearly established rights, the district court, relying on *Stoner v. Watlingten*, 735 F.3d 799, 804 (8th Cir. 2013), explained that it is clearly established that the Fourth Amendment protects the right not to be arrested without probable cause. That is certainly true in a general sense. But the Supreme Court has frequently cautioned lower courts of late not to define rights at issue 'at a high level of generality' because that 'avoids the crucial question whether the official acted reasonably in the particular circumstances.'. . The right must be described with a "high degree of specificity" to take into account the particular circumstances that the officer faced. . . Specificity is 'especially important in the Fourth Amendment context.'. . Mindful of the Court's directive to define rights with specificity, we conclude that the district court minimized two features of this case that serve to distinguish it from *Stoner* and that could have significantly influenced a reasonable officer in Edwards's position. First, her involvement in the alleged seizure was relatively minimal and ministerial. Unlike the two officers who questioned L.G., Edwards merely escorted L.G. to a room and closed a door. Though we agree with the district court that the simple 'fact that Edwards did not herself question L.G. does not mean that she cannot be sued for unconstitutional seizure,' we do believe that her nominal role in the incident could well affect whether a reasonable officer in her position would think that she, as opposed to the other officers, had seized L.G. We point out, moreover, that many of the circumstances we look for to determine whether a seizure occurred were not alleged to be present while Edwards interacted with L.G. For example, the complaint does not allege that Edwards positioned herself to limit L.G.'s movements, displayed a weapon, touched L.G., used language or tone indicating compliance was necessary, or retained L.G.'s property. . . Though it's possible Edwards seized L.G., we are unwilling to say based on Edwards's incidental role and these other circumstances that every reasonable officer in Edwards's position would have known that she was doing so. There is another distinguishing feature of this case. While it is generally true (as the district court observed) that police officers may not arrest someone without probable cause, that general truth doesn't provide much guidance to an officer in the public-school setting. . . . So actions outside the schoolhouse that clearly violate the Constitution do not necessarily do so inside it. . . . Even though students have some Fourth Amendment protection, an officer in Edwards's situation would not know, without more guidance, whether her escorting L.G. to a room with other officers and closing a door constitutes a seizure. . . . We respectfully disagree with the district court that it was clearly established that the school setting makes no difference for Fourth Amendment purposes when the seizure occurs at the behest of police. In support of its view, the district court cited some district court opinions from Minnesota and Florida as well as our opinion in *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987). In *Cason*, we considered whether a search performed at a school without a warrant violated the Fourth Amendment. We held it did not, but along the way we pointed out that '[t]here is no evidence to support the proposition that the activities were at *the behest of* a law enforcement agency.'. . From that, the district court seemed to infer that the school setting doesn't matter for officer-initiated

searches. Perhaps so. But an equally reasonable inference is that the *Cason* court was merely noting that an officer-initiated search would present a closer question than the case it actually confronted. The crucial point is that *Cason* provided only a hint, rather than a holding, that the school setting doesn't matter in cases involving officer-initiated searches. Hints do not create bright-line rules. . . . Given Edwards's minimal involvement and the public-school setting, we do not think existing circuit precedent, such as *Stoner* and *Cason*, would have alerted every reasonable officer in Edwards's position that she was violating L.G.'s constitutional rights.")

Turning Point USA at Arkansas University v. Rhodes, 973 F.3d 868, 879-81 (8th Cir. 2020), *cert. denied sub nom Hoggard v. Rhodes*, 141S. Ct. 2421 (2021) ("[W]e find that the Tabling Policy, as applied to Hoggard, is unconstitutional. We defer to the defendants' judgment about the importance of establishing a space serving as the campus 'living room,' as well as their determination that students should feel comfortable in the space in which they eat, meet, and socialize. But this legitimate university interest bears no rational relationship to the distinction between registered student organizations and individual students when it comes to using the Union Patio. . . . The ultimate success of Hoggard's § 1983 claim, however, depends on whether it was 'sufficiently clear that every reasonable official would have understood' that, by preventing Hoggard from Union Patio tabling, he or she was violating the First Amendment. . . That is, we must determine whether the right violated by the defendants was 'clearly established' at the time of the violation. . . . The rights at issue here — Hoggard's rights under the First Amendment — were not clearly established. . . . In short, Hoggard failed to identify 'controlling authority' or 'a robust consensus of cases of persuasive authority' that 'placed the ... constitutional question beyond debate at the time of the alleged violation.'. . Her First Amendment right to access a limited public forum, which she was unjustifiably denied, was not 'clearly established' at the time. Granting qualified immunity was therefore appropriate. . . . We find that the Tabling Policy, as it was enforced against Hoggard, violates the First Amendment. The defendants' restriction of Union Patio access to registered student organizations has no rational relationship to their proffered justification. As such, the Tabling Policy's enforcement against Hoggard on October 11, 2017, was unreasonable and unconstitutional. But the defendants may reasonably have not understood this at the time. We find the defendants were properly granted qualified immunity and we therefore affirm the district court's grant of summary judgment.")

Shelton v. Stevens, 964 F.3d 747, 752-55 (8th Cir. 2020) ("Relevant circumstances in this case include that police were attempting to arrest Shelton for his role in a brutal beating, and that Shelton fled from officers at high speed for several miles while armed with a handgun and ammunition. When officers finally reached Shelton after a foot chase, he was eventually pinned under five officers, but he refused to surrender his hands. Officers reasonably believed that Shelton's position posed a threat to officer safety, because at least one of his hands was unrestrained in an area of his body where weapons could be concealed. Shelton did not present evidence that officers had secured his hands before Stevens's disputed use of force. Because the unresolved situation still posed a threat to officers, there was a legitimate interest in restraining Shelton further when Stevens approached. . . . While Robinson's use of force is not directly before us in this appeal, we conclude

in analyzing Stevens's action that it was objectively reasonable for officers to apply some amount of supplemental force in order to gain control of Shelton's hands and to restrain him. . . . Whether Shelton's undisputed posture reasonably justified an application of additional force is a legal question that we answer in the affirmative. The particular question here, then, is whether the amount and type of force that Stevens used was objectively reasonable under the circumstances taken in the light most favorable to Shelton. How much force was reasonable presents a fact-specific judgment call, and there may be a fine line between employing a brief chokehold that rendered Shelton unconscious, striking Shelton in the head with a radio, and stomping on Shelton's ankle. Under all the circumstances, however, we conclude that Stevens's alleged use of force was unreasonable under the Fourth Amendment. A stomp on the ankle with sufficient force to break it was excessive when the legitimate objective was to facilitate restraint of Shelton's hands while he was pinned to the ground by several officers. Although the reasonableness requirement of the Fourth Amendment does not require an officer to pursue the least aggressive or most prudent course of conduct, . . . the availability of lesser measures is relevant to the inquiry. . . There were other means, short of the force employed, to distract Shelton from his efforts to avoid restraint and to assist with apprehension of the arrestee while still maintaining officer safety. The force used by other officers on the scene, for example, likely was sufficient to produce the desired outcome without causing serious injury to Shelton. Even allowing for the rapidly evolving situation, and eschewing the temptation to evaluate police conduct with perfect hindsight, we conclude on balance that Stevens's stomp, under the assumed facts, constituted an unreasonable use of force. Even so, to defeat Stevens's defense of qualified immunity, Shelton must demonstrate that his right to be free from this particular use of force was clearly established at the time of the incident. . . . We think Stevens's action falls within the zone described as the 'sometimes hazy border between excessive and acceptable force.'. . The district court's treatment of three officers suggests the haziness: Robinson and Lansing were granted qualified immunity for a blow to Shelton's head and a brief chokehold, respectively, because they were trying to 'subdue a non-compliant, potentially armed suspect.' But the court reasoned that Stevens's stomp, no more than two seconds later, violated a clearly established right because 'Shelton was being restrained by at least five other officers' who 'appeared to have Shelton substantially under control.' As we see it, all three officers confronted a suspect who was being restrained by several other officers, and all three were trying to subdue a non-compliant, potentially armed suspect. Is it obvious that a chokehold with its potential for asphyxiation, or blunt force to the skull with the attendant risk of head injury, is more suitable to the situation than a hard step on the talus? As it turned out, given how the officers applied the tactics here, Shelton was able to resume breathing after the choke, did not suffer brain injury from the blow to the cranium, but assumedly sustained a fractured ankle from Stevens's act. Some use of force was reasonable, and constitutional distinctions among a chokehold, a radio-bang to the head, and an unreasonable ankle-stomp—all objectively designed to prompt Shelton to surrender his hands—are hazy enough to warrant qualified immunity for Stevens. The circuit precedent identified by Shelton and the district court is insufficient to place the reasonableness of Stevens's action beyond debate. . . . Shelton . . . was an accused violent felon who was potentially armed and not fully subdued or handcuffed, and a reasonable officer could have believed that he posed a threat until he surrendered his hands. Even though several officers were on top of Shelton,

he continued to 'turtle up' so that at least one hand was free and potentially available to access any weapon that might be concealed in his midsection. Our closest decision on point held that a prone suspect's refusal to surrender his hands justified the use of a taser. . . Shelton has identified no other decision that addresses how much additional force is reasonably used to subdue a suspect under these or similar circumstances. Nor is this the 'rare obvious case' in which the unreasonableness of a seizure is clearly established without a prior decision on comparable facts. . . A number of the relevant factors supported the use of force, so reasonableness was a matter of degree, and qualified immunity protects officers from the specter of lawsuits and damages liability for mistaken judgments in gray areas. . . For these reasons, the order of the district court denying qualified immunity to Stevens is reversed.")

Boudoin v. Harsson, 962 F.3d 1034, 1039-43 (8th Cir. 2020) ("In this case, we take up the Supreme Court's invitation in *Pearson v. Callahan* and first consider whether the right allegedly violated was clearly established on August 27, 2017. . . . We disagree with both the district court's characterization of the right at issue as well as its analysis of whether a genuine dispute of material fact precluded qualified immunity. . . First, we resist any implication that a single taser shock constitutes 'deadly force.'. . And second, construing the facts in the light most favorable to Boudoin, we do not believe that only a 'plainly incompetent' officer would have thought using a taser under the circumstances complied with the strictures of the Fourth Amendment. . . Regardless of whether Boudoin was actually attempting to flee, Harsson could reasonably conclude that he was based on the information provided to him by other officers and the undisputed actions he observed. . . And, as we explain below, because Harsson could reasonably conclude Boudoin was attempting to flee, Harsson did not violate clearly established law by deploying his taser against Boudoin. . . . Viewing the facts in the light most favorable to Boudoin, we conclude a reasonable officer could have believed that Boudoin was attempting to resume flight. . .Next, we are not prepared to say the crime at issue was not serious. . . Although Boudoin was charged with misdemeanor fleeing, . . fleeing by means of a vehicle is a Class D felony if the person attempts to flee in a manner 'manifesting extreme indifference to the value of human life[.]'. . Once Boudoin was in handcuffs, Harsson asked Boudoin, 'what's wrong with pulling over and taking a speeding ticket?' and told Boudoin that because he instead chose to flee, 'you caught yourself some felony charges today.' Though he was eventually only charged as a misdemeanant, we think there can be little doubt but that a reasonable officer could conclude that fleeing from four other officers at speeds exceeding 100 miles per hour in evening traffic demonstrates an extreme indifference to the value of human life. . . For similar reasons, because Harsson believed Boudoin had fled from no fewer than four other officers, traveling at speeds exceeding 100 miles per hour in evening traffic, he could reasonably conclude that Boudoin posed an 'immediate threat to the safety of the officers [and] others.'. . Harsson could reasonably believe that had Boudoin successfully fled, he would have risked his safety and that of other drivers and the officers as they pursued him. And we will not 'lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger.'. . Given these circumstances, none of the decisions relied on by Boudoin supports denying Harsson qualified immunity. . . . [T]he correct question in this case is whether it was clearly established that the use of a taser,

without warning, against a suspect reasonably *perceived as attempting to flee* constitutes excessive force. *Brown* does not speak to that question, and thus it cannot 'squarely govern[ ] the specific facts at issue.'. . . Boudoin points us to no other cases that clearly establish that Harsson's actions constituted excessive force under the circumstances, and we have not found any based on an independent review. Nor do we believe that there is 'obvious cruelty inherent' in the use of a taser that would have put every reasonable officer on notice that Harsson's actions were unreasonable. . . . Though, 'with the 20/20 vision of hindsight,' one may determine it was preferable for Harsson to warn Boudoin before deploying his taser, we think it clear that 'the nature and quality of the intrusion' did not violate clearly established law given 'the countervailing governmental interests at stake.'. . . Given the lack of any contrary instruction that squarely governs the circumstances of this case, it was not clearly established on August 27, 2017 that it constituted excessive force in violation of the Fourth Amendment to use a taser, without warning, against a suspect perceived as attempting to flee from officers. . . Even if Harsson should have attempted to apprehend Boudoin without deploying his taser or should have given a warning, his actions fall along the 'hazy border between excessive and acceptable force.'. . Harsson is thus entitled to qualified immunity on Boudoin's § 1983 excessive force claim.")

Lombardo v. City of St. Louis, 956 F.3d 1009, 1013-14 (8th Cir. 2020), *cert. granted, vacated, and remanded by* ***Lombardo v. City of St. Louis,*** 141 S. Ct. 2239 (2021) ("[T]he undisputed facts show that the Officers discovered Gilbert acting erratically, and even though Gilbert was held in a secure cell, it was objectively reasonable for the Officers to fear that Gilbert would intentionally or inadvertently physically harm himself. Further, Gilbert actively resisted the Officers' attempts to subdue him. Indeed, Gilbert struggled with the Officers to such a degree that he suffered a gash to the forehead, and several of the Officers needed to be relieved throughout the course of the incident as they became physically exhausted from trying to subdue Gilbert. Nonetheless, Lombardo argues that *Ryan* is not on point. Specifically, Lombardo argues that, unlike *Ryan*, in which the detainee was held in prone restraint for approximately three minutes until he was handcuffed, . . . Gilbert was held in prone restraint for fifteen minutes and was placed in this position only after he had been handcuffed and leg-shackled. Lombardo also argues that she presented expert testimony that Gilbert's cause of death was forcible restraint inducing asphyxia whereas the undisputed cause of death in *Ryan* was sudden unexpected death during restraint. . . We find these differences to be insignificant. This Court has previously noted that '[h]andcuffs limit but do not eliminate a person's ability to perform harmful acts.'. . As discussed above, the undisputed facts show that Gilbert continued to violently struggle even after being handcuffed and leg-shackled. Specifically, after being handcuffed, he thrashed his head on the concrete bench, causing him to suffer a gash on his forehead, and he continued to violently thrash and kick after being leg-shackled. Because of this ongoing resistance, the Officers moved Gilbert to the prone position so as to minimize the harm he could inflict on himself and others. The undisputed facts further show that the Officers held Gilbert in the prone position only until he stopped actively fighting against his restraints and the Officers. Once he stopped resisting, the Officers rolled Gilbert out of the prone position. Lombardo argues Gilbert's resistance while in the prone position was actually an attempt to breathe and an attempt to tell the Officers that they were hurting him.

However, under the circumstances, the Officers could have reasonably interpreted such conduct as ongoing resistance. . . Finally, Lombardo's expert testimony that the use of prone restraint was the principal cause of Gilbert's death is less significant in light of Gilbert's ongoing resistance, his extensive heart disease, and the large quantity of methamphetamine in his system. . . Accordingly, the Officers did not apply constitutionally excessive force against Gilbert. Having concluded that the facts presented do not make out a violation of Gilbert's constitutional rights, we need not evaluate the clearly established prong of the qualified immunity analysis. . . We conclude the Officers are entitled to qualified immunity on Lombardo's excessive force claim.")

See ***Lombardo v. City of St. Louis, Missouri***, 141 S. Ct. 2239, 2241-42 (2021) (granting cert, vacating judgment, and remanding) ("Although the Eighth Circuit cited the *Kingsley* factors, it is unclear whether the court thought the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him. The court cited Circuit precedent for the proposition that 'the use of prone restraint is not objectively unreasonable when a detainee actively resists officer directives and efforts to subdue the detainee.'. . The court went on to describe as 'insignificant' facts that may distinguish that precedent and appear potentially important under *Kingsley*, including that Gilbert was already handcuffed and leg shackled when officers moved him to the prone position and that officers kept him in that position for 15 minutes. . . Such details could matter when deciding whether to grant summary judgment on an excessive force claim. Here, for example, record evidence (viewed in the light most favorable to Gilbert's parents) shows that officers placed pressure on Gilbert's back even though St. Louis instructs its officers that pressing down on the back of a prone subject can cause suffocation. The evidentiary record also includes well-known police guidance recommending that officers get a subject off his stomach as soon as he is handcuffed because of that risk. The guidance further indicates that the struggles of a prone suspect may be due to oxygen deficiency, rather than a desire to disobey officers' commands. Such evidence, when considered alongside the duration of the restraint and the fact that Gilbert was handcuffed and leg shackled at the time, may be pertinent to the relationship between the need for the use of force and the amount of force used, the security problem at issue, and the threat—to both Gilbert and others—reasonably perceived by the officers. Having either failed to analyze such evidence or characterized it as insignificant, the court's opinion could be read to treat Gilbert's 'ongoing resistance' as controlling as a matter of law. . . Such a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent. We express no view as to whether the officers used unconstitutionally excessive force or, if they did, whether Gilbert's right to be free of such force in these circumstances was clearly established at the time of his death. We instead grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance.") and ***Lombardo v. City of St. Louis, Missouri***, 141 S. Ct. 2239, 2242-44 (2021) (granting cert, vacating judgment, and remanding) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting) ("I cannot approve the Court's summary disposition because it unfairly interprets the Court of Appeals' decision and evades the real issue that this case presents: whether the record supports summary judgment in

favor of the defendant police officers and the city of St. Louis. The Court of Appeals held that the defendants were entitled to summary judgment because a reasonable jury would necessarily find that the police officers used reasonable force in attempting to subdue petitioner Lombardo's son, Nicholas Gilbert, when he was attempting to hang himself in his cell. In reaching this conclusion, the Court of Appeals applied the correct legal standard and made a judgment call on a sensitive question. This case, therefore, involves the application of 'a properly stated rule of law' to a particular factual record, and our rules say that we 'rarely' review such questions. . . But 'rarely' does not mean 'never,' and if this Court is unwilling to allow the decision below to stand, the proper course is to grant the petition, receive briefing and argument, and decide the real question that this case presents. That is the course I would take. I do not think that this Court is above occasionally digging into the type of fact-bound questions that make up much of the work of the lower courts, and a decision by this Court on the question presented here could be instructive. The Court, unfortunately, is unwilling to face up to the choice between denying the petition (and bearing the criticism that would inevitably elicit) and granting plenary review (and doing the work that would entail). Instead, it claims to be uncertain whether the Court of Appeals actually applied the correct legal standard, and for that reason it vacates the judgment below and remands the case. . . . Without carefully studying the record, I cannot be certain whether I would have agreed with the Eighth Circuit panel that summary judgment for the defendants was correct. The officers plainly had a reasonable basis for using some degree of force to restrain Gilbert so that he would not harm himself, and it appears that Gilbert, despite his slight stature, put up a fierce and prolonged resistance. . . On the other hand, the officers' use of force inflicted serious injuries, and the medical evidence on the cause of death was conflicting. . . We have two respectable options: deny review of the fact-bound question that the case presents or grant the petition, have the case briefed and argued, roll up our sleeves, and decide the real issue. I favor the latter course, but what we should not do is take the easy out that the Court has chosen.")

NINTH CIRCUIT

Evans v. Skolnik, 997 F.3d 1060, 1066-71 (9th Cir. 2021) ("[D]espite acknowledging circumstances when defining constitutional rights is 'beneficial to clarify the legal standards governing public officials,' the Court has made clear that '[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones' by resolving a constitutional question despite the plaintiff's inability to establish a violation of a clearly established right. . . We have likewise relied on this principle. [citing *O'Doan v. Sanford*] . . . In considering what constitutes 'clearly established' law for purposes of qualified immunity, the Supreme Court has taken a narrow approach. A government official 'violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right.'. . . Although the Supreme Court '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.'. . . In determining whether this standard is met, the Court considers whether there are 'cases of controlling authority' in the plaintiffs' jurisdiction at the time of the incident 'which clearly

established the rule on which they seek to rely,' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'. . Under this rule, our analysis is straightforward if 'the right is clearly established by decisional authority of the Supreme Court or this Circuit.'. . Where such binding precedent exists, 'our inquiry should come to an end.'. . If such binding precedent is lacking, we have considered other sources 'including decisions of state courts, other circuits, and district courts.'. . The Supreme Court has not clarified when state and district court decisions could place a 'statutory or constitutional question beyond debate.'. . Rather, as the Supreme Court has pointed out, 'district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards,' because '[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'. . We have been somewhat hesitant to rely on district court decisions in this context. . . . In this case, we exercise our discretion to consider only the second prong of the qualified immunity analysis: whether Baker's conduct in 'initially screening and occasionally "checking in" on [Witherow's] legal calls' with an attorney not representing him in a criminal matter, . . . violated a Fourth Amendment right that was clearly established at the time. We conclude it did not. Witherow has not cited any precedent that has 'placed the statutory or constitutional question beyond debate.'. . There is no Supreme Court case considering whether a prison official's monitoring of an inmate's legal calls in this manner violates the inmate's Fourth Amendment rights. Nor has Witherow pointed to any Ninth Circuit precedent holding that monitoring the beginning of an inmate's calls to ensure their legal character and then intermittently checking on those calls to confirm their continuing legal character violates a prisoner's Fourth Amendment rights. . . . Because we hold that Baker is entitled to qualified immunity, we decline to address the merits of Baker's Fourth Amendment claim. . . Our discretion to 'determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case' makes further explanation unnecessary. . . Nevertheless, we briefly respond to the concurrence's argument that Witherow's claim warrants a merits decision even though such a decision cannot affect this case's outcome. The Supreme Court has rejected the concurrence's position that '[u]nless a decision on the [merits] would provide "little guidance for future cases," courts should ... continue to develop constitutional precedent.'. . To the contrary, the Court has 'left this matter to the discretion of lower courts, and indeed detailed a range of circumstances in which courts should address *only* the immunity question.'. . Many of those circumstances are present here. First, this case is highly factbound and would provide 'little guidance for future cases.'. . Baker's alleged conduct was specific to the disciplinary segregation unit in the prison and the lack of technology available at the time. . .Moreover, it involved merely the 'practice of initially screening and occasionally checking in on [Witherow's] legal calls,'. . . rather than the more common conduct of recording or monitoring entire phone calls. Whether a constitutional violation occurred will be 'heavily dependent' on these facts, . . . and there is little reason to think such facts will repeatedly occur. Witherow was released from prison in 2010 and the Nevada State Prison where he was incarcerated has since closed down. Prison officials stopped monitoring attorney-client calls in the manner alleged sometime before the prison closed, and there is no indication that other NDOC officials are engaging in similar conduct. Technology has changed,

and prison officials are not likely to pass portable telephones into jail cells. Nor has Witherow presented us with any judicial decision, from any court, describing similar conduct. In sum, it is uncertain whether a merits ruling here will ever prove helpful in a future case. Second, addressing the merits of Witherow's Fourth Amendment claim may result in 'confusion rather than clarity.'. . Witherow failed to develop the basis for his theory that his Fourth Amendment rights were violated by the initial screening and occasional checking of his calls with his attorney, who was assisting Witherow to bring civil lawsuits. We have considered prisoners' communications with their attorneys 'under various constitutional principles, including the First Amendment right to freedom of speech and the Fourteenth Amendment rights to due process and access to the courts,' and adopted the rule that prisoner-attorney communications relating to the prisoner's *criminal case* are 'within the scope of the Sixth Amendment right to counsel.'. . But Witherow's failure to provide any reasoned basis for why the Fourth Amendment protection against unreasonable searches applies here weighs against reaching the merits. . . Our prior unpublished decision, on which the concurrence relies, . . . provides no support; it stated only that Witherow's Fourth Amendment rights were 'implicated,' which has no defined meaning in this context. . . Witherow's reliance on evidentiary rules protecting a client's communications with his attorney from being introduced into evidence are likewise misplaced, as such a common law privilege is not protected by the Constitution. . . As *Pearson* makes clear, we should not address an avoidable constitutional issue when the briefing is inadequate. . . Otherwise, we waste our resources in resolving issues with 'no effect on the outcome of the case.'. . Finally, the circumstances mentioned by the Supreme Court that weigh in favor of deciding a constitutional issue are not present here. . . First, we can resolve the qualified immunity question without delineating the contours of the constitutional right at issue. . . Given the failure of the parties to cite any applicable case, it is easy to conclude that there was no clearly established Fourth Amendment right that Baker violated. Second, this is not a case involving questions unlikely to arise except when qualified immunity is available, . . . because prisoners may bring actions for declaratory and injunctive relief to challenge prison conduct alleged to violate their Fourth Amendment rights. . . Were Witherow currently incarcerated and subject to a call monitoring policy like the one before us, he could seek such relief. A prison term is not inherently transitory such that every prisoner's demand for injunctive and declaratory relief would 'run the same high risk of mootness as occurred with Witherow's declaratory and injunctive claims here,' as the concurrence claims. . . . We conclude that Baker is immune from Witherow's suit for damages based on the Supreme Court's admonition that qualified immunity attaches unless we identify precedent placing the constitutional right at issue 'beyond debate' at the time of the challenged conduct. . . And we decline to address the merits of Witherow's constitutional claim based on the Supreme Court's instruction that we 'think hard, and then think hard again' before doing so.")

Evans v. Skolnik, 997 F.3d 1060, 1072-74, 1076 (9th Cir. 2021) (Berzon, J., concurring in part, dissenting in part, and concurring in the judgment) ("I write separately because I believe that, before addressing the second prong of the qualified immunity inquiry, we should hold that Baker's monitoring of Witherow's legal calls did violate his constitutional rights under the Fourth Amendment. . . . Indeed, unless a decision on the first prong would 'provide[ ] little guidance for

future cases,' courts should, I strongly believe, continue to develop constitutional precedent, to give better guidance to officers of the law so that they may better avoid violating rights guaranteed by the constitution. . . Otherwise, the lack of clearly established law becomes perpetual, as does the lack of incentive to avoid violations of constitutional rights in circumstances—such as this one—in which the Fourth Amendment exclusionary rule has little or no application. . . . The majority contends that '[t]he Supreme Court has rejected' an approach that forwards the development of constitutional precedent. . . That is not the Supreme Court law or the law in this circuit. Although *Pearson* held 'that the *Saucier* protocol should not be regarded as mandatory in all cases,' it explicitly 'continue[d] to recognize that it is *often* beneficial.' . . For several reasons, I disagree with the majority's conclusion that this case presents circumstances under which we should 'address only the immunity question.'. . First, the constitutional question does not depend on the particular technology used in the disciplinary segregation unit and is thus not 'so factbound that the decision provides little guidance for future cases.'. . The underlying constitutional question on which the rest of this case depends is whether prisoners have a Fourth Amendment privacy interest in the content of attorney-client telephone calls related to civil cases. Both Baker's initial screen, which consisted of either waiting for the parties to identify themselves or listening for language Baker judged to 'remotely sound[ ] legal in nature,' and the periodic checks to determine whether the prisoners were 'still making a legal call,' included listening to at least some of the content of Witherow's calls. The specific phone system Baker used for monitoring is not relevant to the analysis of whether Witherow had a Fourth Amendment privacy interest in that content. The majority further contends that 'Witherow failed to develop the basis for his theory that his Fourth Amendment rights were violated,' noting that our prior precedents have discussed prisoner-attorney communications under the First, Sixth, and Fourteenth Amendments, but not the Fourth. . . But Witherow argues that both this Court's protection of the attorney-client privilege for prisoners under other Amendments and our case law supporting the privilege's 'special place in the hierarchy of privacy expectations and Fourth Amendment protections' gave him a reasonable expectation of privacy in his phone calls with his attorney. Witherow's inability to cite precedent squarely on point for his specific circumstances is relevant to the 'clearly established' analysis in the second *Saucier* prong, but cannot be sufficient to make his briefing 'woefully inadequate' to the extent that it weighs against deciding the first prong at all. . .Finally, the issues here 'do not frequently arise in cases in which a qualified immunity defense is unavailable,' weighing in favor of addressing both *Saucier* prongs. . . A prisoner's Fourth Amendment privacy interest in attorney phone calls about civil cases is unlikely to be raised in those civil cases themselves. Any information gleaned from the phone calls may or may not be admissible under the rules of evidence, but the Fourth Amendment exclusionary rule would rarely, if ever, apply, and courts are thus unlikely to reach the constitutional issue. . . Although the majority puts weight on the potential for prisoners to bring actions for declaratory or injunctive relief, such actions run the same high risk of mootness as occurred with Witherow's declaratory and injunctive claims here, as prisoners are often transferred between institutions and institutional practices vary. *Pearson* granted courts discretion; it did not require that no other avenues be available before we address the first *Saucier* prong. . . Given the unsettled nature of prisoners' privacy rights in phone calls with their attorneys, such guidance is needed here. We therefore should address the first prong of

the qualified immunity inquiry in this case. Bound by precedent, we correctly hold that Baker is entitled to qualified immunity because of the lack of 'precedent placing the constitutional right at issue "beyond debate" at the time of the challenged conduct.'. . Nor does any precedent since the time of the challenged conduct squarely establish a constitutional violation in this case, although the current caselaw points squarely in that direction. We can and should provide clarity on the scope of inmates' rights moving forward. I would address whether Witherow had a Fourth Amendment right in properly placed legal calls to his attorney and conclude that he did. . . . It bears repeating that if courts routinely decline to reach the first prong of the qualified immunity inquiry, the development of constitutional precedent will be hamstrung. The resulting absence of clearly established law can allow for repeated civil rights violations with no accountability or guidance for state actors. Although *Pearson* permits courts deciding qualified immunity issues to decline to decide the constitutional issue raised, that permission is best exercised in fact-specific cases, not where, as here, a generic and broadly applicable issue of constitutional law underlies the disputed issues. This panel should make clear to prison officials, going forward, that monitoring the substance of an inmate's properly placed legal calls is a constitutional violation.")

O'Doan v. Sanford, 991 F.3d 1027, 1036-37, 1040, 1043-45 (9th Cir. 2021) ("In the exercise of our discretion, and with the Supreme Court's admonitions in mind, we resolve this case only on the 'clearly established law' prong of the qualified immunity framework. With the benefit of a 360-degree view of the facts and the luxury of reviewing the officers' actions from an armchair rather than a chaotic Reno street or an emergency room, there are some aspects of the officers' actions we can find commendable. In other instances, greater care may have been warranted. Our task, however, is not to serve as a police oversight board or to second-guess officers' real-time decisions from the standpoint of perfect hindsight, but to ask whether the officers violated clearly established law. Under the qualified immunity framework the Supreme Court has forcefully articulated and reaffirmed, the answer is clearly no. . . . Evaluating the facts of this case against the applicable body of Fourth Amendment law, we have little difficulty concluding that, at the very least, Officer Sanford did not violate clearly established law when he executed a reverse reap throw on O'Doan. Officers were called in to a 'Code 3' situation, a request for immediate police assistance for a 'violent' individual. They arrived to find O'Doan naked and moving quickly on a busy street. O'Doan repeatedly resisted officers' commands to stop and then turned to the officers in a threatening manner, with his fists clenched. O'Doan's failure to follow 'lawful commands, and [his] actions' in making threatening gestures 'risked severe consequences.'. . The officers therefore acted reasonably in deciding to bring O'Doan under control. Indeed, their efforts to do so may well have prevented O'Doan from harming himself or those around him. . . .O'Doan identifies no precedent that would suggest the force used here was excessive, much less that excessiveness was clearly established on these facts. . . . [I]it cannot be said that Sanford and Leavitt violated clearly established law in concluding they had probable cause to arrest O'Doan. . . . The officers' awareness that O'Fria or O'Doan had reported O'Doan having a seizure or epilepsy do not change the equation. Supreme Court precedent is clear that 'probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts.'. . Here, the facts were

not merely suspicious of potential criminal wrongdoing but reflected conduct that on its face violated Nevada law. The Supreme Court has acknowledged case law recognizing 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.'. . Nothing in clearly established law would have indicated to Sanford and Leavitt that this was such an 'unusual' case. What this means is that no clearly established law required the officers to credit O'Fria and O'Doan's explanation and deem true a possible defense, namely, that O'Doan lacked the wherewithal to be responsible for unlawful conduct. . . . The dissent's repeated contention that we have not abided by the summary judgment standards is therefore simply wrong. We have faithfully applied those standards and have not 'ignore[d]' O'Doan's evidence, as the dissent mistakenly claims. It is the dissent that reflects an unwillingness to apply the standards that govern the qualified immunity analysis—standards the Supreme Court has repeatedly emphasized in reversing lower courts for failing to follow them. . . Finally, we must reject O'Doan's (and the dissent's) contention that O'Doan's arrest was unconstitutional because this is 'an "obvious case" where "a body of relevant case law" is not needed.' . . The situations where a constitutional violation is 'obvious,' in the absence of any relevant case law, are 'rare.'. . That teaching resonates even more powerfully in the Fourth Amendment context. As we have explained, the 'obviousness principle, an exception to the specific-case requirement, is especially problematic in the Fourth-Amendment context.'. . . The obviousness principle thus has 'real limits when it comes to the Fourth Amendment,'. . . and we decline to transgress those limits here. Construing the facts in the light most favorable to O'Doan, officers were placed in an emergency situation involving a person acting dangerously and unlawfully. While it was unclear what prompted O'Doan's wrongful behavior, nothing made it obvious that officers had to accept O'Fria and O'Doan's explanations and conclude on the spot that O'Doan was not responsible for his actions. . . .O'Doan's reliance on the Supreme Court's recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), is unavailing. There, the Supreme Court held it was obvious that keeping an inmate in a cell 'teeming with human waste' for six days, and forcing him to sleep naked in raw sewage, violated the Eighth Amendment. . . *Taylor* only highlights the level of blatantly unconstitutional conduct necessary to satisfy the obviousness principle. Suffice to say, this case bears no reasonable comparison to *Taylor*. We therefore hold that the district court properly granted qualified immunity to Sanford and Leavitt on O'Doan's § 1983 wrongful arrest claim.")

O'Doan v. Sanford, 991 F.3d 1027, 1046-48, 1054 & n.4 (9th Cir. 2021) (Block, J. Senior District Judge, dissenting in part) ("The majority's opinion is a textbook example of highly skilled craftsmanship and spot-on articulation by my talented colleagues of the legal principles governing qualified immunity for police officers in the performance of their duties. If not for one principal flaw in the application of these principles, I would wholeheartedly cast the third vote for affirmance. Surely, based upon the majority's recitation of the facts, summary judgment would be warranted. But the problem with the majority's opinion is that there are clearly material factual disputes and credibility determinations that are for a jury – not judges – to resolve. Accordingly, I dissent from those parts of the opinion granting summary judgment for the police officers on

O'Doan's § 1983 false arrest and due process claims, as well as on his ADA claim. . . . The core issue here is whether the police knew or should have known they were arresting a criminal or an epileptic. On this record, this is a quintessential question for a factfinder, not a judge. No one disputes, nor rationally can, the obvious: you do not put an epileptic in jail. . . . The majority's palpable failing is that it credits all the testimony of the police and the emergency personnel and ignores all the contrary documentary and testimonial evidence that places their credibility in serious doubt. . . .I have chosen to write a somewhat unconventional dissenting opinion to dramatize the value and importance of our jury system and that we should be circumspect in allowing judges to be factfinders. . . It hopefully will have the added virtue of serving as a cautionary tale that the concept of qualified immunity has its limits – especially in the sensitive area of alleged police misconduct. . . . Recent events have placed qualified immunity in the public spotlight. Judges and the public alike are criticizing what is perceived as tantamount to an absolute bar on police accountability. *See* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES, Jun. 23, 2020, at A16 ("Once a little-known rule, qualified immunity has emerged as a flash point in the protests spurred by [George] Floyd's killing and galvanized calls for police reform."); *see also* Circuit Judge James A. Wynn Jr., *Opinion: As a judge, I have to follow the Supreme Court. It should fix this mistake.*, WASH. POST, Jun. 12, 2020, https://www.washingtonpost.com/opinions/2020/06/12/judgei-have-follow-supreme-court-it-should-fix-this-mistake/ (Qualified immunity "prevents plaintiffs from pursuing their claims ... and excuses ever more egregious conduct from liability"). Justice Sotomayor has criticized the ever-expanding doctrine of qualified immunity as 'an absolute shield for law enforcement officers.'. . She aptly describes the Supreme Court's 'unflinching willingness' to reverse denials of qualified immunity, while rarely intervening in wrongful grants of qualified immunity, as 'gutting the deterrent effect of the Fourth Amendment.'")

Hernandez v. Town of Gilbert, 989 F.3d 739, 743-45 (9th Cir. 2021) ("The Court may address the two prongs in any order. . . We consider only the second prong here. '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."'. . While we do not require a case on all fours, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . Qualified immunity 'protects "all but the plainly incompetent or those who knowingly violate the law."'. . '[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'. .Hernandez argues that both the initial deployment of the canine and the duration of the bite violated clearly established law. . .To defeat qualified immunity, Hernandez must show that the state of the law as of May 5, 2016, gave a reasonable officer 'fair warning' that using a police dog on a noncompliant suspect, who had resisted lesser methods of force to complete his arrest, was unconstitutional. . . .The record here does show that the officers employed an escalating array of control techniques, none of which were effective in getting Hernandez to surrender, before deciding to release the police dog. Because the facts are so dissimilar, *Mendoza* does not clearly establish that Officer Gilbert's conduct in eventually deploying Murphy was unconstitutional.")

Nunes v. Arata, Swingle, Van Egmond & Goodwin (PLC), 983 F.3d 1108, 1113-14 (9th Cir. 2020) (" We acknowledge that this case presents a different scenario than those where officers are forced to make 'split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'. . But the underlying question remains the same: Did Defendants' conduct violate a clearly established constitutional right of the Plaintiffs? . . . .Accordingly, we, like the district courts, conclude that the opaque opinion in *Gonzalez* did not clearly establish a constitutional privacy right in juvenile records. *Gonzalez* did not explain what right was at issue or what constitutional source it flowed from. It did not even explain whether that unnamed right was violated by the attorney's conduct, stating instead only that it could have been. . . Such an opinion, which leaves fundamental questions unanswered about the origin, nature, and scope of the right at issue, cannot place the constitutional issue 'beyond debate.'. . We cannot conclude that every reasonable official acting as Defendants did would have known they were violating the constitutional rights of Plaintiffs based on *Gonzalez*, the only authority on which Plaintiffs' rely. . . . We do not decide whether the Constitution provides a privacy right in juvenile records; rather, we decide only that no such right was clearly established at the time of the Defendants' alleged conduct. Therefore, Defendants are entitled to qualified immunity.")

Nunes v. Arata, Swingle, Van Egmond & Goodwin (PLC), 983 F.3d 1108, 1114-15 (9th Cir. 2020) (Hunsaker, J., joined by Silver, District Judge, concurring) ("I write separately to emphasize one point—our en banc court should reconsider *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), and address in earnest whether there exists a constitutional right to privacy in juvenile records. We carefully dodge this issue today by focusing on the clearly-established-law prong of qualified immunity given the dearth of reasoning and guidance in the *Gonzalez* decision. But *Gonzalez* will continue to stymie district courts and litigants. . . . The question here, whether there is a constitutional right of privacy that protects against disclosure of juvenile records, was answered in *Gonzalez* like an overconfident yet underprepared student—casually, without explanation or supporting authority. We should do better. And until the en banc court performs the analysis that *Gonzalez* neglected, our law on this issue will remain unclear.")

Cates v. Stroud, 976 F.3d 972, 978-85 (9th Cir. 2020) ("If a constitutional violation is established, satisfying the first prong, the second prong of a qualified immunity analysis asks whether the law prohibiting the action was 'clearly established' at the time of the incident in question. . . The function of the inquiry under the second prong is to ensure that officials are subject to suit only for actions that they knew or should have known violated the law. . . Law is 'clearly established' for the purposes of qualified immunity analysis if 'every reasonable official would have understood that what he is doing violates that right.'. . An official can be on notice that his conduct constitutes a violation of clearly established law even without a prior case that had 'fundamentally similar' or 'materially similar' facts. . . In the analysis that follows, we address both prongs. . . . We agree with the Sixth, Seventh and Eighth Circuits. Our agreement with our sister circuits follows naturally from our precedent on prison searches and on screening measures in sensitive facilities more generally. In upholding a blanket policy requiring strip searches of admittees to the county jail in *Bull*, we specifically noted that we were not 'disturb[ing] our prior opinions considering

searches of arrestees who were not classified for housing in the general jail or prison population.'. . Our rationale in *Bull*, like the Supreme Court's rationale in *Bell*, . . . was based on the jail's security interests *within* the jail. . . We specifically noted in *Bull* that 'searches of arrestees at the place of arrest, searches at the stationhouse prior to booking, and searches pursuant to an evidentiary investigation must be analyzed under different principles than those at issue today.'. . Because the ability of prison officials to conduct strip searches of visitors based on reasonable suspicion is premised on the need to prevent introduction of contraband into the prison, a search of a visitor who no longer intends to enter the portion of the prison where contact with a prisoner is possible, or who was leaving the prison, must rely on another justification. Ordinarily, a visitor cannot introduce contraband into the prison simply by appearing in the administrative area of the prison. If prison officials have reasonable suspicion that such a visitor is carrying contraband, the prison's security needs would justify a strip search only if the visitor insists on access to a part of the prison where transfer of contraband to a prisoner would be possible. If the visitor would prefer to leave the prison without such access, the prison's security needs can be satisfied by simply letting the visitor depart. . . . We have concluded, in agreement with three of our sister circuits, that Laurian violated Cates's rights under the Fourth Amendment by subjecting her to a strip search without giving her an opportunity to leave rather than be subjected to the search. We hold, however, that prior to our decision in this case the contours of the right in this circuit were not 'sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right,' and accordingly extend qualified immunity. . . The Supreme Court and our court have addressed strip searches of detainees. But when Cates was subject to the strip search at issue in this case, there was no case in this circuit where we had held that a prison visitor has a right to leave the prison rather than undergo a strip search conducted on the basis of reasonable suspicion. While we 'do not require a case directly on point, ... existing precedent must have placed the ... question beyond debate.'. . Cases allowing strip searches of detainees support a holding that Cates's rights under the Fourth Amendment were violated primarily based on their differences from, rather than their similarities to, Cates's case. Additionally, while 'in a sufficiently 'obvious' case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents,' we have noted that this 'exception ... is especially problematic in the Fourth-Amendment context' where officers are confronted with 'endless permutations of outcomes and responses.'. . Existing case law has already clearly established that a strip search of a prison visitor conducted without reasonable suspicion is unconstitutional. We do not reach the question whether there actually was reasonable suspicion that Cates was carrying drugs on her person. But, for purposes of a qualified immunity analysis, it was not unreasonable for Laurian to have believed that there was reasonable suspicion, given that a search warrant (though unexecuted) had been issued for a search of Cates's 'person' for drugs. However, prior to our decision in this case, there has been no controlling precedent in this circuit, or a sufficiently robust consensus of persuasive authority in other circuits, holding that prior to a strip search a prison visitor—even a visitor as to whom there is reasonable suspicion—must be given an opportunity to leave the prison rather than be subjected to the strip search.")

TENTH CIRCUIT

Estate of Valverde by & through Padilla v. Dodge, 967 F.3d 1049, 1060-68 (10th Cir. 2020) ("Dodge does not dispute that Valverde was discarding the gun and raising his hands before being shot. The thrust of Dodge's argument is that his own actions must be assessed from his perspective of what was happening, and that his actions were reasonable in light of his reasonable beliefs at the time. His argument may or may not be legally valid, but it is within our appellate jurisdiction to consider it. We now turn to that task. Our review is consistent with Plaintiff's version of events, but we supplement that version with clear evidence from the synchronized video that enables us to assess the events from Dodge's perspective. . . . [T]he decisive question is whether Dodge was reasonable in believing that Valverde was going to fire his gun at Dodge or other officers. We conclude that Dodge's belief was reasonable. He had been informed that Valverde was involved in high-violence criminal enterprises—dealing guns and large quantities of drugs. Dodge saw the barrel of a gun as Valverde pulled it from his waistband or pocket. To wait to see what Valverde would do with the weapon could be fatal. Dodge fired immediately. The sound of his first shot was less than a second after Valverde pulled out his gun. The sound of his last shot was a mere second after the first. The district court denied Dodge's motion for summary judgment based on qualified immunity because it said that the evidence could support a finding that Valverde was not shot until after he had disposed of his gun and was raising his hands in surrender. This ruling, however, overlooked two fundamentals of the necessary analysis. First, the district court failed to consider that allowance needs to be made for the fact that the officer must make a split-second decision. The Constitution permits officers to make reasonable mistakes. Officers cannot be mind readers and must resolve ambiguities immediately. . . Perhaps a suspect is just pulling out a weapon to discard it rather than to fire it. But waiting to find out what the suspect planned to do with the weapon could be suicidal. . . The district court's second error was that it failed to appreciate that the facts must be viewed from the perspective of the officer. For purposes of this appeal, we accept as true the district court's view that the evidence could support a finding that by the time Dodge fired his gun Valverde had dropped his gun and was raising his hands. But the court expressed no view on what the jury could find regarding what Dodge had observed when he made his decision to fire. Yet that is absolutely critical to resolving the legal issue before us. Therefore, it is left for this court to determine what a reasonable jury could find on that score. . . And, we should add, even if one were to interpret the district court's ruling as, in some way, addressing events from Dodge's perspective, we are not bound by that ruling to the extent that it is blatantly contradicted by the video. . . Viewing the video, no jury could doubt that Dodge made his decision to fire before he could have realized that Valverde was surrendering (by dropping his gun and raising his hands). The concurrence objects to our use of the video on the ground that it was taken from a significant distance and is grainy, so it does not clearly depict Valverde's right hand or his hand movements. But an HDTV-quality image is not necessary for our purposes. There is no question that Valverde pulled out a gun. What then matters (as will be explained in more detail as we review the relevant case law) is when it should have been clear to Dodge that Valverde was no longer a threat because he had disposed of his gun and was raising his arms in surrender (in particular, not raising his arm to fire at the officers). We have already noted that the video shows that Dodge fired his first shot

less than a second after Valverde pulled out his gun. It is also clear from the video that Valverde did not extend his right arm away from his body (apparently to drop the weapon) until about half a second before the first shot was fired and he did not *begin* to raise his hands toward his head until about a quarter-second before Dodge fired. The law permitted Dodge to fire as soon as he saw the gun in Valverde's hand. This is not a case where the officer had sufficient time to appreciate that the suspect was no longer a danger before the officer decided to fire. This court has repeatedly held that officers in similar circumstances acted constitutionally, even when the actions of the person shot were ambiguous. . . . Several decisions illustrate that an officer does not violate the Fourth Amendment even when in retrospect it is clear that the officer made a mistake in shooting someone who did not pose a threat at the precise moment of the shot. . . . In short, Dodge's decision to shoot Valverde once he observed him draw a gun is exactly the type of split-second judgment, made in 'tense, uncertain, and rapidly evolving' circumstances, 'that [courts] do not like to second-guess using the 20/20 hindsight found in the comfort of a judge's chambers.'. .The above discussion disposes of most of Plaintiff's arguments that Dodge acted unreasonably in using deadly force. . . . Plaintiff contends that even if Dodge was entitled to use deadly force based on the situation at the time of the shooting, he still violated the Fourth Amendment because his reckless conduct during the operation unreasonably precipitated his need to use deadly force. She argues that three of Dodge's pre-shooting actions were reckless: (1) his decision to disregard the tactical plan, which had assigned him the less lethal 40-millimeter gun (rather than the carbine he used) and had him providing backup support (rather than deploying out of the van directly toward Valverde); (2) his failure to identify himself as law enforcement, an error magnified by the fact that the officers drove up in an unmarked van, were wearing green uniforms, and used a flash-bang device that likely confused Valverde; and (3) his failure to provide verbal warnings or commands before shooting. To resolve Plaintiff's first issue, we relied on the first prong of qualified immunity, holding that Dodge did not violate Valverde's Fourth Amendment rights when he decided to shoot. On this issue we rely on the second prong of qualified immunity, the absence of clearly established law to support Plaintiff's claim. . . Plaintiff's general proposition is a correct statement of the law of this circuit. 'Our precedent recognizes that the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'. . Nevertheless, Dodge is entitled to qualified immunity with respect to this theory of liability. It is unnecessary for us to consider whether his conduct was in fact reckless because Plaintiff has not shown that Dodge violated clearly established law. In this circuit, to satisfy the burden of showing that the officer's conduct violated clearly established law, 'the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'. . .The SWAT team was called in to make the arrest specifically because it could act with great speed and overwhelming force. Perhaps that is a poor strategy. This court is hardly qualified to determine whether this approach is, as testified to by the SWAT team members, designed to reduce violence. What we can say, however, is that the officers were not on notice that such tactics are unconstitutional. Simply put, we are aware of no case that would have advised Dodge that what he was doing would violate Valverde's Fourth Amendment

rights.")

Estate of Valverde by & through Padilla v. Dodge, 967 F.3d 1049, 1068-72 (10th Cir. 2020) (Matheson, J., concurring) ("I concur in reversing the district court's grant of summary judgment. But I would not decide whether Sergeant Dodge was entitled to qualified immunity based on prong one—that his conduct violated the Constitution. I have concerns about our interlocutory jurisdiction to review his arguments on that issue. I would reverse instead based on prong two—whether the Estate has shown that Sergeant Dodge's shooting of Mr. Valverde violated clearly established law. . . .Because the majority's legal error points are at least debatable, and Sergeant Dodge's factual arguments jurisdictionally suspect, I would move to the more straightforward analysis under prong two. . . . The Estate's cases . . . do not 'place[ ] the ... constitutional question beyond debate.'. . It has 'failed to identify a case where an officer acting under similar circumstances' violated the Fourth Amendment. . . It inadequately heeds the Supreme Court's instruction that clearly established law must 'not be defined at a high level of generality.'. . . Although we may lack interlocutory jurisdiction to review the district court's factual findings, the Estate has failed to show clearly established law. It thus has not carried its burden to overcome Sergeant Dodge's summary judgment defense of qualified immunity. I concur in the reversal of the district court's denial of summary judgment.")

ELEVENTH CIRCUIT

Crocker v. Beatty, 995 F.3d 1232, 1250-52 & n.16 (11th Cir. 2021) We begin with the constitutional question.[16] **[fn 16:** The Supreme Court has said that 'courts should think hard, and then think hard again' before addressing the merits of an underlying constitutional claim as well as whether the law is clearly established. . . Having done our due diligence, we conclude that addressing the constitutional claim here will 'clarify the legal standards governing public officials.'. . Paired with *Patel*, this case helps illustrate what kind of conduct does and doesn't cross a constitutional line in the context of hot-car cases.**]** Officer Beatty's alleged conduct wasn't objectively unreasonable. The Supreme Court has given us six factors to consider in making a Fourteenth Amendment excessive-force determination, and although the Court cautioned that these factors aren't exhaustive or exclusive, they're sufficient here. . . . Considering all the *Kingsley* factors, it seems most important there was very little 'force' used and essentially no harm done. . . . [I]t's hard to imagine how we could find a constitutional violation here without making a federal case of just about every 'hot car' incident in Alabama, Florida, and Georgia, which we (once again) decline to do.")

Washington v. Warden, 847 F. App'x 734, ___ (11th Cir. 2021) ("Though we may begin the qualified immunity inquiry with either the constitutional question or the question of whether the violation was clearly established, the Supreme Court has admonished us to 'think hard, and then think again' before addressing the merits of the constitutional claim. . . For each defendant here, we thus begin—and ultimately end—our analysis with the issue of whether the alleged constitutional violations here were contrary to clearly established law. . . . In sum, unit managers

Farley and Warren and warden Taylor were entitled to qualified immunity because not every reasonable officer in their circumstances would have known that the risk of harm to Washington was 'substantial.' Correctional officer Milner may have known of a substantial risk of harm to Washington, but it was not clearly established that her actions were unreasonable, and thus deliberately indifferent. All four defendants are thus entitled to qualified immunity.")

Patel v. Lanier County, Georgia, 969 F.3d 1173, 1181-91 (11th Cir. 2020) ("By adopting an objective-reasonableness criterion, the *Kingsley* Court indicated a connection between the Fourteenth Amendment's excessive-force standard and the Fourth Amendment's standard, rather than the Eighth Amendment's. . . . Notwithstanding *Kingsley*, the district court here pointedly distinguished Fourth Amendment precedent, citing our pre-*Kingsley* cases for the proposition that '[t]he standard for showing excessive force in violation of the Fourteenth Amendment ... is higher than that required to show excessive force in violation of the Fourth Amendment.'. . But as we clarified in *Piazza*—which came down after the district court here issued its decision—that's no longer true. After *Kingsley*, the Fourteenth Amendment's standard is analogous to the Fourth Amendment's. Had the district court applied the correct standard—*Kingsley*'s Fourth-Amendment-like objective-reasonableness test, informed by several contextual considerations—we think it would have concluded, as we do, that Deputy Smith violated Patel's Fourteenth Amendment right to be free from excessive force. . .We haven't directly confronted a 'hot car' case before now, but variations of this fact pattern are understandably common. To try to bring clarity to the law governing such circumstances, we'll identify the considerations that inform our decision, but we can't hope to lay down a neat rule; as the Supreme Court has explained—for better or worse—'objective reasonableness turns on the "facts and circumstances of each particular case."'. . . Whenever the force used against a pretrial detainee consists in his subjection to hazardous conditions, the 'amount of force used' is a function of two component factors—(1) the severity of those conditions and (2) the duration of his subjection to them. These two considerations combine to create a sliding scale: The more severe the conditions, the shorter the detention need be before it amounts to excessive force—and vice versa. Now, how about 'need'? In cases involving pretrial detainees, there is always (by definition) some need to detain, at least until a judge authorizes a release. But, it seems to us, the need for detention *in relatively harsh conditions* depends both on the threat that the detainee poses and on the feasibility of alternative means of holding him. Again, a sliding scale: Detention in harsher conditions may be justified where alternative modes of detention are not readily available, especially if the detainee poses a heightened risk of danger to police or the public; by contrast, where the detainee poses no particular risk or where an alternative is at hand, the 'need' for harsher modes of detention dissipates. Here, Patel was kept in a hot transport van—without any ventilation or air conditioning—for a period of approximately two hours. While those facts alone don't entitle Patel to a trial on his excessive-force claim, we note that detentions of comparable duration and severity have been held to create jury questions. . . Moreover, for nearly half of Patel's detention—the 55 minutes during which he was left unattended in the sally port—Deputy Smith presumably could have moved him inside the Lowndes County jail while he made arrangements to transport Grant. Hence, it seems to us that a significant fraction of the force applied to Patel was not just harsh but also unnecessary. . . .

Although *Kingsley*'s list isn't 'exclusive,' its factors suffice to resolve the constitutional question here. Construing the facts and accompanying inferences in his favor, the *Kingsley* factors tilt decisively toward Patel. Accordingly, we conclude that in the particular circumstances of this case, Patel's detention and transport were 'more severe than [was] necessary to ... achieve a permissible governmental objective.'. . Because the force Deputy Smith applied was not 'objectively reasonable,' it violated Patel's Fourteenth Amendment rights. . . .That's the good news for Patel on excessive force. Now the bad: Although we conclude that Deputy Smith violated Patel's constitutional rights, we cannot say that the underlying law applicable to Patel's excessive-force claim was sufficiently 'clearly established' to defeat qualified immunity. Before explaining why, we must first address Patel's threshold contention that, in the context of a Fourteenth Amendment excessive-force claim, he doesn't have to show a clearly established right. . . . The usual rule in a qualified-immunity case is that, in addition to proving a constitutional violation, the plaintiff must demonstrate that the law underlying his claim was 'clearly established' at the time of the incident in question. . . It is true, as Patel says, that in *Johnson v. Breeden*, 280 F.3d 1308, 1321–22 (11th Cir. 2002), and *Fennell*, 559 F.3d at 1216–17, we articulated a sui generis exception to that general rule for Eighth and Fourteenth Amendment excessive-force claims. But that exception was justified only by an idiosyncrasy of those claims—an idiosyncrasy that, with respect to those arising under the Fourteenth Amendment, *Kingsley* eliminated. As a result, Patel can no longer rely on our previous holdings but, rather, must prove that his right not to be subjected to prolonged detention in the hot transport van was clearly established. . . . The *Johnson*/*Fennel* exception rested entirely on the 'extreme' subjective-intent element of Eighth and (then) Fourteenth Amendment excessive-force claims. *Kingsley*, though, expressly eliminated *any* subjective element for such claims arising under the Fourteenth Amendment—at least as to the excessiveness of the force. . . . In so doing, the Supreme Court likewise eliminated the justification for the *Johnson/Fennel* exception itself—effectively undermining that special rule 'to the point of abrogation,' at least as to Fourteenth Amendment excessive-force claims. . . And if that weren't enough, the *Kingsley* Court expressly acknowledged that the clearly-established prong of the qualified-immunity inquiry would govern such claims. . . As a result, although the *Johnson*/*Fennel* exception continues to apply to Eighth Amendment claims, we must abandon it as applied in the Fourteenth Amendment context. . . . Applying the ordinary qualified-immunity framework, we conclude that Patel's constitutional rights here were not clearly established at the time of his transport between Cook, Lowndes, and Lanier Counties. . . . At the time of the constitutional violation here, there existed no clearly established law that could have given Deputy Smith fair notice that confining Patel as he did amounted to excessive force. For starters, Patel can point to no 'materially similar case.'. . .[O]ur holding that the pepper-spray incident in *Danley* was unconstitutional didn't give Deputy Smith fair notice that his treatment of Patel was excessive. Although our precedent clearly establishes that environmental conditions can amount to excessive force in violation of the Fourteenth Amendment, our previous cases would not have put Deputy Smith on notice that the particular conditions he caused were sufficiently harsh. We note that *Danley* cites *Burchett*—a Sixth Circuit case with facts quite similar to this one—for the proposition 'that confining ... an arrestee, in a "police car with the windows rolled up in ninety degree heat for three hours constituted excessive force" in violation of the Fourth

Amendment.'. . But a mere citation to an out-of-circuit decision—even with approval, and even with an accompanying factual précis—cannot clearly establish the law for qualified-immunity purposes. . . . Moreover, and in any event, even if *Burchett*—or *Danley*'s citation of it—could clearly establish the law in general, it wouldn't clearly establish that Deputy Smith's particular conduct violated Patel's constitutional rights. The detention in *Burchett* was both (1) somewhat longer—three hours with no ventilation, as compared to two hours here, less than half of which was wholly unventilated—and (2) somewhat more severe—a 90 degree ambient temperature, as compared to 85 degrees. . . Close, but not close enough—because all agree that confining a pretrial detainee in a hot vehicle for just a short time wouldn't be unreasonable, law-enforcement officials need some leeway in this area. Accordingly, we will not impute notice in a hot-car case unless the analogy to preexisting case law is clear. . . . Although *Kingsley* established that all objectively unreasonable applications of force against pretrial detainees violate the Fourteenth Amendment, . . . confining a prisoner in a hot transport van, even for a couple of hours, is not so obviously unreasonable that Deputy Smith should have known better in the absence of case law more closely on point. Patel doesn't point to any other case that established 'a broad[ ], clearly established principle that should govern the novel facts of the situation,'. . . and we aren't aware of any. Nor, finally, was Deputy Smith's conduct so egregious 'that prior case law is unnecessary' to establish a clear violation of the Fourteenth Amendment. . . Although Patel's detention and transport were no doubt exceedingly uncomfortable—and as it turns out, dangerous—Deputy Smith's conduct was not akin to those instances 'so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without caselaw on point.'. . . The basic standards governing Patel's Fourteenth Amendment deliberate-indifference claim are uncontested and, here, are 'identical to those under the Eighth.'. . . Here, the circumstantial evidence would allow a jury to infer 'subjective knowledge of a risk of serious harm' because (1) Deputy Smith witnessed symptoms that even a layperson could recognize as indicating that risk and (2) Smith wasn't any ordinary layperson—he was trained as a medical first responder. . . A jury could also find 'disregard' of the risk based on the fact that Deputy Smith provided no intervention until after he delivered Patel to the Lanier County Sheriff's Office, and then only reluctantly. . . Finally, the conduct here was worse 'than gross negligence' because Deputy Smith utterly refused to respond to the severe symptoms that he saw. . . Deputy Smith's *total* inaction is telling; he not only failed to enlist the help of a medical professional in the face of a serious medical need, but he failed even to provide water on request and made no attempt to treat Patel himself despite having first-responder training. And of course it was Deputy Smith's neglect—leaving Patel in a hot, unventilated, un-air-conditioned transport van—that created the danger in the first place. Finally, the evidence amply supports the conclusion that Deputy Smith's deliberate indifference caused Patel harm. Patel's hospitalization and diagnoses alone suffice to establish a jury question as to injury. And the very identity of his diagnosed conditions—heat exhaustion and heat syncope—indicate heat exposure as their most likely cause. . . . For all these reasons, we conclude that Patel has presented sufficient evidence to prove every element of a Fourteenth Amendment deliberate-indifference claim. . . .We turn once more, then, to the second step of qualified immunity—that is, whether the right that Patel alleges was clearly established. Although we haven't identified any controlling case with closely

analogous facts, we think 'the novel facts of the situation' are obviously governed by a 'broader, clearly established principle.'. . 'The knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.'. . Both aspects of this articulation—knowledge and intentional refusal—are on full display here. This broad principle has put all law-enforcement officials on notice that if they actually know about a condition that poses a substantial risk of serious harm and yet do *nothing* to address it, they violate the Constitution. No more notice was necessary because 'the assumed circumstances here are stark and simple, and the [preexisting] decisional language ... obviously and clearly applies.'. . This is not a case in which a law-enforcement officer provided inadequate aid, the reasonableness of which can be fairly disputed. Here, at least on the facts as we must take them, Deputy Smith provided no timely aid—he was confronted with a serious medical need and did *nothing*. Because we have made clear that such complete abdication in the face of a known serious need is unconstitutional, Deputy Smith is not entitled to qualified immunity.")

Waldron v. Spicher, 954 F.3d 1297, 1304-11 & n.7 (11th Cir. 2020) ("Because we are assuming that Spicher was acting within the scope of his authority, to prevail, Waldron will have to prove not only that her substantive due process rights were violated (the first prong), but also that the substantive due process rights thus violated were clearly established (the second prong) at the time Spicher acted. Because Waldron can prevail only if she successfully establishes this second prong, and because if she does establish the second prong she necessarily will have established the first prong, we address in this opinion *only* whether Waldron can prove that Spicher's actions violated clearly established substantive due process rights. This court has identified three different ways that a plaintiff can prove that a particular constitutional right is clearly established. First, a plaintiff can show that a materially similar case has already been decided. . . This category consists of binding precedent tied to particularized facts in a materially similar case. In determining whether a right is clearly established under this prong, only materially similar cases from the United States Supreme Court, this Circuit, and/or the highest court of the relevant state can clearly establish the law. . . Second, a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case. . . . Put another way, 'in the light of pre-existing law, the unlawfulness must be apparent.'. . Third, a plaintiff could show that the case 'fits within the exception of conduct which so obviously violates [the] Constitution that prior case law is unnecessary.'. . This third test is a narrow category encompassing those situations where 'the official's conduct lies so very obviously at the very core of what the [relevant constitutional provision] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding lack of case law.'. . . As is apparent from the above discussion of *Lewis*, context is significant. And the above description of the facts in *Hamilton* reveals that the facts of the instant case are very similar. The general context is identical: both cases involve a law enforcement officer called to the scene of an attempted suicide (in the instant case) or an accidental drowning (in *Hamilton*). In both cases, bystanders were performing lifesaving CPR when the officer arrived. In both cases, the officer ordered everyone away from the victim, thus terminating ongoing CPR efforts. In both cases, the bystanders objected, but the officer persisted in his order such that CPR

terminated. In neither case did the officer himself undertake CPR efforts. In both cases, no CPR or other lifesaving efforts were undertaken (for a few minutes until paramedics arrived in our case and for five minutes in *Hamilton*[.] . . In both cases, the victim died. As explained in *Lewis*, the context in which the officer's action occurs is important in determining the level of culpability required for a plaintiff to state a viable substantive due process violation. Our *Hamilton* decision holds that, in the context there, a 'reckless rescue attempt, or interference with a bystander's rescue attempt,'. . . does not rise to the level of a clearly established violation of substantive due process. Deputy Spicher in our case argues that the context in this case is materially similar to that in *Hamilton*, and therefore the plaintiff in our case must prove more than reckless interference with the bystanders' rescue attempt to demonstrate a clearly established violation of the Constitution. Waldron responds—and the district court apparently agreed—that *Hamilton* analyzed the substantive due process challenge there employing the now-superseded 'special relationship' or 'special danger' analysis, and therefore that *Hamilton* could provide little or no guidance to Spicher as to what the Constitution required—*i.e.*, little or no indication of the content of a clearly established violation of substantive due process. Contrary to Waldron's position, we believe that our decision in *Hamilton* is a relevant part of the 'legal landscape' that would have informed Spicher with respect to the contours of the constitutional right. Binding case law in this Circuit holds that the 'relevant legal landscape'—including even cases from outside our Circuit and unpublished cases—are informative in a court's determination of whether a particular constitutional right is clearly established. . . Thus, merely because a later Supreme Court case changed the legal analysis, we cannot expect every reasonable officer in Spicher's shoes to disregard the fact that the materially similar facts in *Hamilton* resulted in a holding that it takes more than a 'reckless ... interference with a bystander's rescue attempt' to constitute a clearly established violation of substantive due process. Moreover, even if Spicher had been aware that the Supreme Court changed the appropriate analysis after our *Hamilton* decision, we do not believe that would undermine the significance of *Hamilton* for this case. The new shock-the-conscience analysis is clearly at least as favorable to defendant governmental officers—and unfavorable to plaintiffs in suits like Waldron's—as had been the previous analysis; and very probably the new standard is more so. Thus, there being fair notice to reasonable officers in Spicher's shoes under the old standard that it takes more than reckless interference with a rescue attempt to violate clearly established substantive due process rights, we believe that there is at least as much fair notice to Spicher under the new standard. For the foregoing reasons, we believe that in this Circuit, Spicher's actions cannot be deemed to violate clearly established substantive due process rights, unless the jury finds that Spicher acted with a level of culpability more than reckless interference with bystanders' attempted rescue efforts. . . . In other words, with *Hamilton* as part of the relevant legal landscape guiding Spicher, we cannot conclude that he had fair notice or fair warning that reckless or deliberately indifferent actions on his part in these circumstances would violate substantive due process. . . No case in the Supreme Court, or in this Circuit, or in the Florida Supreme Court has held that recklessness or deliberate indifference is a sufficient level of culpability to state a claim of violation of substantive due process rights in a non-custodial context. . . . We believe that it is a matter of obvious clarity, derived from principles set out in *Lewis*, that Waldron would have stated a violation of clearly established substantive due process rights *if* the jury finds that he

intended to cause harm to Ybarra, which harm in the context of the facts of this case obviously would take the form of death or serious brain injury. . . .If the circumstances we assume in this summary judgment posture are found by the jury, and if the jury also finds that Spicher intended to cause harm to Ybarra in the form of death or serious brain injury, then we hold that it is a matter of obvious clarity, derived from the above principles, that Waldron would have proved a violation of clearly established substantive due process rights. . . .[B]ecause the Court in *Lewis* concluded there that a purpose to cause harm would violate substantive due process, we believe it is a matter of obvious clarity that, if the jury finds that Spicher intended to cause harm to Ybarra in the form of death or serious brain injury, and finds the other circumstances we assume in this summary judgment posture, then we hold that Waldron would have proved a violation of clearly established substantive due process rights. . . . In this opinion, we have held that—in this Circuit where *Hamilton* is part of the relevant legal landscape—Waldron cannot demonstrate that Spicher violated clearly established substantive due process rights without proving more than that Spicher acted with deliberate indifference or recklessness. But we have also held that, if the jury should find that Spicher acted for the purpose of causing harm to Ybarra, Waldron would have proved a violation of clearly established substantive due process rights. Because the district court analyzed this case under the erroneous assumption that a deliberate indifference level of culpability was sufficient under these circumstances, the district court of course has not evaluated whether a reasonable jury could find such a purpose of causing harm on this summary judgment record, and/or whether the parties should be permitted to further develop the summary judgment record in light of the standard which we announce today. We believe it is appropriate to remand this case to the district court to permit it to reconsider this case under the standard we announce in this opinion. . . . In this case, because we address only the issue of whether Waldron can prove that her clearly established substantive due process rights were violated, we need not—and we do not—decide the precise level of culpability which is required to state a violation of substantive due process in these circumstances. We do not rule out the possibility that there might be a level of culpability higher than recklessness and deliberate indifference, but lower than an intent to cause harm, that the Supreme Court might ultimately decide is sufficient. However, there is no case from the Supreme Court, from this Circuit, or from the Supreme Court of Florida so holding. Therefore, we are confident that—in this Circuit in light of *Hamilton*, to demonstrate a *clearly established* violation —Waldron would have to prove under these circumstances that Spicher acted for the purpose of causing harm to Ybarra. . . There being no binding precedent fixing the precise level of culpability required in a similar non-custodial case, we conclude that the only way Waldron can prove a *clearly established* violation of substantive due process would be to prove that Spicher's actions were for the purpose of causing harm to Ybarra. This is especially so in light of the Supreme Court's decision in *Lewis*.")

Washington v. Rivera, 939 F.3d 1239, 1245, 1248-49 (11th Cir. 2019) ("Because we conclude that Washington cannot show a violation of a clearly established Fourth Amendment right, we assume *arguendo* that Rivera violated the constitutional right and turn to the issue of whether that right was clearly established. . . . [I]n both *Kingsland* and *Tillman*, the defendant officers consciously ignored information they already possessed that cast significant doubt on whether a

defendant was guilty. In *Kingsland*, the officers took no investigative measures, even though the evidence they possessed did not give rise to the narrative they included in their report and used to arrest the plaintiff. In *Tillman*, the sheriff willfully disregarded a large incongruity between what he knew about the suspect and what his undercover officer had told him. In both cases, the defendants possessed information giving rise to an exculpatory inference, and did nothing to examine 'easily discoverable facts' that would confirm or contradict that inference. . . But the complaint here does not allege that Rivera intentionally disregarded pertinent exculpatory information about Washington. Because she never received a phone call indicating that Washington had paid his fine, she already possessed evidence that he had not paid. And she possessed no information that Washington *had* in fact paid. We cannot say that a review of the case law would have indicated to her that the Constitution required *further* investigation to confirm that the evidence she possessed was accurate.")

Corbitt v. Vickers, 929 F.3d 1304, 1314-23 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) ("Given our conclusion that SDC was already seized when Vickers fired at the dog, we proceed by exercising our discretion to address only the qualified immunity issue as it relates to Corbitt's claim that Vickers's second shot at the dog violated SDC's clearly established Fourth Amendment rights. . . . Although we have held that SDC was already seized at the time of the shot, SDC is best described as an innocent bystander. And although the commands of the officers that SDC and the other children lie face down on the ground were actions directed at SDC and the other children, Corbitt does not claim that those actions violated SDC's Fourth Amendment rights; rather, she claims that the action of Vickers firing at the dog and accidentally hitting SDC violated the Fourth Amendment. We hold that Vickers's action of intentionally firing at the dog and unintentionally shooting SDC did not violate any clearly established Fourth Amendment rights. . . . First, we note that Corbitt failed to present us with any materially similar case from the United States Supreme Court, this Court, or the Supreme Court of Georgia that would have given Vickers fair warning that his particular conduct violated the Fourth Amendment. Corbitt admitted as much during the hearing on Vickers's motion to dismiss before the district court. Moreover, neither the district court's order nor our own research has revealed any such case. Thus, the only way Corbitt can successfully overcome Vickers's assertion of qualified immunity is to show either that 'a broader, clearly established principle should control the novel facts' of this case as a matter of obvious clarity, or that Vickers's conduct 'so obviously violates [the] constitution that prior case law is unnecessary.'. . . As our cases suggest, it is very difficult to demonstrate either. . . .[W]e conclude that the district court erred in relying on the general proposition that it is clearly established that the use of excessive force is unconstitutional. The unique facts of this case bear this out. Not only was SDC not the intended target of the arrest operation, he also was not the intended target of Vickers's gunshot. Both of these facts take this case outside 'a run-of-the-mill Fourth Amendment violation.'. . In other words, we are not dealing with 'an obvious case,' and no principles emerge from our decisions that speak with 'obvious clarity' to the unique and unfortunate circumstances that befell SDC. Indeed, we are unable to identify any settled Fourth Amendment principle making it obviously clear that volitional conduct which is not intended to harm an already-seized person gives rise to a Fourth Amendment violation. . . . No case capable of clearly establishing the law

for this case holds that a temporarily seized person—as was SDC in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person. In other words, Corbitt is not claiming that the officers' command that SDC and the other children lie face down on the ground violated Fourth Amendment rights. Nor is she claiming that any other action of the officers directed toward SDC and the other children violated Fourth Amendment rights. Rather, she is claiming SDC's Fourth Amendment rights were violated by Vickers's shot—an action targeting the dog, not SDC. Corbitt's Fourth Amendment claim is based on a governmental action not directed toward SDC and which only accidentally harmed SDC. . . . In sum, not only is there no materially similar binding case that clearly establishes a Fourth Amendment violation; dicta from the Supreme Court and nonbinding case law indicates that reasonable jurists have found no Fourth Amendment violation in similar circumstances. . . We conclude that the accidental shooting, as occurred here, does not constitute a clearly established Fourth Amendment violation as a matter of obvious clarity. . . Thus, Corbitt has failed to demonstrate a clearly established Fourth Amendment violation, either by the first method (a materially similar, binding case), or the second method (the violation is a matter of obvious clarity from such a binding case). We turn therefore to the third method (the challenged conduct so obviously violates the Fourth Amendment that prior case law is unnecessary). This is not a case that so obviously violates the Fourth Amendment that prior case law is unnecessary to hold Vickers individually liable for his conduct. To find otherwise would require us to conclude that no reasonable officer would have fired his gun at the dog under the circumstances. This we are unable to do. With the benefit of hindsight, we do not doubt Vickers could have acted more carefully; the firing of a deadly weapon at a dog located close enough to a prone child that the child is struck by a trained officer's errant shot hardly qualifies as conduct we wish to see repeated. However, even the underlying constitutional issue itself (which of course is easier for a plaintiff to prove than proving that particular circumstances violate clearly established constitutional law) is evaluated pursuant to a 'calculus ... [that] must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'. . In the instant qualified immunity context, we are cognizant that several cases (some of which are mentioned above) have considered similar accidental shootings of bystanders, and that many, if not most, of the jurists involved have concluded that there was no clearly established Fourth Amendment violation. Indeed, we are aware of no case and no jurist indicating that such an accidental shooting (i.e., one resulting from volitional conduct indisputably intended to stop someone or something other than the plaintiff) so obviously violates the Fourth Amendment that prior case law is unnecessary to hold that the officer violated clearly established law. . . Moreover, the facts alleged here involve 'accidental effects' of conduct directed toward something other than the plaintiff, not the kind of 'misuse of power' which *Brower* suggests is the focus of a Fourth Amendment violation. . . We conclude that the circumstances alleged in this case do not so obviously violate the Fourth Amendment such that it would be apparent to every reasonable officer that his actions were in violation of the Fourth Amendment. . . . The relevant question is not whether a reasonable officer would have refrained from shooting the dog. Instead, the relevant question is whether every reasonable officer would have inevitably refused to do so in light of the Fourth Amendment standards established by *Graham* and our own case law. Our answer to that

relevant question is in the negative. Accordingly, Vickers's qualified immunity defense must prevail in the absence of a materially similar case or a governing legal principle or binding case that applies with obvious clarity to the facts of this case. . . .Because we find no violation of a clearly established right, we need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place. This opinion expressly takes no position as to that question.")

Corbitt v. Vickers, 929 F.3d 1304, 1323-26 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (Wilson, J., dissenting) ("Because no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children, qualified immunity should not protect Officer Vickers. Therefore, I dissent. . . . This conduct—discharging a lethal weapon at a nonthreatening pet that was surrounded by children. . .is plainly unreasonable. The nonthreatening nature of the pet is crucial to this conclusion. . . We have consistently denied qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat. . . . It is also relevant that Officer Vickers was a mere foot and a half from S.D.C. and was only a few feet from several other children. Nonetheless, facing no apparent threat, Officer Vickers chose to fire his lethal weapon in the direction of these children. . . No reasonable officer would engage in such recklessness and no reasonable officer would think such recklessness was lawful. Therefore, I agree with the district court that Officer Vickers should not be entitled to qualified immunity.")

VI. When Is Right "Clearly Established?"

A. What Law Controls?

U.S. SUPREME COURT

District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8 (2018) ("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.")

Taylor v. Barkes, 135 S. Ct. 2042, 2044-45 (2015) (per curiam) ("No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols. And 'to the extent that a "robust consensus of cases of persuasive authority"' in the Courts of Appeals 'could itself clearly establish the federal right respondent alleges,'. . . the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist. [collecting cases] The Third Circuit

nonetheless found this right clearly established by two of its own decisions, both stemming from the same case. Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue.")

City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1776 (2015) ("[E]ven if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman,* 574 U.S. ——, ——, 135 S.Ct. 348, 350, 190 L.Ed.2d 311 (2014) (*per curiam*), it does not do so here.")

Carroll v. Carman, 135 S. Ct. 348, 350 (2014) ("Here the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity—*Estate of Smith v. Marasco,* 318 F.3d 497 (C.A.3 2003). Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, see *Reichle v. Howards,* 566 U.S. ——, ——, 132 S.Ct. 2088, 2094, 182 L.Ed.2d 985 (2012), *Marasco* does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights.")

Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here.")

Wilson v. Layne, 526 U.S. 603, 615, 616 (1999) (The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. Furthermore, A[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.").

United States v. Lanier, 520 U.S. 259, 269 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("[I]n applying the rule of qualified immunity under 42 U.S.C. § 1983 and *Bivens* . . . we have referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.'. . . Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.").

Elder v. Holloway, 114 S. Ct. 1019, 1023 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.' [cites omitted] That question of law, like the generality of such questions, must be resolved *de novo* on appeal.

[cite omitted] A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'").

D.C. CIRCUIT

Bame v. Dillard, 637 F.3d 380, 384, 386 (D.C. Cir. 2011) ("In this case the principle of constitutional avoidance counsels that we turn directly to the second question. As the Court recognized in *Pearson* itself, 'There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'. . This is such a case. Therefore the first and, as it happens, only question we address is whether it was clearly established in September 2002 that strip searching an arrestee before placing him in a detention facility without individualized, reasonable suspicion was unconstitutional. To answer this question, 'we look to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view,' *Johnson v. District of Columbia*, 528 F.3d 969, 976 (D.C.Cir.2008)–if there is one. . . . We conclude the law in 2002 did not clearly establish that strip searching all male arrestees prior to placement in holding cells at the Superior Court violated the Fourth Amendment. The governing precedent was then, as it is now, *Bell v. Wolfish*, and nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility. . . . We are aware of no Supreme Court case . . . that suggests a reasonable officer could not have believed his actions were lawful despite a consensus among the courts of appeals when a precedent of the Supreme Court supports the lawfulness of his conduct. A different reading of *Bell* by the several circuits to have considered the issue before 2002 could not 'clearly establish' the unconstitutionality of strip searches in this context. That *Powell* and *Bull* came down after 2002 is of no moment; those opinions simply accord with our own understanding that *Bell* did not establish the unconstitutionality of a strip search under conditions like those present here. . . . Because there was in 2002 no clearly established constitutional prohibition of strip searching arrestees without individualized, reasonable suspicion, we need not consider whether Dillard had individual suspicion as to each of the plaintiffs.")

FIRST CIRCUIT

Irish v. Fowler (Irish II), 979 F.3d 65, 76-80 (1st Cir. 2020) ("A rule is clearly established either when it is 'dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority.'". . A 'robust consensus' does not require the express agreement of every circuit. Rather, sister circuit law is sufficient to clearly establish a proposition of law when it would provide notice to every reasonable officer that his conduct was unlawful. . . '[T]he salient question ... is whether the state of the law [at the time of the defendants' conduct] gave [them] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional.' [citing cases, including *Hope v. Pelzer* and *Taylor v. Riojas*] The Supreme Court has established that cases involving materially similar facts are not necessary to a finding that the law was clearly established. . . The circuits have followed that rule. . . A defendant's adherence to proper police procedure bears on all prongs of

the qualified immunity analysis. . . When an officer violates the Constitution, state law, of course, provides no refuge. A lack of compliance with state law or procedure does not, in and of itself, establish a constitutional violation, but when an officer disregards police procedure, it bolsters the plaintiff's argument both that an officer's conduct 'shocks the conscience' and that 'a reasonable officer in [the officer's] circumstances would have believed that his conduct violated the Constitution.'. . The defendants' main argument is that because this circuit to date has not recognized the state-created danger doctrine, the law was not clearly established. That is simply incorrect. The Supreme Court has stated that clearly established law can be dictated by controlling authority or a robust consensus of persuasive authority. . . The widespread acceptance of the state-created danger theory, described above, was sufficient to clearly establish that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff. The defendants' reliance on *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), is also misplaced. In *Soto*, this court concluded that the state-created danger doctrine was not clearly established. . . The broad acceptance of the doctrine 'militate[d] in favor of finding that there [was] clearly established law in this area,' but two circumstances prevented the court from holding that the law was clearly established. . . First, the court noted that at the time of the defendants' conduct in *Soto*, the First Circuit had *never* 'discuss[ed] the contours of [the state-created danger] doctrine.'. . Second, the court relied on the fact that while the Third Circuit had then recently 'comprehensively described' the state-created danger theory, the history of the doctrine was 'uneven,' and that only 'more recent judicial opinions ... ha[d] begun to clarify the contours' of the doctrine. . . All of this had changed by the time Detective Perkins left the voicemail for Anthony Lord. By July 2015, this court had discussed the state-created danger doctrine at least a dozen times, even if it had never found it applicable to the facts of a specific case. And our sister circuits' law developed as well in the decades since *Soto*. The officers argue that because the Fifth and Eleventh Circuits have rejected the state-created danger doctrine, . . .the doctrine cannot be clearly established. Again, as a proposition of law this is wrong. A circuit split does not foreclose a holding that the law was clearly established, as long as the defendants could not reasonably believe that we would follow the minority approach. . . After *Rivera*, the defendants could not reasonably have believed that we would flatly refuse to apply the state-created danger doctrine to an appropriate set of facts. *Rivera* was a critical warning bell that officers could be held liable under the state-created danger doctrine when their affirmative acts enhanced a danger to a witness. This court did not simply dismiss Rivera's claim without analysis, as would have been appropriate if the state-created danger doctrine could never apply to any set of facts in this circuit. Instead, *Rivera* outlined the elements of the state-created danger doctrine and performed a nuanced analysis of why each particular action of the defendants was not the type of affirmative act covered by the doctrine. . . *Rivera* warned that if an officer performed a *non-essential* affirmative act which enhanced a danger, a sufficient causal connection existed between that act and the plaintiff's harm, and the officer's actions shocked the conscience, the officer could be held liable for placing a witness or victim in harm's way during an investigation. Defendants also argue that they are immune from suit because no factually similar cases alerted them that their conduct was impermissible. This too is incorrect. As we have just said, a general proposition of law may clearly establish the violative nature of a defendant's actions, especially when the violation is egregious.

. . Not only is the argument wrong, but its premise is wrong; there are factually similar earlier cases. Both were decided after *Soto*. . . . The plaintiffs allege that the defendants, even in the face of Irish's expressed fear that Lord would react violently, contacted him in a manner that a reasonable jury could find notified him that Irish had reported him to the police. The plaintiffs also allege that the defendants failed to convey her request for protection to their superiors for several hours and further failed to inform her in a timely fashion that the request had been denied. A jury could also conclude that the defendants played a role in the decision to withdraw all resources from the area without telling the plaintiffs that they had done so, thereby allowing the plaintiffs to believe more protection was available than was actually true. Finally, the defendants' apparent utter disregard for police procedure could contribute to a jury's conclusion that the defendants conducted themselves in a manner that was deliberately indifferent to the danger they knowingly created, and that they thereby acted with the requisite mental state to fall within the ambit of the many cases holding that a violation of the Due Process Clause requires behavior that 'shocks the conscience.'. . Whether the jury will or should conclude as much is, of course, not a question for this court, but it was clearly established in July 2015 that such conduct on the part of law enforcement officers, if it occurred, could give rise to a lawsuit under § 1983.")

SECOND CIRCUIT

Jones v. Treubig, 963 F.3d 214, 236-37 & n.13 (2d Cir. 2020) ("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. . . 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. [collecting cases] . . . .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."'. . 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.")

Sanchez v. Bonacchi, 799 F. App'x 60, __ (2d Cir. 2020) ("In denying qualified immunity, the District Court held in part that, 'because Defendant essentially testified that he knew [conducting a manual cavity search] violated Plaintiff's rights, Defendant is not entitled

to qualified immunity.'. . By relying on Bonacchi's subjective intent or belief as to the state of the law to determine whether he was entitled to qualified immunity, the District Court erred. . .We nonetheless affirm the District Court's denial of judgment as a matter of law because this Court's binding opinion in *Sloley v. VanBramer*, 945 F.3d 30 (2d Cir. 2019), compels that result. Under *Sloley*, as of 2013, when the search at issue in this case occurred, it was clearly established that a 'visual body cavity search conducted as an incident to a lawful arrest for any offense must be supported by a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.'. . A manual body cavity search, which is more intrusive than a visual search, must at minimum be supported by the same reasonable suspicion as a visual cavity search.")

Sloley v. VanBramer, 945 F.3d 30, 33-34, 37-43 (2d Cir. 2019) ("We vacate in part and hold that visual body cavity searches must be justified by specific, articulable facts supporting reasonable suspicion that an arrestee is secreting contraband inside the body cavity to be searched. Moreover, because this requirement was established by sufficiently persuasive authority, it was 'clearly established' for purposes of a qualified immunity defense by New York state police officers at the time Eric searched Sloley. . . .[W]e have held that the Fourth Amendment 'requires an individualized "reasonable suspicion that a misdemeanor arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" before she may be lawfully subjected to a strip search.'. . The VanBramers are correct that neither we nor the Supreme Court have ever squarely held that a similar reasonable suspicion requirement applies to visual body cavity searches of persons arrested for felony offenses. Balancing the degree to which visual body cavity searches 'intrude[ ] upon an individual's privacy' against 'the degree to which [they are] needed for the promotion of legitimate governmental interests,'. . . we now hold that such searches do require reasonable suspicion. In other words, a visual body cavity search conducted as an incident to a lawful arrest for any offense must be supported by 'a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.'. . .To be sure, the type of crime for which someone is arrested may play some role in the analysis of whether a visual body cavity search incident to that arrest is supported by reasonable suspicion. But that role has nothing to do with a categorical distinction between felonies and misdemeanors. Rather, the question is whether the criminal conduct for which a person was arrested speaks to the likelihood that he or she secreted contraband inside a body cavity. . . . In short, we have previously held that strip searches conducted incident to a misdemeanor arrest must be supported by reasonable suspicion. . . . We clarify today that that rule applies equally to visual body cavity searches incident to all arrests and hold that such searches must be based on reasonable suspicion to believe that the arrestee is secreting evidence inside the body cavity to be searched. . . . At the time of the search at issue here, this Court had not yet held that visual body cavity searches incident to a felony arrest must be supported by reasonable suspicion. Nevertheless, we have little trouble concluding that that requirement would have been sufficiently clear to a reasonable New York state police officer in the VanBramers' position. . . . We have, at times, suggested that the proper inquiry is whether 'the Supreme Court or the Second Circuit [has] affirmed the rule.'. . However, that is not the only way

in which a right may be 'clearly established' for qualified immunity purposes. In addition to being 'dictated by controlling authority,' a right may be 'clearly established' if it is supported by 'a robust consensus of cases of persuasive authority.'. . The rule must be more than merely 'suggested by then-existing precedent.'. . Rather, the 'decisions by this or other courts' must 'clearly foreshow a particular ruling.'. . . Here, every reasonable officer in the VanBramers' position as New York State Troopers would have known that visual body cavity searches conducted incident to any arrest must additionally be supported by 'a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity' and must be conducted in a reasonable manner. . . This Court has been previously unpersuaded that existing Supreme Court precedent, Second Circuit precedent, and the above-cited body of district court decisions are sufficient to have made it 'clearly established' for qualified immunity purposes that visual body cavity searches incident to felony arrests require reasonable suspicion. . . What tips the balance in this case, however, is the decision of the New York Court of Appeals, five years before the search at issue in this case took place, holding that the Fourth Amendment requires visual body cavity searches conducted incident to any lawful arrest. . . to be supported by 'a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity'—the very rule we adopt today. . . The VanBramers' ask our decision in *Gonzalez* to carry more weight than it can bear. There, we held that it was not clearly established that an officer must have reasonable suspicion before conducting a visual cavity search incident to a felony arrest. . . However, that holding was based, at least in part, on the observation that '*Hall* was decided *after* the search at issue in [that] case,'. . . and for that reason *Gonzalez* is not a basis for upholding a qualified immunity defense for a search conducted after *Hall*. *Gonzalez* also noted that 'not one case cited in *Hall* said that an officer needs particular, individualized facts to conduct a visual body cavity search.'. . Even if true, that circumstance is not a basis for disregarding the authoritative effect of a decision of New York's highest court on the availability of a qualified immunity defense for a New York state police officer. The VanBramers cannot draw the conclusive support they seek from a case regarding the state of the law in 2006 when the search at issue in *Gonzalez* took place, . . . because the legal landscape was different in 2013 when the search here took place. To be clear, we need not and do not decide whether a decision of a state court, standing alone, would necessarily suffice to defeat a Section 1983 defendant's claim to qualified immunity in every case. Nevertheless, '[s]tate court decisions, like the decisions of other federal lower courts, are relevant and often persuasive' authority on the 'clearly established' issue. . . Nor do we hold that *Hall* would necessarily tip the balance against finding qualified immunity if this case involved officers from different states in our Circuit. . . In this case, however, *Hall* is not just persuasive authority in this Court; it has been binding authority for the VanBramers since 2008. At the time Eric conducted the visual body cavity search of Sloley in 2013, the VanBramers—New York State Troopers—were already forbidden as a matter of federal constitutional law as interpreted by the New York Court of Appeals—the highest court in their state—from conducting suspicionless visual body cavity searches incident to felony arrests. Thus, had they discovered evidence during the course of a suspicionless visual body cavity search incident to arrest, that evidence would have been subject to suppression on Fourth Amendment grounds in any corresponding state criminal proceeding. . . We therefore do not hesitate to

conclude that they were 'on notice their conduct [was] unlawful.'. . We pause to address the dissent's misplaced concern that our reliance on the caselaw of the highest court of New York will inhibit police activity by forcing police officers to be attentive to the federal law of constitutional rights as developed in both state and federal courts. It is beyond doubt that police officers frequently have difficult jobs. But if the dissent were right, then state police officers could disregard the decisions of state supreme courts without any fear of being held accountable through a § 1983 action. This is inconsistent with our cases, which hold that courts can look to state court decisions to determine if a federal right has been clearly established. . . And in conjuring up a fictitious world where police proceed as unlicensed attorneys, the dissent overlooks that it is already the job of state police officers to follow the federal constitutional rules articulated by the supreme court of their state.")

Sloley v. VanBramer, 945 F.3d 30, 47-50 (2d Cir. 2019) (Jon O. Newman, J., concurring) ("In dissent, Judge Jacobs contends that the majority opinion permits a decision of New York's highest court, *People v. Hall*, 10 N.Y.3d 303, 856 N.Y.S.2d 540, 886 N.E.2d 162 (2008), to establish federal law for purposes of a New York state police officer's qualified immunity defense. Judge Jacobs also apprehends that the majority's ruling will oblige police officers to 'keep ahead of trends in federal constitutional law ....'. . . I concur in Judge Pooler's opinion and add these words to point out that the majority considers *Hall* important to our ruling but by no means the sole basis for deciding that the New York officer, arresting a person for a felony, should have known that he must have reasonable suspicion to conduct a visual body cavity search. I also seek to allay the unwarranted concern about police officers' difficulty in understanding the constitutional limits on their conduct. The majority announces no general rule that the requirements of federal law, for purposes of a qualified immunity defense to a claim of unconstitutional police misconduct, can be established by a state court decision. The decision of the New York Court of Appeals in *Hall* is enlisted as part of the guidance available to the New York state police officer in this case because of the following unusual combination of circumstances that existed prior to the visual body cavity search he conducted:
(1) The Supreme Court acknowledged 34 years before the search in this case that visual body cavity searches 'instinctively give us the most pause.'. . . (2) The unconstitutionality of a visual body cavity search without reasonable suspicion had been firmly established in this Circuit for those arrested for misdemeanors . . . . (3) The distinction between misdemeanors and felonies was highly unlikely to be considered by a police officer hurriedly deciding to make a visual body cavity search of a person arrested for a misdemeanor. . . (4) The seriousness of the assault that a visual body cavity search inflicts on personal dignity had been repeatedly recognized in federal law[.] . . . (5) New York's highest court had instructed New York state police officers that a visual body cavity search of all persons arrested requires reasonable suspicion 'supported by a specific, articulable factual basis[.]'. . . (6) Decisions of New York's Appellate Division had reinforced the ruling in *Hall*. . . (7) District courts in this Circuit had understood that a visual body cavity search requires reasonable suspicion. . . Although these courts do not establish federal law for purposes of qualified immunity, their consistency contributes to the conclusion that the requirement of reasonable suspicion for visual body cavity searches was established prior to VanBramer's search.

The combination of these circumstances, not the *Hall* decision alone, clearly establishes that reasonable suspicion is required for a visual body cavity search of a person arrested for a felony. At a minimum, these circumstances clearly foreshadow the requirement, and we have ruled that a constitutional limitation on police conduct can be clearly established for purposes of a qualified immunity defense if 'decisions by this or other courts "clearly foreshadow a particular ruling on the issue."'. . Judge Jacobs suggests that New York police officers will have to 'anticipate new law.' Not so. Once the highest court of New York ruled that a police officer may conduct a visual body cavity search only if the officer has reasonable suspicion 'that the arrestee has evidence concealed inside a body cavity,'. . . all New York police officers were on notice of their legal obligations concerning visual body cavity searches. Whether or not VanBramer could anticipate that this Court would rule, under the particular circumstances outlined in Judge Pooler's opinion, that reasonable suspicion as a requirement for visual body searches of those arrested for felonies was sufficiently established, or at least foreshadowed, to defeat a qualified immunity defense under 42 U.S.C. § 1983, he was on notice that reasonable suspicion was required. It would be fanciful to think that he said to himself, 'I know that New York's highest court has ruled that I need reasonable suspicion, but I will go ahead without such suspicion because I am not sure that a federal court will rule that the federal right not to be subjected to a body cavity search without reasonable suspicion has been clearly established.'. . . Judge Jacobs expresses concern that under the majority's ruling police officers 'would need to keep ahead of trends in federal constitutional law as developed in state courts as well as in federal courts.'. . But the only state court decisions the majority opinion charges VanBrmer or any reasonable New York State police officer with an obligation to follow are decisions of New York courts, which he is obliged to follow no matter how we rule. And though it is concededly unusual to rule that reasonable police officers in Connecticut and Vermont are not subject to the same federal requirement as reasonable New York police officers, I see no reason to impose on them a requirement influenced in significant part, but not exclusively, by a decision of New York's highest court. . . . For all of these reasons, I concur in Judge Pooler's opinion, ruling that a remand to resolve a factual dispute is required in order to determine whether VanBramer is shielded by qualified immunity from liability for conducting a visual body cavity search of Maximillian Sloley without reasonable suspicion that narcotics were concealed within his body.")

Sloley v. VanBramer, 945 F.3d 30, 50-52 (2d Cir. 2019) (Jacobs, J., dissenting) ("I respectfully dissent. I would affirm the grant of qualified immunity to New York State Trooper Eric VanBramer, who conducted a body-cavity search when the plaintiff was arrested for a felony offense. Federal constitutional law recognizes that a body-cavity search requires reasonable suspicion if a person is arrested for a *misdemeanor*[.] . . . .There is thus an express distinction between misdemeanors (and other minor offenses) and felonies. . . . [I]f *Hall* can make the difference to clearly establish the Fourth Amendment right that Sloley contends was violated, then federal constitutional law can be made clearly established by state courts. Moreover, it would follow that clearly established federal constitutional law can differ state-by-state within the same circuit. That is not contested by the majority. . . . Splits could thus be opened state-by-state within this Circuit on issues of federal constitutional law. I don't see how that can be; and I see no

explanation in the majority opinion beyond the shrug that such a 'strange' result is 'simply a quirk of our federal system[.]'. . . But *Hall*—which of course is not a decision of the Supreme Court or the Second Circuit—cannot plausibly make federal constitutional law, let alone clearly establish it. . . . To maintain qualified immunity, officers need to know only the settled precepts of federal constitutional law. In order to decide what every police officer should know, the majority opinion splices together: a federal circuit court opinion that goes the other way, a state court opinion, several trial court opinions, and whatnot. If the majority opinion were the law, officers would need to keep ahead of trends in federal constitutional law as developed in the state courts as well as in the federal courts. . . and because the majority opinion shores up its argument with trial court opinions, officers would need to follow developments in the trial courts as well as in the appellate courts: I don't know what my colleagues think police do all day. The majority has it backwards. The better an officer understands federal constitutional law, the less plausible it would seem to her that settled federal constitutional law could vary in the several states of a single circuit. Certainly, it is news to me. It is hard enough for police to ascertain settled federal constitutional law; it is surely harder to anticipate new law; but it is simply impossible to anticipate error. So a police officer who understood the concept of clearly established federal constitutional law would have no notice that it could be one thing in New York and something else in Connecticut and Vermont. Even among persons trained in the law, few would think that. . . . If the majority's error prospers, police will have to follow federal constitutional developments in the state courts as well as the federal courts, and apply a learned distinction between state court rulings that are based on the federal Constitution and those that are based on state law. It may be thought that any confusion will be a benign limitation on the police; but it is by no means always good to inhibit police conduct, and it is an error for federal courts to restrict police conduct by imposing liability on individual officers unless the federal Constitution is unambiguously violated. That is not my opinion; that is Supreme Court law. . . The majority's idea that federal law can be clearly established state-by-state, or even circuit-by-circuit, is conceptually flawed because federal constitutional law is national and uniform. A circuit court ruling that a principle is clearly established is not pronouncing on local or regional constitutional law; it reflects the understanding of that circuit as to the clear establishment of that law nationwide. That is why a circuit split on what is clearly established becomes a problem for the Supreme Court to resolve. . . If federal constitutional law is deemed to be made or settled in the courts of each state, the federal constitution will mean different things in different places within each jurisdiction of a single circuit: a kind of circuit splinter.")

THIRD CIRCUIT

James v. New Jersey State Police, 957 F.3d 165, 170 (3d Cir. 2020), *reh'g and reh'g en banc denied sub nom Gibbons v. New Jersdy State Police,* 969 F.3d 419 (3d Cir. 2020), *pet. for cert. filed sub nom James v. Bartelt*, No. 20-997 (U.S. Jan. 4, 2021) ("For qualified-immunity purposes, 'clearly established rights are derived either from binding Supreme Court and Third Circuit precedent or from a "robust consensus of cases of persuasive authority in the Courts of Appeals."'. . So we first look to factually analogous precedents of the Supreme Court and the Third Circuit. .

. Then, we examine persuasive authorities, such as our nonprecedential opinions and decisions from other Courts of Appeals. . . We may consider all relevant cases under this inquiry, not just those cited by the parties. [citing *Elder v. Holloway*]")

Randolph-Ali v. Minium, 793 F. App'x 146, ___ (3d Cir. 2019) ("We acknowledge that the Ninth Circuit had held, prior to August 2014, that officers employed excessive force when they used a taser without warning on a potential domestic abuse victim whose 'crime, if any, was minimal,' who 'posed no threat to the officers,' who 'minimally resisted [her husband's] arrest while attempting to protect her own body and to comply with [an officer's] request that she speak to him outside, and [who] begged everyone not to wake her sleeping children.'. . The facts in *Mattos*, however, are distinguishable from those presented here. The officer in *Mattos* used the taser in 'dart mode,' which constitutes an intermediate, significant level of force, while Detective Minium tased Randolph-Ali in 'drive stun' mode, which causes incapacitating pain, but does not paralyze the entire body. . . In addition, Randolph-Ali refused to comply with Detective Minium's demand that she allow him inside to search for the suspect. By contrast, the plaintiff in *Mattos* 'was attempting to comply with [a police officer's] request to speak with her outside when she got physically caught in the middle between [another police officer] and [her husband].'. . Finally, Randolph-Ali's crime was not 'minimal.' Instead, she was arrested for, inter alia, endangering the welfare of children, obstructing the administration of law, resisting arrest, and disorderly conduct. Under these circumstances, we conclude that there is no consensus of authority that Detective Minium's actions under the particular circumstances of this case implicated a clearly established constitutional right. Accordingly, we will affirm the District Court's judgment.")

FOURTH CIRCUIT

Latson v. Clarke, 794 F. App'x 266, ___ (4th Cir. 2019) ("Although no longer good law, . . . at the time of Latson's incarceration (2014–2015) we had held that long-term solitary confinement did not violate the Eighth Amendment. . . Latson argues that MCTC staff nevertheless had fair notice of the unconstitutional nature of solitary confinement as applied to prisoners with mental disabilities, given a handful of district court opinions from outside this Circuit. [citing cases] The argument fails. These decisions simply do not represent an 'overwhelming consensus' of persuasive authority that clearly established and gave fair notice of an Eighth Amendment violation, particularly due to our contrary circuit authority at the time of the alleged violation. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017). Accordingly, notwithstanding the dreadful conditions imposed on Latson, we can only conclude that MCTC staff are entitled to qualified immunity.")

Booker v. South Carolina DOC, 855 F.3d 533, 539-46 (4th Cir. 2017), *cert. denied*¸ 138 S. Ct. 755 (2018) ("The Supreme Court, in an opinion authored by Chief Justice Rehnquist, articulated that courts may rely on 'a consensus of cases of persuasive authority' to determine whether a 'reasonable officer could not have believed that his actions were lawful.'. . Since *Wilson*, the Supreme Court has reaffirmed that 'qualified 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."'. . . And in evaluating whether a right is clearly established in a given circuit, the Supreme Court has looked to precedent from other circuits. [citing *Pearson* and *Brosseau*] . . . . At the outset, we preempt a possible point of confusion—Booker did *not* allege in his complaint that he has an absolute right to file prison grievances pursuant to the First Amendment. Rather, Booker alleged that he has a First Amendment right to be free from retaliation when he does file a grievance pursuant to an existing grievance procedure. . . More particularly, Booker asserts that this right is rooted in the First Amendment's Petition Clause, which guarantees individuals the right 'to petition the Government for a redress of grievances.'. . Booker contends that an inmate's right to petition is violated when he is retaliated against for filing a grievance. . . . Booker's detailed factual allegations and his reference to the First Amendment provide a more-than-sufficient basis for us to analyze whether the right was clearly established under the Petition Clause. . . .The clearly established inquiry asks whether the state of the law gave a reasonable prison official 'fair warning' that retaliating against an inmate who files a prison grievance was unconstitutional. It is 'well established' in this Circuit that a 'public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right.'. . . Thus, if an inmate exercises his First Amendment right when he files a prison grievance, retaliation against him for doing so is unconstitutional. The pertinent question in this appeal, then, is whether it was clearly established that an inmate exercises a First Amendment right to petition for redress of grievances when he files a prison grievance. Framed differently, we must determine whether it was clearly established that an inmate's right to petition is violated when he is retaliated against for filing a grievance. . . . *Adams* [*v. Rice*, 40 F.3d 72 (4th Cir. 1994)] establishes a clear rule: inmates have no constitutional entitlement or due process interest in access to a grievance procedure. An inmate thus cannot bring a § 1983 claim alleging denial of a specific grievance process, for example. But *Adams* is entirely silent on the issue in this case—whether an inmate's First Amendment right is violated when he is *retaliated against* for submitting a grievance pursuant to an existing grievance procedure. That a prison is not required under the Constitution to provide access to a grievance process does not mean that prison officials who retaliate against inmates for filing grievances do not violate the Constitution. . . .The Eighth Circuit is not alone in finding that although inmates do not have a constitutional entitlement to and/or due process interest in accessing a grievance procedure, they have a First Amendment right to be free from retaliation when they do file. [collecting cases from other Circuits] In short, *Adams* concerns whether inmates have a constitutional entitlement to or liberty interest in accessing grievance procedures. It says nothing about whether a prison official violates an inmate's First Amendment rights by retaliating against the inmate for submitting a grievance. Therefore, contrary to Appellees' suggestion, *Adams* does not speak to the right at issue. As such, neither party has cited cases from courts of controlling authority—the Supreme Court, this Court, or the Supreme Court of South Carolina—that explicitly address an inmate's First Amendment right to be free from retaliation for filing a prison grievance. . . .We therefore agree with the district court's conclusion that no published decision from the Supreme Court, this Court, or the Supreme Court of South Carolina squarely addresses whether filing a grievance is protected First Amendment conduct. The district court, after determining there were no binding cases that squarely established the specific First Amendment right, concluded that

the right was not clearly established. . . But the clearly established inquiry was not complete: as this Court has stated, and as Booker recognizes, the 'absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity.'. . The district court failed to consider whether, despite the lack of directly on-point, binding authority, the right was clearly established based on general constitutional principles or a consensus of persuasive authority. We now proceed to that task. . . .In the absence of controlling authority that specifically adjudicates the right in question, a right may still be clearly established in one of two ways. A right may be clearly established if 'a general constitutional rule already identified in the decisional law [ ] appl[ies] with obvious clarity to the specific conduct in question.'. . A right may also be clearly established based on a ' "consensus of cases of persuasive authority" from other jurisdictions.'. . Here, Booker argues that his First Amendment right was clearly established in both ways. Arguably, the prohibition on retaliating against inmates for filing grievances was obviously unconstitutional given longstanding principles articulated in controlling authority. It is beyond dispute that prison officials cannot retaliate against inmates for exercising a constitutional right. . . And Booker presents a logical and compelling argument that, in light of binding Supreme Court precedent, he exercised his constitutional right to petition the government for redress of grievances when he filed an administrative grievance seeking redress for what he believed was the improper handling of his legal mail. . . In addition to Supreme Court precedent, this Court has long held that prison officials may not retaliate against prisoners for exercising their right to access the courts, . . . which is a component of the right to petition for redress of grievances [.] . . . Given the close relationship between an inmate filing a grievance and filing a lawsuit—indeed, the former is generally a prerequisite for the latter—our jurisprudence provided a strong signal that officials may not retaliate against inmates for filing grievances. Regardless of whether Booker's right was obvious or 'manifestly apparent' from broader principles in the decisional law, we find that it was clearly established based on a robust 'consensus of persuasive authority.' The Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have all recognized in published decisions that inmates possess a right, grounded in the First Amendment's Petition Clause, to be free from retaliation in response to filing a prison grievance. . . .The Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have likewise recognized that inmates possess a First Amendment petition right to be free from retaliation for filing grievances. [collecting cases] Even more, the Third, Fifth, and Tenth Circuits have recognized an inmate's right to be free from retaliation for filing a grievance under the First Amendment (albeit without referencing a particular clause). [collecting cases] Given the decisions from nearly every court of appeals, we are compelled to conclude that Booker's right to file a prison grievance free from retaliation was clearly established under the First Amendment. Consistent with fundamental constitutional principles and common sense, these courts have had little difficulty concluding that prison officials violate the First Amendment by retaliating against inmates for filing grievances. Rarely will there be such an overwhelming consensus of authority recognizing that specific conduct is violative of a constitutional right. The unanimity among our sister circuits demonstrates that the constitutional question is 'beyond debate,' and therefore we find that the right at issue was clearly established. . . . Our 'conclusion that "a reasonable person would have known," *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 818 (1982)], of the violation is buttressed by' the South Carolina Department of Correction's internal policies.

. . Although officials 'do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision,'. . . the Supreme Court has analyzed prison regulations in combination with case law to determine whether an individual had fair warning[.] [citing *Hope*] Here, the SCDC's detailed policy document concerning the 'Inmate Grievance System'. . .expressly provides that '[n]o inmate will be subjected to reprisal, retaliation, harassment, or disciplinary action for filing a grievance or participating in the resolution of a grievance.'. . The record further indicates that this prohibition was communicated to prison officials. . . . Again, the fundamental inquiry for purposes of qualified immunity is whether a reasonable official in Jones's position had 'fair warning' that the alleged conduct was unconstitutional. . . The unequivocal language of SCDC's own policies provides additional support for our finding that Jones had such warning here. In sum, given the authority discussed above, we conclude that a reasonable prison official had fair warning that retaliating against an inmate who filed a prison grievance was unlawful. Because an inmate's First Amendment right to be free from retaliation for filing a grievance was clearly established, we find that Appellees are not entitled to qualified immunity on that basis and therefore the district court erred in granting their motion for summary judgment.")

Booker v. South Carolina DOC, 855 F.3d 533, 547-53 (4th Cir. 2017) (Traxler, J., dissenting), *cert. denied*, 138 S. Ct. 755 (2018) ("Relying on decisions from other circuits, the majority concludes that a prisoner's right to be free from retaliation for filing a grievance was clearly established in 2010, when the actions giving rise to this lawsuit took place. Even assuming that that right may have been clearly established in *other* circuits, the case law from *this* circuit in 2010 could reasonably be understood as foreclosing that claim. *See Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994). Because the controlling law in this circuit did not put the prison officials on notice that their conduct violated Booker's constitutional rights, I believe the prison officials are entitled to qualified immunity. Accordingly, I respectfully dissent. . . . I do not disagree that the weight of authority outside this circuit holds that the First Amendment is violated when prison officials retaliate against an inmate for filing a grievance under an established grievance system. Where I disagree with the majority is in its conclusion that case law from this circuit was silent on the relevant First Amendment question. In my view, this court's decision in *Adams v. Rice* could reasonably be understood as holding that an inmate's use of a prison grievance system does not implicate the First Amendment and that grievance-based retaliation against the inmate likewise does not implicate the First Amendment. Because *Adams* can reasonably be understood to permit the actions of the prison officials at issue in this case, the majority erred by looking outside the circuit to conclude otherwise. . . .[I]f filing a grievance implicates no constitutional right, then retaliation against the inmate because of the grievance does not violate the Constitution. . . . I simply see no basis for concluding, as the majority apparently does, that the act of filing a grievance -- an act that is *not* constitutionally protected -- somehow imbues the filing with constitutional protections. Accordingly, it seems to me that this court's decision in *Adams* affirmatively closes the door to the retaliation claim being asserted here. . . .In my view, *Adams* directly, though not explicitly, forecloses Booker's retaliation claim. But even if the distinction between this case and *Adams* that the majority apparently embraces were viable, a reasonable prison official could still conclude that the actions alleged in this case were permissible under this

court's decision in *Adams*. . . . I therefore believe that the defendants are entitled to qualified immunity. . . .In *Adams*, this court held that 'there is no constitutional right to *participate* in grievance proceedings.' 40 F.3d at 75 (emphasis added). Because inmates participate in grievance proceedings by *filing a grievance*, our decision in *Adams* must be understood as holding that inmates have no constitutional right to file a grievance. The filing of a grievance therefore implicates no constitutional right of the inmate and cannot support a retaliation claim against prison officials. . . .*Adams* is binding authority that directly rejects the constitutional right asserted in this case. The majority errs by ignoring *Adams* and relying instead on out-of-circuit cases that are inconsistent with our holding in *Adams* in order to declare that an inmate's right to be free from retaliation for filing a grievance was clearly established. Accordingly, for the foregoing reasons, I believe that the defendants are entitled to qualified immunity, and I therefore respectfully dissent from the majority's contrary conclusion.")

FIFTH CIRCUIT

Nerio v. Evans, 974 F.3d 571, 575 & n.2 (5th Cir. 2020) ("We cannot find a case that would've given Evans 'fair notice' that his conduct might be unconstitutional. . . Therefore, Appellant Nerio has not shown that the violative nature of Evans's particular conduct was clearly established at the time of the arrest. . . . Although we know the Supreme Court's decisions can clearly establish the law, the Supreme Court has never held that our decisions can do the same. *See Wesby*, 138 S. Ct. at 591 n.8 ("We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.").")

Marks v. Hudson, 933 F.3d 481, 486 (5th Cir. 2019) ("Because nonprecedential opinions do not establish any binding law for the circuit, *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322 n.1 (5th Cir. 2019), they cannot be the source of clearly established law for qualified immunity analysis. Certainly, though, to the extent any of those opinions are restating what was clearly established in precedents they cite or elsewhere, the unpublished opinions can properly guide us to such authority.")

SIXTH CIRCUIT

Ashford v. Raby, 951 F.3d 798, 801, 803-04 (6th Cir. 2020) ("[E]ven if Raby's use of force *was* unreasonable, Ashford still can't recover unless its unreasonableness was 'clearly established at the time.'. . That's a tough standard. How tough? Well, Ashford must show that 'then-existing precedent' put the illegality of Raby's conduct 'beyond debate.'. . The law must have been so clear that *every* reasonable officer in Raby's shoes would have recognized that the force used was excessive—and not just in the abstract but in the *precise* situation Raby was facing. . . That means that Ashford must point to precedent finding a Fourth Amendment violation in similar circumstances or (failing that) show that this is 'the rare "obvious case"' in which no precedent is needed. . . So can Ashford show that Raby violated his clearly established rights? He

cannot. . . . At the very least, Raby's choice to deploy the dog was not 'plainly incompetent' and did not violate clearly established law. . . Ashford can point to no binding authority holding that deploying a police dog in similar circumstances violated the Fourth Amendment. . . Indeed, most of this circuit's excessive-force precedents involving police dogs find no violation at all. . . . Ashford cites only two out-of-circuit cases to show that Raby should have known his use of force was unreasonably prolonged. . . But as a threshold matter, our sister circuits' precedents are usually irrelevant to the 'clearly established' inquiry. The only exception is for 'extraordinary' cases where out-of-circuit decisions 'both point *unmistakably* to' a holding and are '*so clearly* foreshadowed by applicable direct authority as to leave *no doubt*' regarding that holding. . . . This general rule against out-of-circuit authority makes perfect sense. Why? Because at its heart, the 'clearly established' requirement comes down to fair notice. . . Reasonable officers in this circuit will pay attention to this court's caselaw. After all, that's the law that governs their actions. But we can't expect officers to keep track of persuasive authority from every one of our sister circuits. . . They spend their time trying to protect the public, not reading casebooks. . . . In the end, nothing about Raby's use of Ruger to seize Ashford violated clearly established law. Thus, Raby is entitled to qualified immunity.")

SEVENTH CIRCUIT

Estate of Clark v. Walker, 865 F.3d 544, 551-52 (7th Cir. 2017) ("Clark's right to be free from deliberate indifference to his risk of suicide while he was in custody was clearly established at the time of his death in 2012. . . .Walker responds to this substantial body of case law in several ways. First, he argues that it is 'doubtful' whether circuit precedent can clearly establish law for purposes of qualified immunity. He cites two Supreme Court cases, but both cases leave this question unanswered. See *Taylor v. Barkes*, 579 U.S. —, —, 135 S. Ct. 2042, 2045 (2015); *City & County of San Francisco v. Sheehan*, 575 U.S. —, —, 135 S. Ct. 1765, 1776 (2015). Other Supreme Court cases indicate circuit precedent is adequate for these purposes. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely."). In addition, we have exercised this authority for decades, including in this specific context of prison and jail suicides. See *Hall*, 957 F.2d at 404–05; see also *Werner v. Wall*, 836 F.3d 751, 762 (7th Cir. 2016). We see no reason to depart from these precedents.")

Werner v. Wall, 836 F.3d 751, 762 & n.28 (7th Cir. 2016) ("In conducting the clearly established inquiry, our first task is to consider controlling Supreme Court and Seventh Circuit precedent. . . Our earlier discussion makes evident that the precedent of the Supreme Court and of our court certainly did not provide adequate guidance to permit the defendants to understand their responsibilities in the face of the tangle of overlapping laws and regulations that Wisconsin had created. . . We therefore must 'cast a wider net' and look to whether 'all relevant case law' demonstrates "such a clear trend ... that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'. . In this respect, Mr. Werner identifies a line of Wisconsin state court decisions. . . .We are not alone in looking to trends in the

decisional law of other jurisdictions once we are satisfied that controlling precedent in our own circuit does not clearly establish a particular legal right. [collecting cases]")

Sutterfield v. City of Milwaukee, 751 F.3d 542, 551, 573-79 (7th Cir. 2014) ("It will no doubt be frustrating to Sutterfield and to the reader that we do not reach firm conclusions as to the merits of all of the claims she has asserted and instead, like the district court, resolve the case in part based on the doctrine of qualified immunity. We recognize the significant role that resolving the merits of each claim plays in the development of precedent and clarifying the boundaries of constitutional rights. . . But given the importance of the interests at stake, the lack of clarity in the case law, and the shallowness of the briefing as to the alternatives available to the police on the facts presented here, we believe that the tentative nature of some of our analysis is appropriate. . . .Sutterfield contends that because Wisconsin precedent would not bind this court on the merits of her claims, and because in particular we, in contrast to the Wisconsin courts, have refused to extend the community caretaking doctrine to anything but automobile searches, the Wisconsin cases are irrelevant in terms of whether the defendants have qualified immunity. Not so. Although it is true that in this court, the Wisconsin cases have persuasive value only on the merits of Sutterfield's federal claims, they remain relevant as to what the defendants might have thought the law, including the federal constitution, permitted them to do in executing the emergency statement of detention. Federal courts do not possess exclusive authority to decide Fourth Amendment issues; state courts resolve such issues every day. . . In the absence of a controlling decision by the United States Supreme Court, the Wisconsin cases are thus as relevant as our own precedents in evaluating what a Milwaukee police officer might have thought the law permitted in responding to a report that the occupant of a private dwelling was in danger of harming herself. . . . Although our decision in *Pichany* refused to extend the community caretaking exception recognized by the Supreme Court in *Cady* beyond the automobile context, Wisconsin courts have given the exception a much broader reach. They have relied on the community caretaking doctrine to justify warrantless entries into the home when the police have reason to believe that the occupant may be injured or otherwise in danger of harm. . . . Based on these decisions, the officers who forcibly entered Sutterfield's home could have believed that their entry was justified by the community caretaking doctrine as understood and applied by the Wisconsin courts. . . .The decision to forcibly open and search the locked compact disc case discovered in the course of the protective sweep presents a closer question in terms of the officers' qualified immunity, just as it does on the merits of Sutterfield's Fourth Amendment claim. No Wisconsin case that has been cited to us or that we have found has relied on the community caretaking doctrine to justify any search of the premises more intrusive than the sort of limited, protective sweep envisioned by *Buie*—that is, a search of places within the home that another person might be found. . .The gun, having been secured within a locked, opaque case, obviously was not in plain view, in contrast to the drugs found in both *Horngren* and *Pinkard.* Opening the case was a substantial step beyond the standard protective sweep, and constituted a more substantial intrusion on Sutterfield's privacy interests in her personal effects. . . . [T]he defendants are entitled to qualified immunity for the warrantless entry into Sutterfield's home, the search of the locked compact disc case, and the temporary seizure of the gun found inside of the case. The police were faced with a difficult situation in which they had reason to

believe, based on her physician's report, that Sutterfield might pose a danger to herself, they were implementing an emergency detention of her person for evaluation pursuant to section 51.15, and they were logically attempting to find the firearm they had reason to believe Sutterfield possessed and to secure that firearm while Sutterfield was undergoing a mental health evaluation. Notwithstanding the uncertainty as to which legal framework best applies to the warrantless actions of the police in these circumstances, the police could have believed that Wisconsin precedents, if not the federal cases, authorized them to take these actions in order to protect Sutterfield's wellbeing as well as the well-being of anyone else, including her son, who might have access to her home in her absence. . . .Based on the Supreme Court's decision in *Brigham City* and this court's decision in *Fitzgerald*, we conclude that the warrantless entry into Sutterfield's home was justified. Under the circumstances confronting the defendant police officers, they had an objectively reasonable basis for believing that Sutterfield posed an imminent danger of harm to herself; the circumstances thus constituted an emergency which dispensed with the need for a warrant under the exigent circumstances exception to the Fourth Amendment's warrant requirement. Alternatively, even if the entry into Sutterfield's home was inconsistent with the Fourth Amendment, a reasonable person would not have known that the entry violated Sutterfield's clearly established rights; the officers would therefore be entitled to qualified immunity on the unlawful entry claim. Similarly, although we have assumed *arguendo* that both the search of the compact disc case in Sutterfield's home and the seizure of the (lawfully-possessed) gun found inside of that case were contrary to the Fourth Amendment, we conclude that the defendant officers are entitled to qualified immunity on the unlawful search and seizure claims.")

EIGHTH CIRCUIT

Lane v. Nading, 927 F.3d 1018, 1022-24 (8th Cir. 2019) ("Even assuming that the officers violated the Fourth Amendment by failing to knock and announce their presence before entering Lane's dwelling, it was not clearly established in January 2015 that failing to knock and announce before entering the dwelling of a parolee was unlawful. That is because neither the Arkansas Supreme Court, this Court, nor the U.S. Supreme Court had spoken on the specific issue of whether the knock-and-announce requirement applies to parolees. Moreover, there existed no 'robust consensus of cases of persuasive authority' addressing the issue at the time the officers entered Lane's dwelling. Lane essentially argues that a robust consensus of persuasive authority had established by January 2015 that the knock-and-announce requirement applies to parolees. To support his argument, he cites the Seventh Circuit's *Green v. Butler* decision, . . . a pair of district-court decisions, . . . and an intermediate appellate-court decision out of California. . . We disagree. It is true that the cases Lane cites generally hold that an officer must knock and announce his presence before entering a parolee's dwelling. However, we do not consider a consensus based on the decision of a single circuit and a handful of lower courts to be 'robust.' [collecting cases] . . . . While we recognize that *Samson* does not address the issue of whether the knock-and-announce rule applies to parolees, it certainly stands for the proposition that parolees may be treated differently than non-parolees for some Fourth Amendment purposes. Given that proposition and

the fact that the Supreme Court decided *Samson* after the Seventh Circuit decided *Green*, we hold it would not have been clear to every reasonable officer in the defendant officers' positions that failing to knock and announce his presence before entering and searching Lane's hotel room violated the Fourth Amendment. . . Because the law was not clear, the officers are entitled to qualified immunity.")

NINTH CIRCUIT

Hines v. Youseff, 914 F.3d 1218, 1229-30 (9th Cir. 2019) ("The inmates' alleged constitutional right would be 'clearly established' if 'controlling authority or a robust consensus of cases of persuasive authority' had previously held that it is cruel and unusual punishment to expose prisoners to a heightened risk of Valley Fever. . . But no such precedent exists. The inmates argue that several of our memorandum dispositions clearly establish their right to not face an unreasonable risk of Valley Fever. But memorandum dispositions do not establish law. . .They are, at best, persuasive authority. And more importantly, none of the cited memorandum dispositions held that inmates have an Eighth Amendment right to not be exposed to a heightened risk of Valley Fever. . .The inmates also point us to unpublished district court decisions about Valley Fever exposure. We have previously said that unpublished district court decisions 'may inform our qualified immunity analysis.'. . But we have also noted that 'it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only.'. . And at most, the cited district court opinions show that the law was developing—not that it was already clearly established. . .We therefore conclude that when the officials acted, existing Valley Fever cases did not clearly establish that they were violating the Eighth Amendment.")

TENTH CIRCUIT

Estate of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1183 n.2 (10th Cir. 2020) (Bacharach, J., dissenting) ("Mr. Smart did not present this case law when arguing the clearly established prong in district court. But 'appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court.' *Elder v. Holloway*, 510 U.S. 510, 512, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994). So we must consider these opinions.")

Ullery v. Bradley, 949 F.3d 1282, 1290-94, 1298-1301 (10th Cir. 2020) ("Because the sexual misconduct alleged here is unquestionably 'repugnant to the conscience of mankind[,]'. . it is unsurprising Defendant has elected not to challenge the district court's conclusion regarding the existence of a constitutional violation. To be sure, Defendant's alleged actions—(1) approaching Plaintiff from behind and forcibly pressing his genitals into her buttocks while lasciviously moaning 'mmmmmm' in her ear; (2) purposefully and knowingly using physical force against Plaintiff by touching her breasts; and (3) forcibly grabbing and fondling Plaintiff's crotch without her consent—are *each* sufficiently serious to satisfy the Eighth Amendment's objective

component and without any penological justification. Given the factual circumstances of this case, any one of these three alleged uses of force, even when viewed in isolation, deeply offends contemporary standards of decency and therefore violates the Eighth Amendment. . . Despite the intolerable conduct at issue, Defendant is nonetheless entitled to qualified immunity unless Plaintiff has carried her burden of showing the law was clearly established. For the reasons discussed below, we conclude Plaintiff has, for all relevant purposes, satisfied this burden. . . .Specifically, the clearly established weight of persuasive authority in our sister circuits as of August 11, 2015, would have put any reasonable corrections officer in Defendant's position on notice his alleged conduct would violate the Eighth Amendment. Because Plaintiff's asserted right to be free from sexual abuse was clearly established at the relevant time, Defendant is not entitled to qualified immunity. . . . Relying on a footnote in *Wesby*, Defendant argues only the Supreme Court can clearly establish law in the particular circumstances of a case. . . While *Wesby* may have suggested this is an open question, we do not think only Supreme Court precedents are relevant in deciding whether a right is clearly established. [referencing *Wilson v. Layne*] In recent years, the Supreme Court has reaffirmed that 'qualified 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."'. . Following the Supreme Court's lead, nearly all of our sister circuits, like us, consider both binding circuit precedent and decisions from other circuits in determining whether the law is clearly established. [collecting cases] . . . . Defendant's argument therefore conflicts with Supreme Court authority, our precedents, and the decisions of our sister circuits. Limiting the source of clearly established law to only Supreme Court precedents also is unwarranted and impractical given the current state of the doctrine. Such a restriction would transform qualified immunity into an absolute bar to constitutional claims in most cases—thereby skewing the intended balance of holding public officials accountable while allowing them to perform their duties reasonably without fear of personal liability and harassing litigation. . . Accordingly, Defendant's position is untenable. . . . Neither the district court nor Plaintiff have identified any case from the Supreme Court or this court squarely addressing whether Defendant's alleged conduct violates the Eighth Amendment. Our clearly-established-law inquiry, however, does not end here. Despite the lack of on-point, binding authority addressing the issue, we must now consider whether the right was clearly established based on either a consensus of persuasive authority or general constitutional principles. . . In the absence of binding precedent specifically adjudicating the right at issue, the right may still be clearly established based on a 'consensus of cases of persuasive authority' from other jurisdictions. . . Plaintiff argues the clearly established weight of out-of-circuit authorities would have put any reasonable corrections officer in Defendant's position on notice his conduct violated the Constitution. Accordingly, we now proceed to examine the relevant decisions of our sister circuits addressing the right of inmates under the Eighth Amendment to be free from sexual abuse. . . .The consensus of persuasive authority from our sister circuits since August 11, 2015, places the constitutional question in this case 'beyond debate.'. . The Second, Seventh, Eighth, and Ninth Circuits have all held—in published decisions involving materially analogous facts—sexual abuse of the nature alleged here violates the Eighth Amendment. Even more, the Third and Sixth Circuits have recognized an inmate's right to be free from sexual abuse under the Eighth Amendment was clearly established

at the time of Defendant's unlawful conduct. . . .Given the persuasive authority in the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits, we are compelled to conclude Plaintiff's right to be free from sexual abuse was clearly established under the Eighth Amendment. Following *Crawford I*, no 'reasonable [corrections] officer, looking at the entire legal landscape at the time of the [alleged sexual misconduct], could have interpreted the law as permitting' Defendant's actions. . . If Defendant did not 'knowingly violate the law' when he sexually abused Plaintiff, which we doubt is the case here, then he is 'plainly incompetent.'. . Either way, qualified immunity affords Defendant no shelter for the alleged constitutional violations he committed after August 11, 2015. . . . In sum, persuasive out-of-circuit authority addressing the constitutional right in question was not divided or otherwise unclear following the Second Circuit's decision in *Crawford I*. Defendant violated clearly established Eighth Amendment law by: (1) approaching Plaintiff from behind and forcibly pressing his genitals into her buttocks while lasciviously moaning 'mmmmmm' in her ear; (2) purposefully and knowingly using physical force against Plaintiff by touching her breasts; and (3) forcibly grabbing and fondling Plaintiff's crotch without her consent. Moreover, based on the consensus of persuasive authority addressing the right in question, any one of these three uses of force on its own—regardless of whether Plaintiff's allegations are viewed in isolation or as a pattern of pervasive sexual abuse—violated clearly established law. Defendant does not point to a single decision from this circuit or a published opinion from one of our sister circuits—and we have found none—shedding doubt on our conclusion today. Rather, the unanimity among our sister circuits since *Crawford I* demonstrates the constitutional question here is 'beyond debate.'. . As for any sexual misconduct which occurred before August 11, 2015, we cannot agree with Plaintiff that Defendant's alleged actions so obviously violated the Eighth Amendment there is no need for case law clearly establishing the point. Before the Second Circuit's decision in *Crawford I*, it was not beyond debate Defendant's alleged conduct satisfied the Eighth Amendment's objective component. . . Contrary to Plaintiff's argument, the allegations in *Boddie* are quite similar to the allegations here. A reasonable officer could therefore have believed based on *Boddie*, which was widely followed until recent years, that the sexual abuse at issue—even if it might subject Defendant to criminal or tort liability—did not violate the Eighth Amendment. . . We recognize our parsing of the relevant case law and time period may appear unduly formalistic considering the despicable nature of Defendant's alleged misconduct. But this is the task required of us under the qualified-immunity precedents we are obligated to follow. And while Plaintiff asks us to reject the current qualified-immunity framework as unconstitutional, her competent counsel is well-aware it is not this appellate court's place to issue such edicts. We, of course, decline to do so here. Nevertheless, after August 11, 2015, any reasonable corrections officer would have known Defendant's alleged conduct violated the Eighth Amendment based upon the consensus of persuasive circuit authority addressing the right in question. . . As we explained above, any constitutional violations Defendant committed before April 10, 2016, fall outside the applicable statute of limitations. Because all actionable constitutional violations in this case—that is, those occurring within the two-year limitation period—would necessarily have occurred after August 11, 2015, the law was clearly established for all relevant purposes here. Accordingly, Defendant is not entitled to qualified immunity.")

Grissom v. Roberts, 902 F.3d 1162, 1168 (10th Cir. 2018) ("The role of an unpublished nonprecedential opinion in this enterprise depends on whether the opinion is being used to show that the plaintiff's proffered proposition is clearly established law or to show that the proposition is unsettled. We have held that '[a]n unpublished opinion ... provides little support for the notion that the law is clearly established on [a] point.'. . But an unpublished opinion can be quite relevant in showing that the law was *not* clearly established. If we make the collegial, and quite legitimate, assumption that panels of this court render reasonable decisions, we would be hard pressed to say that a proposition of law was clearly established at a time when an unpublished opinion by a panel of this court said the opposite. To do so we would have to say that the panel's decision was contrary to clearly established law at the time it was rendered. Our assumption does not require us to credit the unpublished opinion as being correct, only as being debatably correct. And there is perhaps a more important reason to presume that an unpublished decision was not contrary to clearly established law at the time. The purpose of the qualified-immunity test is to limit liability to those public officials who are 'plainly incompetent or ... knowingly violate the law.'. . This purpose would be ill served if liability were imposed on an official for conduct that had been held to be lawful, even in an unpublished opinion, by the federal appellate court with jurisdiction over the conduct, at least in the absence of later contrary authority issued before the official acted. Could we properly say that an official was plainly incompetent for taking guidance from an unpublished appellate opinion? . . . The argument favoring consideration of an unpublished opinion is particularly compelling if the same alleged victim and same defendant conduct are involved.")

Grissom v. Roberts, 902 F.3d 1162, 1174-75 (10th Cir. 2018) ("Grissom alleges he was subjected to cruel and unusual punishment because (1) 20 years in solitary created a substantial risk of serious harm, and (2) the defendants knew of but disregarded that harm. Pointing to various academic literature and government reports (both domestic and international), he appeals to us to recognize '[s]ociety's evolving standards of decency.'. . To overcome the defense of qualified immunity, however, Grissom must point to clearly established law. . . That, he has failed to do. He states, 'A growing number of courts have concluded denying the basic human needs of social interaction and environmental stimulation can violate the Eighth Amendment, especially when the deprivation lasts for years.'. . But the cited courts are four federal district courts, none from this circuit. That does not suffice to clearly establish the law. . . Indeed, the most recent relevant decision by this court is an unpublished opinion rejecting an Eighth Amendment claim brought by a prisoner who had been in solitary confinement for 30 years under conditions not markedly different from those here. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 741 (10th Cir. 2014). . . .Grissom, similar to the prisoner in *Silverstein*, has regularly communicated with other inmates and staff and has been afforded regular exercise (including outdoor recreation) and regular access to reading materials and to medical and mental-health care. We conclude that the Prison Officials are entitled to qualified immunity on this claim.")

ELEVENTH CIRCUIT

Jackson v. McCurry, 762 F. App'x 919, ___ (11th Cir. 2019) ("*Riley* held only that the exception to the warrant requirement for searches incident to arrest does not extend to searches of information contained in cellphones, and *T.L.O.* held that '[t]he warrant requirement ... is unsuited to the school environment,'. . . so there is room for a reasonable school official to conclude that *Riley* has no application to school searches. And in the light of the permissible disagreement about the implications of *Riley* for school searches, we cannot say that Oates was 'plainly incompetent' or 'knowingly violate[d] the law.'. . Jackson also cites a pair of out-of-circuit district-court opinions, *see Gallimore v. Henrico Cty. Sch. Bd.*, 38 F. Supp. 3d 721 (E.D. Va. 2014), *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622 (E.D. Pa. 2006), and an opinion from one of our sister circuits, *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623 (6th Cir. 2013), but these decisions cannot clearly establish that Oates's conduct was unlawful. As we have repeatedly explained, 'a district court case cannot clearly establish the law for qualified immunity purposes.'. . Nor can a decision from one of our sister circuits do so.")

Benjamin v. City of Miami, 727 F. App'x 635, 639 (11th Cir. 2018) ("Federal courts may rely on a state court decision to decide whether a plaintiff has demonstrated a violation of his clearly established rights. . . But for this reliance to be proper, the state court decision must pertain to a violation of *federal* law. . . Since *Haliburton*'s due process holding was expressly confined to state law, it cannot clearly establish a federal due process right.")

B. Defining the Contours of the Right

U.S. SUPREME COURT

Taylor v. Riojas, 141 S. Ct. 52, 53-54 (2020) (per curiam) ("Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. . . . The first cell was covered, nearly floor to ceiling, in ' "massive amounts" of feces': all over the floor, the ceiling, the window, the walls, and even ' "packed inside the water faucet."'. . Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage. The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. But, based on its assessment that '[t]he law wasn't clearly established' that 'prisoners couldn't be housed in cells teeming with human waste' 'for only six days,' the court concluded that the prison officials responsible for Taylor's confinement did not have ' "fair warning" that their specific acts were unconstitutional.'. .The Fifth Circuit

erred in granting the officers qualified immunity on this basis. 'Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.'. . But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time. . . The Fifth Circuit identified no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency. Nor does the summary-judgment record reveal any reason to suspect that the conditions of Taylor's confinement could not have been mitigated, either in degree or duration. And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells. . . Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution. . . We therefore grant Taylor's petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand the case for further proceedings consistent with this opinion. It is so ordered.") [Justice Thomas dissented without comment or opinion]

Taylor v. Riojas, 141 S. Ct. 52, 56 (2020) (Alito, J., concurring in the judgment) ("While I would not grant review on the question the Court addresses, I agree that summary judgment should not have been awarded on the issue of qualified immunity. We must view the summary judgment record in the light most favorable to petitioner, and when petitioner's verified complaint is read in this way, a reasonable fact-finder could infer not just that the conditions in the cells in question were horrific but that respondents chose to place and keep him in those particular cells, made no effort to have the cells cleaned, and did not explore the possibility of assignment to cells with better conditions. A reasonable corrections officer would have known that this course of conduct was unconstitutional, and the cases on which respondents rely do not show otherwise.")

[*Compare* ***Thomas v. Blackard***, No. 20-1718, 2021 WL 2644224, at *3-4 (7th Cir. June 28, 2021) ("Thomas's assertions of feces-covered walls, a lack of hot water, hundreds of dead flies in his bed, and a mattress covered in human waste no doubt establish a material dispute on the objective prong of an Eighth Amendment claim. Indeed, these purported cell conditions are not far from the 'deplorably unsanitary conditions' decried in *Taylor*. 141 S. Ct. at 53. But that is not the end of the matter. Unlike in *Taylor*, Thomas failed to point to evidence that prison officials responded with deliberate indifference to the abysmal cell conditions. . . To the contrary, the record shows that officials reacted reasonably: Thomas promptly received a new, unsoiled mattress, several cups of disinfecting solvent to clean the walls, and gloves to remove the dead flies from his bunk bed. As for his complaint that his cell lacked hot water, Pontiac officials provided him with three hot showers per week while awaiting repair of the faucet. On this record, no reasonable jury could conclude these officials responded with deliberate indifference to Thomas's cell conditions. . . .The conditions of confinement Thomas encountered at Pontiac are troubling. But prison officials took steps to address the inadequacies. Because Thomas has not produced evidence of deliberate indifference by Blackard and Punke, we AFFIRM.")**]**

City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503-04 (2019) (per curiam) ("Under our cases, the clearly established right must be defined with specificity. 'This Court has repeatedly told courts ... not to define clearly established law at a high level of generality.'. . That is particularly important in excessive force cases . . . . In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established. With the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial. . . Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the *Gravelet–Blondin* case from that Circuit, which described a right to be 'free from the application of non-trivial force for engaging in mere passive resistance....'. . . Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity, . . . the Ninth Circuit's *Gravelet–Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents. . . .The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity.")

Kisela v. Hughes, 138 S. Ct. 1148, 1152-54 (2018) (per curiam) ("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. . . .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 remitthe 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.' [*citing Plumhoff*] That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way. Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. 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. . . . [N]ot one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), *Glenn v. Washington County*, 673 F.3d 864 (C.A.9 2011), and *Harris v. Roderick*, 126 F.3d 1189 (C.A.9 1997)—supports denying Kisela qualified immunity." [majority discusses and distinguishes *Deorle, Glenn,* and *Harris*])

Kisela v. Hughes, 138 S. Ct. 1148, 1155, 1158-62 (2018) (per curiam) (Sotomayor, J., joined by Ginsburg, J., 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,' . . . 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.'. . 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. . . 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. . . .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. . . 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.'. . That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, . . . 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[.]'. . '[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . At its core, then, the 'clearly established' inquiry boils down to whether Kisela had 'fair notice' that he acted unconstitutionally. . .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.'. . It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. . . 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. . . 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. . . . [T]he majority asserts that Hughes was 'within striking distance' of Chadwick, . . 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. [citing *Tolan*] 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. . . . 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. . . . If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. [collecting cases] 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. . . It is enough that governing law places 'the constitutionality of the officer's conduct beyond debate.'. . 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. . . .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.'. . . 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. . . 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.'. . 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.")

District of Columbia v. Wesby, 138 S. Ct. 577, 589-91 & n.7 (2018) ("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.'. . We exercise that discretion here because the D. C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'. . .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. . . 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. . . . 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.' [citing *Mullenix*] 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.' [citing *Plumhoff*] 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.' [citing *Anderson*] 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.'". . We have stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.' [citing *Mullenix*] Probable cause 'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'. . . 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.' [citing *Ziglar*] 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.' [citing *Pauly*] While there does not have to be 'a case directly on point,' existing precedent must place the lawfulness of the particular arrest 'beyond debate.' [citing *al-Kidd*] 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. [citing *Brosseau*] But 'a body of relevant case law' is usually necessary to ' 'clearly establish' the answer' with respect to probable cause. . .Under these principles, we readily conclude that the officers here were entitled to qualified immunity. . . . 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.'. . 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.'. . And it should go without saying that this is not an 'obvious case' where

'a body of relevant case law' is not needed. . . The officers were thus entitled to qualified immunity.")

Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) ("With respect to petitioners' Fifth Amendment claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was 'an alien who had no significant voluntary connection to ... the United States.'. . It is undisputed, however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts. . . 'The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established ... constitutional rights of which a reasonable person would have known."'. . The 'dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . The qualified immunity analysis thus is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question. *White v. Pauly,* 580 U.S. ——, ——, 137 S.Ct. 548, 550, 196 L.Ed.2d 463 (2017) (*per curiam*). Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant. Mesa and the Government contend that Mesa is entitled to qualified immunity even if Mesa was uncertain about Hernández's nationality and his ties to the United States at the time of the shooting. The Government also argues that, in any event, petitioners' claim is cognizable only under the Fourth Amendment, and not under the Fifth Amendment. This Court declines to address these arguments in the first instance. The Court of Appeals may address them, if necessary, on remand.")

Ziglar v. Abbasi, 137 S. Ct. 1843, 1868-69 (2017) ("To be sure, this Court has not given its approval to [the intracorporate-conspiracy] doctrine in the specific context of § 1985(3). . . There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies. . . Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context. Yet the fact that the courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See *Wilson v. Layne,* 526 U.S. 603, 618, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (noting that it would be "unfair" to subject officers to damages liability when even "judges ... disagree"); *Reichle v. Howards,* 566 U.S. 658, 669–670, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) (same). In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same

Department should not be the subject of a private cause of action for damages under § 1985(3). . . .These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law. . . Petitioners are entitled to qualified immunity with respect to the claims under 42 U.S.C. § 1985(3).")

White v. Pauly, 137 S. Ct. 548, 551-53 (2017) (per curiam) ("Officer White did not violate clearly established law on the record described by the Court of Appeals panel. . . . 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,"'. . . 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. . . 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.'. . 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. . . 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. . . 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.")

White v. Pauly, 137 S. Ct. 548, 553 (per curiam) (2017) (Ginsburg, J., 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.")

City & Cnty. of San Francisco, Cal. v. Sheehan, 135 S. Ct. 1765, 1775-78 (2015) ("The real question. . . is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. . . Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not. To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor*,. . . but *Graham* holds only that the ' "objective reasonableness"' test applies to excessive-force claims under the Fourth Amendment. . . That is far too general a proposition to control this case. 'We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . Qualified immunity is no immunity at all if 'clearly established'

law can simply be defined as the right to be free from unreasonable searches and seizures. Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction. . . and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter. Moving beyond *Graham*, the Ninth Circuit also turned to two of its own cases. But even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman*, 574 U.S. ——, —— (2014) (*per curiam*) (slip op., at 4), it does not do so here. The Ninth Circuit first pointed to *Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue 'an emotionally disturbed' person who 'was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense.'. . The officer there, moreover, 'observed Deorle at close proximity for about five to ten minutes before shooting him' in the face. . . Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight. The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (C.A.9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home 'for the primary purpose of arresting him' even though they lacked an arrest warrant. . . Quade, in response, fired a handgun; police officers 'shot back, and Quade died from gunshot wounds shortly thereafter.'. . The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no 'exigent circumstances' excusing their entrance. . .*Alexander* too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. . . Under Ninth Circuit law. . . an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. . Courts must not judge officers with 'the 20/20 vision of hindsight.'. . When *Graham, Deorle,* and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases 'would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.'. . But even assuming that is true, *no precedent clearly established that there was not 'an objective need for immediate entry' here*. No matter how carefully a reasonable officer read *Graham, Deorle,* and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that 'fair notice,' an officer is entitled to qualified

immunity. . . Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. . . .Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'. . Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified. Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, . . . no such consensus exists here. . . .In sum, we hold that qualified immunity applies because these officers had no 'fair and clear warning of what the Constitution requires.'. . Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness. * * * For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.")

Stanton v. Sims, 134 S. Ct. 3, 5, 7 (2013) (per curiam) ("There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was 'plainly incompetent' in entering Sims' yard to pursue the fleeing Patrick. . . The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. . . .To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided. We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.' *al–Kidd, supra,* at ——, 131 S.Ct., at 2083. Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084, 2085 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'. . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . The constitutional question in this case falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-

witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.")

Weise v. Casper, 131 S. Ct. 7, 7, 8 (2010) (Ginsburg, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("I cannot see how reasonable public officials, or any staff or volunteers under their direction, could have viewed the bumper sticker as a permissible reason for depriving Weise and Young of access to the event. Nevertheless, the Court of Appeals held respondents entitled to qualified immunity because 'no specific authority instructs this court ... how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area.' 593 F.3d 1163, 1170 (C.A.10 2010). No 'specific authority' should have been needed. . . . I see only one arguable reason for deferring the question this case presents. Respondents were volunteers following instructions from White House officials. The Volunteer Protection Act of 1997, 111 Stat. 218, 42 U.S.C. § 14501 *et seq.*, had respondents invoked it in the courts below, might have shielded them from liability. Federal officials themselves, however, gain no shelter from that Act. Suits against the officials responsible for Weise's and Young's ouster remain pending and may offer this Court an opportunity to take up the issue avoided today.")

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643, 2644 (2009) ("[T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions. . . . *T.L.O.* directed school officials to limit the intrusiveness of a search, 'in light of the age and sex of the student and the nature of the infraction,'. . . and as we have just said at some length, the intrusiveness of the strip search here cannot be seen as justifiably related to the circumstances. But we realize that the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to such searches. [collecting cases] We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.").

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2644 (2009) (Stevens, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("This is, in essence, a case in which clearly established law meets clearly outrageous conduct. . . .The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student's purse in

T.L.O. Therefore, while I join Parts I-III of the Court's opinion, I disagree with its decision to extend qualified immunity to the school official who authorized this unconstitutional search.").

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ' "clearly established"' in this more ' "particularized"' sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the ' Ahazy border between excessive and acceptable force."' . . The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment.").

Groh v. Ramirez, 124 S. Ct. 1284, 1293, 1294 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case–perhaps just a simple glance–would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.")

Hope v. Pelzer, 122 S. Ct. 2508, 2514-18 (2002) ("We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment. . . . In assessing whether the Eighth Amendment violation here met the *Harlow* test, the Court of Appeals required that the facts of previous cases be ' 'materially similar' to Hope's situation.' . . This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, [footnote omitted] is not consistent with our cases. . . . Our opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.' 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. The same is true of cases with 'materially similar' facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional. . . . The use of the hitching post as alleged by Hope 'unnecessar[ily] and wanton [ly] inflicted pain,' . . . and thus was a clear violation of the Eighth Amendment. . . Arguably, the violation was so obvious that our own Eighth Amendment

cases gave the respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections ("DOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . [F]or the purpose of providing fair notice to reasonable officers administering punishment for past misconduct, [there is no] reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours. The Court of Appeals' conclusion to the contrary exposes the danger of a rigid, overreliance on factual similarity. . . . The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity–he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct. Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The 'fair and clear warning,' . . . that these cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage. . . .We did not take, and do not pass upon, the questions whether or to what extent the three named officers may be held responsible for the acts charged, if proved. Nothing in our decision forecloses any defense other than qualified immunity on the ground relied upon by the Court of Appeals.").

Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").[*See* discussion of *Saucier, infra*]

Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

United States v. Lanier, 520 U.S. 259, 269-72 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. [citing cases] But even putting these examples aside, we think that the Sixth Circuit's 'fundamentally similar' standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling. This danger flows from the Court of Appeals' stated view . . . that due process under § 242 demands more than the 'clearly established' law required for a public officer to be held civilly liable for a constitutional violation

under § 1983 or *Bivens*. [cites omitted] This, we think, is error. In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,'. . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' [citing *Anderson*] So conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.' This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances 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,'. . . . In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness [under the Constitution is] apparent,' [citing *Anderson*] Where it is, the constitutional requirement of fair warning is satisfied.").

Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.....in light of pre-existing law the unlawfulness must be apparent.")

D.C. CIRCUIT

Johnson v. District of Columbia, 927 F.3d 539, 546 (D.C. Cir. 2019) ("'Although the Supreme Court's decisions do "not require a case directly on point for a right to be clearly established," for purposes of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate."'. . Much turns, then, on the level of generality at which the relevant decisions establish the pertinent right. . . A plaintiff may be unable to overcome qualified immunity if the precedents define the right abstractly rather than in a manner 'particularized to the [pertinent] facts.'. .Johnson's claim falls short on that ground. Months before his initial parole hearing, the Supreme Court recognized that '[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause.'. . But that broadly framed principle would not have put a reasonable officer on adequate notice that the specific violation alleged here—denying a presumption of suitability in the face of essentially unfettered discretion to depart from the presumption—would entail a significant risk of a longer term of incarceration so as to violate

the Ex Post Facto Clause. Indeed, *Garner* itself acknowledged that determining the Ex Post Facto consequences of any particular change is a 'question of particular difficulty when the discretion vested in a parole board is taken into account.'. . Neither Johnson nor his amicus identifies any contemporaneous precedent establishing the contours of the claimed right with the requisite specificity.")

FIRST CIRCUIT

Lachance v. Town of Charlton, 990 F.3d 14, 20-28 (1st Cir. 2021) ("In determining whether the unlawfulness of officers' conduct was clearly established, 'the salient question ... is whether the state of the law [at the time of the officers' conduct] gave [them] fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'. . The answer to that question is 'yes' when: (1) the law was 'clear enough that every reasonable official would [have] interpret[ed] it to establish the particular rule the plaintiff seeks to apply'; and (2) '[t]he rule's contours [were] so well defined that it [would have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . The rule establishing the conduct's illegality must be 'dictated by [either] "controlling authority" or "a robust consensus of cases of persuasive authority,"' the latter of which 'does not require the express agreement of every circuit' but rather some sister circuit law can suffice. . . In the Fourth Amendment context, the '[s]pecificity' of the rule set forth in such precedent 'is especially important,' because it can be 'difficult for an officer to determine how the relevant legal doctrine,' such as excessive force, 'will apply to the factual situation the officer confronts.'. . Of course, prior cases with materially similar facts are not necessary to clearly establish conduct's illegality; a 'general constitutional rule' located in prior authority can suffice to defeat qualified immunity even in 'novel factual circumstances.'. . But that is true only in an 'obvious case,'. . . where 'any reasonable officer should have realized that [the conduct at issue] offended the Constitution[.]'. . As such, 'relevant case law,' where 'an officer acting under similar circumstances ... was held to have violated the Fourth Amendment,' is 'usually necessary' to overcome officers' qualified immunity. . . . The district court . . . found that 'it was clearly established that [Lachance] had a constitutional right to be free from an officer kneeling on his back after he had been restrained,' but that there were fact issues that bore on whether a reasonable officer would have understood that his conduct violated that right, namely whether an officer kneeled on Lachance's back at all and, if so, for how long. However, the court found that it was not clearly established that the push, even assuming it was carried out with a lot of force, violated the Constitution under the circumstances. The court noted that Lachance failed to point to any controlling or persuasive case law to show that his right to be free from such force was clearly established, although the court identified one out-of-circuit case that might support his position. . . . In fact, the court added, in-circuit case law 'suggests that forcefully pushing a resistant plaintiff to the ground is not excessive[.]' There may be some tension in our cases about how to analyze multiple-force scenarios. [discussing *Jennings* and *Alexis*] We have found no circuit that is completely averse to applying a segmented approach where it makes sense. [collecting circuit cases using segmented approach] It seems to us that the segmented approach is also consistent with Supreme Court precedent. In *Graham*, the Court made clear that the reasonableness of a use

of force is to be determined 'at the moment' that the force was applied. . . It explicated that the reasonableness inquiry depends on 'the facts and circumstances confronting' the officer in 'a particular situation,' which facts and circumstances are 'often ... tense, uncertain, and rapidly evolving.'. .. Put differently, '[e]xcessive force claims ... are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.'. . Such language seems to favor a segmented approach, at least when circumstances relevant to the reasonableness inquiry changed between one use of force and another. . . After all, if the reasonableness of an officer's use of force depends on the information available to that officer under a particular set of circumstances, which appear to have meaningfully changed between one use of force and another, then it only makes sense to consider those uses separately. . . Here, there was clearly a change in circumstances between the push and the kneel that was relevant to the reasonableness inquiry. Before the push, Lachance was still standing and actively attempting to make his way outside, and he had been resisting the officers' efforts to stop him by issuing instructions, grabbing his arms, and redirecting him. After the push, Lachance was on the floor with visible bruising on his back and, although he was flailing his arms and legs, may have been attempting simply to stand up (as opposed to going outside) when an officer kneeled on his back to keep him down. On these facts, it made sense for the district court to segment its analysis. . . .Proceeding to analyze the push separately from the kneel, we conclude that the push was not a clearly established violation of Lachance's right to be free of unreasonable seizures. Lachance argues that the *Graham* factors are lopsided in his favor and that this is sufficient to show that his right was clearly established. But it is well-established that the *Graham* factors, while instructive, are not exhaustive of the totality of the circumstances that must be considered in each excessive force case. . . Moreover, the *Graham* test is geared toward criminal suspects as opposed to persons who are suspected only of experiencing a medical emergency for which they require aid. *See Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 313 (6th Cir. 2017). . . .Lachance cites a number of purportedly factually analogous cases, but none are materially similar enough to have provided reasonable officers under the circumstances with fair warning that they would violate Lachance's rights by pushing him in the manner that the defendant officers did. He cites as controlling authority our decision in *Ciolino*, . . . but that decision could not have clearly established his right as of the date of the push in January 2014. . . The same is true of most of the decisions that Lachance relies on. . . . Here, Lachance posed a risk of serious physical harm to himself were he permitted to stumble outside to a steep, icy stairway. Moreover, whereas in those cases the plaintiffs at no point resisted the officers, here Lachance clearly did by continuing toward the door even after they grabbed his arms and repeatedly told him to stop walking. . . Therefore, Lachance has failed to meet his burden of showing that the defendants violated his clearly established rights. Accordingly, we affirm the district court's grant of summary judgment in favor of the defendants as to the push.")

Irish v. Fowler (Irish II), 979 F.3d 65, 76-80 (1st Cir. 2020) ("A rule is clearly established either when it is 'dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority.'". . A 'robust consensus' does not require the express agreement of every circuit. Rather, sister circuit law is sufficient to clearly establish a proposition of law when it would provide notice

to every reasonable officer that his conduct was unlawful. . . '[T]he salient question ... is whether the state of the law [at the time of the defendants' conduct] gave [them] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional.' [citing cases, including *Hope v. Pelzer* and *Taylor v. Riojas*] The Supreme Court has established that cases involving materially similar facts are not necessary to a finding that the law was clearly established. . . The circuits have followed that rule. . . A defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis. . . When an officer violates the Constitution, state law, of course, provides no refuge. A lack of compliance with state law or procedure does not, in and of itself, establish a constitutional violation, but when an officer disregards police procedure, it bolsters the plaintiff's argument both that an officer's conduct 'shocks the conscience' and that 'a reasonable officer in [the officer's] circumstances would have believed that his conduct violated the Constitution.'. . The defendants' main argument is that because this circuit to date has not recognized the state-created danger doctrine, the law was not clearly established. That is simply incorrect. The Supreme Court has stated that clearly established law can be dictated by controlling authority or a robust consensus of persuasive authority. . . The widespread acceptance of the state-created danger theory, described above, was sufficient to clearly establish that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff. The defendants' reliance on *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), is also misplaced. In *Soto*, this court concluded that the state-created danger doctrine was not clearly established. . . The broad acceptance of the doctrine 'militate[d] in favor of finding that there [was] clearly established law in this area,' but two circumstances prevented the court from holding that the law was clearly established. . . First, the court noted that at the time of the defendants' conduct in *Soto*, the First Circuit had *never* 'discuss[ed] the contours of [the state-created danger] doctrine.'. . Second, the court relied on the fact that while the Third Circuit had then recently 'comprehensively described' the state-created danger theory, the history of the doctrine was 'uneven,' and that only 'more recent judicial opinions ... ha[d] begun to clarify the contours' of the doctrine. . . All of this had changed by the time Detective Perkins left the voicemail for Anthony Lord. By July 2015, this court had discussed the state-created danger doctrine at least a dozen times, even if it had never found it applicable to the facts of a specific case. And our sister circuits' law developed as well in the decades since *Soto*. The officers argue that because the Fifth and Eleventh Circuits have rejected the state-created danger doctrine, . . .the doctrine cannot be clearly established. Again, as a proposition of law this is wrong. A circuit split does not foreclose a holding that the law was clearly established, as long as the defendants could not reasonably believe that we would follow the minority approach. . . After *Rivera*, the defendants could not reasonably have believed that we would flatly refuse to apply the state-created danger doctrine to an appropriate set of facts. *Rivera* was a critical warning bell that officers could be held liable under the state-created danger doctrine when their affirmative acts enhanced a danger to a witness. This court did not simply dismiss Rivera's claim without analysis, as would have been appropriate if the state-created danger doctrine could never apply to any set of facts in this circuit. Instead, *Rivera* outlined the elements of the state-created danger doctrine and performed a nuanced analysis of why each particular action of the defendants was not the type of affirmative act covered by the doctrine. . . *Rivera* warned that if an officer performed a *non-essential* affirmative act which

enhanced a danger, a sufficient causal connection existed between that act and the plaintiff's harm, and the officer's actions shocked the conscience, the officer could be held liable for placing a witness or victim in harm's way during an investigation. Defendants also argue that they are immune from suit because no factually similar cases alerted them that their conduct was impermissible. This too is incorrect. As we have just said, a general proposition of law may clearly establish the violative nature of a defendant's actions, especially when the violation is egregious. . . Not only is the argument wrong, but its premise is wrong; there are factually similar earlier cases. Both were decided after *Soto*. . . . The plaintiffs allege that the defendants, even in the face of Irish's expressed fear that Lord would react violently, contacted him in a manner that a reasonable jury could find notified him that Irish had reported him to the police. The plaintiffs also allege that the defendants failed to convey her request for protection to their superiors for several hours and further failed to inform her in a timely fashion that the request had been denied. A jury could also conclude that the defendants played a role in the decision to withdraw all resources from the area without telling the plaintiffs that they had done so, thereby allowing the plaintiffs to believe more protection was available than was actually true. Finally, the defendants' apparent utter disregard for police procedure could contribute to a jury's conclusion that the defendants conducted themselves in a manner that was deliberately indifferent to the danger they knowingly created, and that they thereby acted with the requisite mental state to fall within the ambit of the many cases holding that a violation of the Due Process Clause requires behavior that 'shocks the conscience.'. . Whether the jury will or should conclude as much is, of course, not a question for this court, but it was clearly established in July 2015 that such conduct on the part of law enforcement officers, if it occurred, could give rise to a lawsuit under § 1983.")

SECOND CIRCUIT

Wagschal v. Skoufis, No. 20-871, 2021 WL 1568822, at *2 (2d Cir. Apr. 22, 2021) (not reported) ("Even assuming that, after *Knight*'s vacatur, it would remain clearly established that a public official's use of Facebook's tools to hide specific comments on the official's public page violates the First Amendment, such a rule was not clearly established in 2018 by *Knight* or any other decision from our Court or the Supreme Court. In so commenting, we take heed of the Supreme Court's caution against determining what constitutes 'clearly established law' at too high a level of generality. . . The 'hide comments' feature limits the user's interaction on Facebook in a different, and less substantial, way than does the blocking at issue in *Knight*. Blocking a person on Twitter may well frustrate his or her ability to follow along with and engage in an online discussion, while hiding a comment on Facebook merely shields the comment from viewing by the general public. . . Whether hiding comments in this manner would place an unconstitutional burden on speech was not a question addressed by *Knight*, in which we dealt with the President's use of the blocking function on Twitter. . . Skoufis is therefore also entitled to qualified immunity with regard to Wagschal's damages claim arising from his temporarily hidden comments.")

Ketcham v. City of Mount Vernon, 992 F.3d 144, 151-52 (2d Cir. 2021) ("While the absence of serious injury is certainly a matter that the jury can consider in assessing both the reasonableness of the force and potential damages from any misconduct, a district court should not grant summary judgment on this basis alone. Additionally, there is presumably no proper law enforcement justification for deliberately pushing a restrained individual's head into a car's hard, metal doorframe. Thus, if a jury credits Ketcham's testimony that Patterson deliberately slammed his head into the car's doorframe despite him being restrained and not resisting, that force would be excessive. Regardless of the extent of Ketcham's injuries, the infliction of harm against a restrained and unresisting suspect is excessive force, and such conduct would violate the Fourth Amendment. As an alternative basis for upholding the district court's decision, Appellees argue that the officers were entitled to qualified immunity as a matter of law. To demonstrate entitlement to qualified immunity, the officers must show that their actions did not violate clearly established law, or that it was objectively reasonable for them to believe that their actions did not violate such law. . .The district court did not address this argument. Because we conclude that reasonable officers would not disagree as to the illegality of the alleged handcuffing conduct, qualified immunity is rejected in that respect. . . The established law of this Circuit makes clear that the excessive tightening of handcuffs after an explicit verbal complaint of pain is made violates the Fourth Amendment. . . Accordingly, it would be unreasonable for officers to believe that ignoring Ketcham's cries to loosen the over-tight, non-double-locked restraints did not violate clearly established law. If credited by a jury, Ketcham's testimony indicates Patterson did just that. We therefore reject his qualified immunity defense as to the handcuffing allegations. We reach the same conclusion with regard to the alleged head-slamming conduct. By March 2017, it was 'clearly established by our Circuit caselaw that it is impermissible to use significant force against a restrained arrestee who is not actively resisting.'. . . Therefore, accepting as true Ketcham's testimony that Patterson 'slammed [his] head into the car's door frame' despite being restrained and physically docile, . . . we must reject Patterson's qualified immunity defense in this respect as well.")

Vasquez v. Maloney, 990 F.3d 232, 238-43 (2d Cir. 2021) ("Law that was clearly established in January 2015 put the Officers on notice that their detention of Vasquez was unconstitutional. . . .On this record, the Officers did not satisfy even the low threshold that would satisfy either justification for an investigative *Terry* stop. That is, they offered no specific and articulable facts—at all—supporting an inference that Vasquez was (1) involved in or (2) wanted in connection with a crime. . . .[T]he Officers seek to justify their seizure of Vasquez based solely on Detective Cruz's recollection of Vasquez and his previous arrests by Clarkstown police, and Detective Cruz's uncorroborated belief that 'there might be' a warrant for Vasquez's arrest. . . But, absent any basis in articulable facts, speculation that a warrant 'might' be outstanding is the quintessential 'inchoate and unparticularized suspicion or "hunch,"'. . . and here it was readily dispelled by the dispatcher's report that there was no outstanding warrant. . . . Since *Terry*, it has been clearly established that when an officer can point to *no* facts at all to justify a hunch, the detention violates the Fourth Amendment. The Officers suggest that our decision in *United States v. Santa*, 180 F.3d 20 (2d Cir. 1999), supports their claim to qualified immunity. . . . *Santa* offers no safe harbor for the Officers.

In that case, the officers articulated a specific fact—a computer record of an outstanding warrant which they first checked and confirmed—on which they reasonably relied, even though that record turned out to be erroneous. Here, by contrast, the Officers do not claim to have relied on *anything*, not even one officer's faulty memory of an outstanding warrant, in seizing and detaining Vasquez. Absent any articulation of a factual basis for a belief that a warrant existed, *Santa* offers their position no support. . . The Officers further contend that denying them qualified immunity amounts to a requirement that 'police exhaust all available means of technology to determine whether an arrest warrant was open before conducting a basic safety search.'. . But the problem here is not so much that the police failed to *confirm* the existence of a warrant; it is that, taking the facts in the light most favorable to Vasquez, they did not even purport to have any basis for believing that there was a warrant outstanding for his arrest in the first place. . . .In sum, we hold that it was clearly established law in January 2015 that an officer's unconfirmed hunch that an arrest warrant might possibly exist, coupled with nothing more than the officer's recognition of a suspect from prior arrests, does not constitute reasonable suspicion justifying a *Terry* stop or frisk. Accordingly, at this stage and on the limited factual record before us, the Officers are not entitled to qualified immunity for their detention and frisk of Vasquez.")

Gerard v. City of New York, 843 F. App'x 380, ___ (2d Cir. 2021) ("We need not, and exercise our discretion not to, decide whether Detective Bia's alleged conduct would have given rise to a constitutional violation, in part because the record is murky on what precisely Gerard alleges Detective Bia did with his gun and what circumstances confronted Detective Bia at the time of the alleged incident. . . Drawing all inferences in favor of Gerard and assuming, for purposes of this appeal only, that Detective Bia brandished his gun and threatened to shoot Gerard when he volubly refused to comply with the court order, Detective Bia was entitled to qualified immunity. . . . It is clearly established that the use of deadly force against an unarmed, non-dangerous person is unconstitutional. . . This Court has also held that verbal harassment, absent 'any appreciable injury,' cannot support an excessive force claim. . . But neither the Supreme Court, nor this Court, has clearly established that a verbal threat combined with a display of a firearm, without any physical contact, constitutes excessive force, much less when it is directed at an uncooperative detainee who is loudly and profanely resisting a court order.")

Hurd v. Fredenburgh, 984 F.3d 1075, 1089-90, 1092 (2d Cir. 2021) ("It was not clearly established during the period of Hurd's prolonged detention that an inmate suffers harm of a constitutional magnitude under the Eighth Amendment when they are imprisoned past their mandatory conditional release date, nor was it clearly established that an inmate has a liberty interest in mandatory conditional release protected by the Fourteenth Amendment's substantive due process clause. Hurd nevertheless urges us to find that these rights were clearly established because they follow from existing precedent. For his Eighth Amendment claim, Hurd relies on *Sample*, 885 F.2d 1099, *Calhoun*, 999 F.2d 647, *Sudler v. City of New York*, 689 F.3d 159 (2d Cir. 2012), and *Francis*, 942 F.3d 126. These cases confirm a uniform legal principle that no federal, state, or local authority can keep an inmate detained past the expiration of the sentence imposed on them. But in the qualified immunity analysis, the Supreme Court has admonished that

rights should not be defined at a high level of generality and instead must be 'particularized to the facts of the case.'. . None of the cases upon which Hurd relies addresses a conditional release scheme, let alone one in which an inmate is entitled to mandatory release prior to the expiration of their maximum sentence. More to the point, none of them confirm that prolonging an inmate's detention past their conditional release date might violate the inmate's rights under the Eighth Amendment. . . . It was clearly established that New York State could not detain Hurd past the expiration of his maximum sentence, but it was not clearly established that once Hurd's conditional release date was approved, continued detention beyond that date qualifies as a constitutional harm for Eighth Amendment purposes. . . . As for his substantive due process claim, Hurd admits that no decision has held that imprisonment past a mandatory conditional release date violates the Fourteenth Amendment's substantive protections. He nevertheless argues that 'such a conclusion follows inescapably from the procedural due process cases, as a prisoner must have such a right once state officials have actually granted him discretionary early release.'. . We disagree. The substantive due process analysis differs from procedural due process; and it is not the case that one must follow from the other. And for the same reasons that our precedents do not dictate the outcome of his Eighth Amendment claim, Hurd's liberty interest in conditional release does not obviously follow from the procedural due process cases upon which Hurd relies. Fredenburgh is therefore entitled to qualified immunity on Hurd's Eighth and Fourteenth Amendment claims.")

Hayes v. Dahlke, 976 F.3d 259, 276 n.8 (2d Cir. 2020)("Dahlke alternatively argues that he is entitled to qualified immunity because 'it was objectively reasonable to believe that the thorough search Hayes described did not violate the Eighth Amendment.'. . We disagree. Although there is clearly a factual dispute as to whether Dahlke ever engaged in the conduct alleged by Hayes, there can be no doubt that the illegality of such conduct was clearly established by *Crawford* the year before the frisk took place. *See* 796 F.3d at 254 ("A correction[ ] officer's intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or to humiliate the inmate, violates the Eighth Amendment.").")

Pourkavoos v. Town of Avon, 823 F. App'x 53, ___ (2d Cir. 2020) ("[W]e have cautioned against 'convert[ing] the fair notice requirement into a presumption against the existence of basic constitutional rights.'. . In *Edrei*, we held that our rule was clearly established 'that using force in a crowd control context violates due process' and as such that it was sufficient to put police officers on notice of the unlawful nature of using a 'long-range acoustic device' that could produce volumes unsafe for human ears during a protest. . . To hold otherwise, we explained, would be akin to 'saying police officers who run over people crossing the street illegally can claim immunity simply because we have never addressed a Fourteenth Amendment claim involving jaywalkers.'. . So too here. Our precedent establishes, and it should come as no surprise, that officers may not knowingly omit information likely to influence a judge or a prosecutor's probable cause determination.")

Booker v. Graham, 974 F.3d 101, 106-07 (2d Cir. 2020) ("We may 'grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law, without resolving the often more difficult question whether the purported right exists at all.'. . . We need not reassess the legitimacy of Defendants' penological interest in the lockdown, the reasonableness of the lockdown restrictions, or the feasibility of alternative means by which Defendants could have accommodated Booker's observance of Ramadan. Instead, we affirm the district court's grant of summary judgment to Defendants on the alternative basis of qualified immunity—*i.e.*, because there was no clearly established law requiring the accommodation of inmates' religious practices during a prison lockdown. . . . [W]e have never held that a prison has an obligation to provide religiously compliant meals during a facility-wide, safety-motivated lockdown. Nor have we held that a prison must accommodate group prayers or religious bathing rituals under such circumstances. Indeed, Supreme Court and Second Circuit precedent make clear that 'a generally applicable policy will not be held to violate a plaintiff's right to free exercise of religion if that policy "is reasonably related to legitimate penological interests."'. . Federal law does not provide any clearly established right of an inmate confined to the SHU to attend group prayer, and New York law actually prohibits it.")

Liberian Community Ass'n of Connecticut v. Lamont, 970 F.3d 174, 187-91 (2d Cir. 2020) ("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] **[fn. 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.'. .Yet the Supreme Court has cautioned us to 'think hard, and then think hard again, before turning small cases into large ones.'. . 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.**]** . . . . 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.'. . 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. . . . 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. . . To the extent the substantive due process restrictions articulated by Appellants existed then, they were 'at best undeveloped.'. . 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.'. .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,'. . . 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. . . .

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.")

Liberian Community Ass'n of Connecticut v. Lamont, 970 F.3d 174, 191-93 (2d Cir. 2020) ("The inquiry into the existence of a procedural due process right is guided by the three-factor balancing test enunciated in *Mathews v. Eldridge*[.] . . 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.'. . Rather, 'due process is flexible and calls for such procedural protections as the particular situation demands.'. . '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.'. .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. . . . 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.'. .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, 263 S.E.2d 661 (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. . . .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. . . . 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.")

Liberian Community Ass'n of Connecticut v. Lamont, 970 F.3d 174, 193-94 (2d Cir. 2020) ("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,' . . . a number of factors could support a determination that the quarantines were at least arguably reasonable as a matter of Fourth Amendment law. . . . 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.")

Liberian Community Ass'n of Connecticut v. Lamont, 970 F.3d 174, 194, 198-200 (2d Cir. 2020) (Chin, J., concurring in part and dissenting in part) ("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. . . . 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. . . . 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.'. . 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."'. . 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. . . 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 reelected ... [and p]ublic polling and media accounts at the time described the gubernatorial race as extremely close.'. . 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. . . 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].'. .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.")

Lennox v. Miller, 968 F.3d 150, 156-58 (2d Cir. 2020) ("Officer Clarke asserts he is entitled to qualified immunity because his actions, even viewed in the light most favorable to Lennox, did not violate 'clearly established' law. The operative question thus becomes whether it was clearly impermissible on July 22, 2016 under the circumstances presented for a police officer to use the force that a jury could find Officer Clarke used—that is, when the handcuffed arrestee was not actively resisting arrest—to take down that arrestee, kneel on top of her with his full body weight, and slam her head into the ground. Courts are cautioned not to define clearly established law at 'a high level of generality,' and 'police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.'. .That is not to say that there must be 'a case directly on point for a right to be clearly established, but 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . Years before the incident at issue here, we took note of the 'well established' principle 'that the use of entirely gratuitous force is unreasonable and therefore excessive.'. . . .And we have not limited potential findings of excessive force to situations where officers were using equipment like pepper spray or tasers. . . On July 22, 2016, it was therefore clearly established by our Circuit caselaw that it is impermissible to use significant force against a restrained arrestee who is not actively resisting. . . As *Muschette* suggests, and as we have recently explained in great detail in *Jones v. Treubig*, this

is true despite differences in the precise method by which that force was conveyed. Because a reasonable jury could find that the force used by Officer Clarke was significant and that Lennox was not resisting when such force was used, we cannot say, as a matter of law, that Officer Clarke did not violate clearly established law. The district court thus properly denied Officer Clarke qualified immunity at this stage of the proceedings, and we affirm this denial without expressing a view as to Officer Clarke's ultimate entitlement to judgment in his favor after factual disputes are resolved. . . . Even assuming that Officer Miller observed Officer Clarke's use of force, there is no evidence in the record that would suggest he had a realistic opportunity to intervene that he then disregarded. Nor do we know of any clearly established law that would require him to abandon his crowd control duties and intervene to stop Officer Clarke's use of force. Thus, Officer Miller was entitled to summary judgment on the basis of qualified immunity, and we reverse the judgment as to him.")

Elder v. McCarthy, 967 F.3d 113, 131 (2d Cir. 2020) ("We established in *Kingsley* that a hearing officer is required to identify the witnesses an inmate seeks to call using 'readily available' prison records, . . . even where the inmate cannot 'identify [the witnesses] by name[.]'. . . Kling made a paltry effort to do so. Nor does he argue that he was somehow reasonably ignorant that those records existed. In light of our guidance in *Kingsley*, Kling's ineffectual efforts to identify Elder's requested witnesses were not 'objectively reasonable.' Kling is not entitled to qualified immunity.")

Vega v. Semple, 963 F.3d 259, 273-81 (2d Cir. 2020) ("The Defendants in this appeal have staked their defense on the second step. For the purposes of their motion to dismiss in the District Court, the Defendants merely asserted that they had not violated any clearly established law; they did 'not disput[e] ... that the plaintiffs' alleged conditions of confinement at Garner ... amounted to or could amount to a constitutional violation.'. . Accordingly, the District Court considered only the second step—whether the right was clearly established at the relevant times pleaded in the complaint. Like the District Court, our inquiry is only as to whether the Defendants violated clearly established law. . . . Though the rule is stated simply enough, the application of the rule often presents challenges. As Dean John C. Jefferies, Jr. has commented, 'determining whether an officer violated "clearly established" law has proved to be a mare's nest.'. . Defining the precise right at issue poses a 'chronic difficulty' for courts. . . By framing the relevant right too narrowly, we may unduly permit officials to escape liability; by framing the relevant right too generally, however, we risk allowing plaintiffs 'to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.' On the one hand, 'the clearly established right must be defined with specificity.'. . Indeed, the Supreme Court instructs courts that '[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established,' and that '[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . On the other hand, the Supreme Court has also emphasized that, while the 'contours of the right must be sufficiently clear[,]' that 'is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'. .In attempting to determine the right at issue here, the District

Court turned to a Supreme Court case decided in 1993, *Helling v. McKinney*. . . . The District Court concluded that *Helling* established a prisoner's right to be free from toxic environmental substances that, like ETS, posed an unreasonable risk of some future harm. Accordingly, the District Court denied Defendants qualified immunity for conduct alleged to have occurred after *Helling*, decided on June 18, 1993, finding the right to be clearly established as of that date. On *de novo* review, we hold the same: as of June 18, 1993, reasonable officials were on notice that deliberate indifference to Plaintiffs' excessive exposure to radon, then a known toxic environmental substance, violated their Eighth Amendment right. Reasonable officials had such 'fair notice' as of that date because of *Helling*'s clear pronouncement: inmates exposed to toxic substances did not need to wait to get sick to file a lawsuit; they did not need to wait, in other words, for 'tragic event' to occur. . . Rather, they could bring a claim under the Eighth Amendment as soon as an 'unreasonable risk of serious damage to ... future health' existed. . . But in what context would a reasonable official know that right to be violated? This court has stated that 'after *Helling* it was clearly established that prison officials could violate the Eighth Amendment through deliberate indifference to an inmate's exposure to levels of ETS that posed an unreasonable risk of future harm to the inmate's health.'. . Put another way, as of 1993, no reasonable prison official could be unaware that deliberate indifference to levels of ETS that posed an unreasonable risk of future harm to the inmate's health was a Constitutional violation. But what about radon exposure? Were the 'contours of the right' in *Helling* 'sufficiently clear that a reasonable officer would understand' that deliberate indifference to radon exposure 'violates that right' as well? The answer is 'yes.' As the District Court concluded: '[i]f anything, knowing or reckless exposure of prisoners to radon, given the facts alleged by Plaintiffs, is *more* obviously unconstitutional than exposure of prisoners to ETS was in 1993.'. . The District Court reached this conclusion because, while the dangers of ETS were still being debated in 1993, 'radon in 1993 had already five years earlier been identified "as a human carcinogen by the International Agency for Research on Cancer ... and added by Congress that same year to the Toxic Substances Control Act."'. . . If a reasonable officer was aware of the future risk of ETS by that point, then surely a reasonable officer would have been aware of the future risk of a known carcinogen like radon. . . .Taking the allegations as true, we conclude that the mitigation effort implemented was not a reasonable measure taken to abate the risk of excessive radon exposure in the cell block; instead, the allegedly excessive radon in the cell block went unattended. A conscious decision not to address a known risk of excessive radon exposure, as described by Plaintiffs, would violate clearly established law for all the reasons we have expressed above. . . . First, Defendants argue that they are entitled to qualified immunity on the basis that no binding decision discusses the constitutional implications of *radon* exposure to inmates. Essentially, they argue that qualified immunity must be granted absent binding precedent that addresses the *very same* carcinogen in this case. The argument is not compelling. The Supreme Court has held that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . We have repeatedly rejected this type of argument, . . . and we do so once more today. . . Defendants next argue that the District Court erred by relying on statutes, not case law, in partially denying qualified immunity. We disagree. While '[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or

administrative provision,' . . . we have previously held that 'we may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights.'. . The District Court did not rely exclusively on any alleged violation of statutes or regulations to determine that Defendants had violated clearly established rights. Rather, the District Court relied on the binding case law in *Helling* and this Circuit's decision in *LaBounty v. Coughlin*, recognizing a prisoner's right to be free from exposure to friable asbestos, . . . to establish the contours of the right. In conjunction with those cases, it referred to regulations and statutes provided in the complaint to bolster the conclusions that radon is a dangerous carcinogen; that society is unwilling to tolerate the risks accompanying certain levels of radon exposure; and that such risks are—and have been since 1988—well known. Both the Supreme Court and this Court have similarly considered statutes as part of the qualified immunity analysis. . . Moreover, our decision also relies on our binding decisional law in *Warren v. Keane*, which held that, after *Helling*, it was 'clearly established' that defendants could violate the inmates' Eighth Amendment rights by exposing them to unreasonable levels of ETS with deliberate indifference. . . .Third, Defendants argue that the denial of their qualified immunity motion is inconsistent with the Supreme Court's decision in *Taylor v. Barkes*. . . We think that *Taylor* is distinguishable and does not preclude our ruling on qualified immunity. [court discusses *Taylor*] . . . Just as important as what the Supreme Court *did* conclude in *Taylor* is what it *did not* conclude. It did not conclude that it would have been reasonable for the prison guards to completely forego suicide-prevention screening—to simply not act at all. Nor did it conclude that it would have been consistent with clearly established law for the prison guards to forego preventive measures if they were aware that an inmate posed a suicide risk—to operate in a state of knowing indifference. And so, the Supreme Court did not address the distinct possibility that complete inaction in the face of a risk to a prisoner's health—or complete indifference to that risk once it was known—could be unreasonable, in violation of a prisoner's clearly established constitutional rights. With that in mind, we see no difficulty in appreciating the difference between the present appeal and *Taylor*. In this case, Plaintiffs have alleged that prior to 2014, Defendants failed to take *any* steps to mitigate the substantial risk of excessive radon exposure. . . Unlike *Taylor*, where there was a risk-mitigation system in place that allegedly should have been *better*, the Plaintiffs here complain that Defendants took no action whatsoever. Worse still, Plaintiffs here plausibly allege that Defendants had knowledge of the radon exposure risk and still failed to act. *Taylor* granted immunity to prison guards who took *some* effort to remediate the health risks of the prisoners they oversaw; but it hardly stands for the principle that prison guards are immune even where *no* action is taken, especially when a health risk is known. . . In sum: Plaintiffs have alleged that from Garner's inception, Defendants had knowledge of an unreasonable risk of serious harm to the inmates' health, namely excessive radon exposure, and that Defendants were deliberately indifferent in failing to take any reasonable steps (including testing and mitigation) to abate this risk. . . On the basis of these allegations, accepted as true, we conclude that a failure to take any steps to abate the risk of excessive radon exposure violated Plaintiffs' clearly established right to be free from deliberate indifference to exposure to excessive radon gas, a toxic substance that poses a serious health risk—a right clearly established in *Helling*.")

Jones v. Treubig, 963 F.3d 214, 224-28, 230, 236, 240 (2d Cir. 2020) ("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.'. . . 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.'. .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. . . .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.'. . .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 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. . . . [W]e 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.'. .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.'. . 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. . . .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. . . . [O]ur qualified 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. . . . [W]here 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*. . . . 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. . . . 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.")

McCray v. Lee, 963 F.3d 110, 119-20 (2d Cir. 2020) ("The operation of the 'clearly established' standard 'depends substantially upon the level of generality at which the relevant "legal rule" is to be identified.'. . To deny qualified immunity, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . But this does 'not' mean that the official enjoys immunity 'unless the very action in question has previously been held unlawful.'. .In this Circuit the rights of prisoners to a meaningful opportunity for physical exercise had been clearly established nearly three decades before the events of which McCray complains. . . . [T]he district court defined the right to a meaningful opportunity for physical exercise at an unduly narrow level of specificity, stating that defendants here would be entitled to qualified immunity 'because there is no clearly established constitutional right to a prison yard without naturally accumulating ice or snow during winter months.'. . But the right to a meaningful opportunity for physical exercise is not confined to a particular season; although not constant, the right is ongoing. The right need not be described with specific references to the weather or characteristics of the seasons of the year in order for a reasonable prison official to

understand that climatic features may necessitate responsive measures to ensure that the right to a meaningful opportunity for physical exercise not be denied.")

Barnes v. Fedele, 813 F. App'x 696, ___ (2d Cir. 2020) ("Nuttall relies primarily on *White v. Pauly*, 137 S. Ct. 548, 551 (2017), which he argues changed the law after our last remand and required there to be 'clearly established' precedent showing that an official violated the law before he can be stripped of qualified immunity. . . We disagree. *White* did not change the law; it merely 'reiterate[d] the longstanding principle that clearly established law should not be defined at a high level of generality.'. . Here, the law is and has been specific and clear: Prison officials may only abridge a prisoner's free exercise rights if doing so is 'reasonably related to some legitimate penological interests.'. .Importantly, Nuttall was the only Defendant involved in creating the Directive, yet he did not provide a declaration explaining the penological purpose behind its creation. Indeed, he did not provide any declaration. Nevertheless, the district court imputed the penological interest articulated by Chappius onto Nuttall. . . This was error, as nothing in the record sets forth Nuttall's motivation or thinking. As we indicated when this case was last before us, the analysis for the Defendants who merely applied the Directive is different than the analysis for the Defendant who implemented it. . . It is possible, after all, that Chappius's 'understanding' of the policy, . . . was not aligned with Nuttall's reason for signing the Directive. Accordingly, on the record before us, Nuttall is not entitled to summary judgment.")

McDonald v. City of Troy, No. 1:18-CV-1327, 2021 WL 2232565, at *5–6 (N.D.N.Y. June 3, 2021) ("Contrary to Iler's hopes, his defense of qualified immunity does not require summary judgment in his favor. After all, the Second Circuit has unambiguously held that the 'clearly established' label applies to the use of deadly force to stop a fleeing motorist in the absence of a significant threat of death or serious physical injury to the officer or others. . . Defendants may nevertheless argue that this language conflicts with the Supreme Court's demand for specificity in defining what rights are clearly established, but any such conflict is irrelevant in this case. . . The facts of this case simply line up too squarely with the facts in *Cowan*. Both involve an officer firing on an approaching vehicle within a short window of time. . . Both cases involve an officer trying to verbally stop a would-be escapee from fleeing before opening fire. . . Both cases involve a dispute as to whether the officer was actually in danger when he opened fire. . .In short, the factual underpinnings of this case and *Cowan* are strong enough that, at the very least for the purposes of summary judgment, the Court is satisfied that Iler is not entitled to qualified immunity on his excessive force claims. . . Iler's motion for summary judgment against plaintiff's § 1983 excessive force claim on the basis of qualified immunity must therefore also be denied.")

THIRD CIRCUIT

Peroza-Benitez v. Smith, 994 F.3d 157, 165-72 & n.3 (3d Cir. 2021) ("The District Court chose to begin with the 'clearly established' prong. We will do the same. . . .We answer this question by first looking to factually analogous Supreme Court precedent, as well as binding opinions from our own Court. . . Next, we consider whether there is a 'robust consensus of cases of persuasive

authority in the Courts of Appeals.'. . We may also take into account district court cases, from within the Third Circuit or elsewhere. . . As we examine the case law, we must keep in mind that this Court takes a 'broad view of what constitutes an established right of which a reasonable person would have known.'. . And a right may be 'clearly established' even without a ' "precise factual correspondence" between the case at issue and a previous case.'. . A public official does not get the benefit of 'one liability-free violation' simply because the circumstance of his case is not identical to that of a prior case. . . .We note that 'appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court.'. . . The District Court found that C.I. Haser was entitled to qualified immunity as '[his] actions did not violate a clearly established constitutional right, because "a reasonable officer in [his] shoes at the time in question would not have perceived federal law to preclude" his conduct.'. . We disagree. Viewing the facts in the light most favorable to Peroza-Benitez as the non-moving party – as we are required to do at summary judgment – a reasonable jury could find that C.I. Haser's actions violated a 'clearly established' right. We first define the right that C.I. Haser allegedly violated. The District Court defined Peroza-Benitez's right as 'the Fourth Amendment right to be free from excessive force in the form of multiple punches to the head while hanging out of a window through which he had attempted to flee and while known to be unarmed.'. . Here, Peroza-Benitez was unarmed, injured, covered in his own blood, and hanging from a second-story window by his hands, feet dangling, when C.I. Haser – knowing Peroza-Benitez to be unarmed – punched him 'repeatedly' in the head with a closed fist. . . C.I. Haser's punches 'stunned and disoriented' Peroza-Benitez, causing him to fall over ten feet into a below-ground concrete stairwell. . . Accordingly, we rely on a modification of the District Court's definition: The Fourth Amendment right of an injured, visibly unarmed suspect to be free from temporarily paralyzing force while positioned at a height that carries with it a risk of serious injury or death. Next, we ask whether Peroza-Benitez's defined right was 'clearly established' at the time of C.I. Haser's alleged violation. We do not find any factually analogous precedent from either the Supreme Court or our own Court, thus we turn to persuasive authority in the Courts of Appeals and district courts. It is within this inquiry that we find the necessary 'robust consensus of cases' supporting our holding that a reasonable jury could find that C.I. Haser, by punching Peroza-Benitez 'repeatedly' in the head as he hung out of a second-story window, violated a 'clearly established' right. [collecting cases] While each of these cases, including *Martin*, concerns a police officer tasing, as opposed to punching, an individual vulnerable to falling from a precarious height, tasing is sufficiently analogous to punching in this context such that a reasonable jury could find that C.I. Haser's actions violated a 'clearly established' right. The risk in using a taser on an individual positioned on an elevated surface is that the individual could fall off said surface once incapacitated by the taser and suffer serious injury or death. Officer Smith – who was with C.I. Haser at the window – testified that it is 'against protocol' to 'tase someone on the roof' because if 'they fall off, that's not going to be good. We're not gonna tase someone that's on a roof.'. . The same exact logic applies to deliberately punching someone 'to stun' them. . . when that person is hanging out of a window. . . . Tasing an individual vulnerable to falling from a precarious height is sufficiently analogous to repeatedly punching an unarmed individual in the head to stun him while he is dangling from a windowsill at a precarious height. Requiring this case

to be a factual clone of a previous case would afford C.I. Haser 'one liability-free violation,' a premise that this Court has repeatedly cautioned against. . . . In short, there was a 'clearly established' right at the time for an injured, visibly unarmed suspect to be free from temporarily paralyzing force while positioned as Peroza-Benitez was. A reasonable jury, on this record, could conclude that C.I. Haser 'repeatedly' punched Peroza-Benitez in the head and caused him to fall from a second-story window, in violation of that right. Or a jury could conclude that the facts do not support Peroza-Benitez's account of the incident. But if a jury credited Peroza-Benitez's version, then Peroza-Benitez's 'clearly established' right was violated. Thus there is a genuine dispute of material fact regarding C.I. Haser's conduct, which must be resolved by a jury. So we will vacate the District Court's finding that C.I. Haser was entitled to qualified immunity and remand for further proceedings. . .As to Officer White, the District Court held that he was entitled to qualified immunity because his 'use of non-lethal force in the form of a single tase to [Peroza-Benitez], regard-less of whether or not [Peroza-Benitez] was armed and whether or not he was unconscious in the moments after falling and being tased, cannot be considered a violation of any clearly established precedent.'. . We disagree. The District Court defined Peroza-Benitez's right as 'the Fourth Amendment right to be free from excessive use of force in the form of the use of a taser while not visibly armed (but after the acting officer was informed moments earlier by a fellow officer that [Peroza-Benitez] was armed and in active flight), while laying [sic] on the ground after having fallen from a window through which he had attempted to flee and been rendered temporarily unconscious, and after having made no further attempt to flee after hitting the ground.'. . While the District Court 'assume[d] [Peroza-Benitez] made no further movements [upon landing] and was knocked temporarily unconscious,' it notably concluded in its analysis that Peroza-Benitez's 'degree of consciousness after hitting the ground is irrelevant' because Officer White 'made a quick decision, deploying his taser *immediately*, essentially *simultaneously* with [Peroza-Benitez] hitting the ground.'. . But the consciousness of Peroza-Benitez is not irrelevant to the analysis; it is critical. Viewing the facts in the light most favorable to Peroza-Benitez – again, as we *must* do at summary judgment – Peroza-Benitez was tased by Officer White while lying unconscious after having fallen over 10 feet into a below-ground, concrete stairwell. The duration of time that elapsed between Peroza-Benitez hitting the ground and getting tased does not change the fact that, in the light most favorable to Peroza-Benitez, he was tased while visibly unconscious and after multiple seconds had elapsed. . . such that a reasonable jury could find that Officer White should have known that he was tasing an unconscious individual. . . Thus, Peroza-Benitez's right at issue boils down to the following: The Fourth Amendment right to be free from excessive force in the form of being tased while visibly unconscious. There is a 'robust consensus of cases' that support the proposition that tasing a visibly unconscious person – who just fell over ten feet onto concrete – is a violation of that person's Fourth Amendment rights. [collecting cases] [W]e hold that the right not to be tased while visibly unconscious was 'clearly established' at the time and that a reasonable jury could find that Officer White violated this right. To be sure, a jury could find that the facts do not support Peroza-Benitez's account – for example, by finding that Peroza-Benitez was not unconscious and was still trying to flee, that Officer White reasonably believed Peroza-Benitez was armed, or that there was not enough time for Officer White to recognize that Peroza-Benitez was unconscious. But if a jury credited Peroza-Benitez's version of events, then

Peroza-Benitez's 'clearly established' right was violated. Thus, here too we have a genuine dispute of material fact for the jury to resolve, and we will vacate the District Court's finding that Officer White was entitled to qualified immunity and remand for further proceedings.")

HIRA Educational Services North America v. Augustine, 991 F.3d 180, 191 & n.7 (3d Cir. 2021) ("Like the plaintiffs in *X-Men*, HIRA alleges the Legislators urged the agency (DGS) to terminate its contract with HIRA, sought an investigation into the sale, disparaged HIRA, and favored a different recipient of the government contract. HIRA's only attempt to distinguish this case from *X-Men* is to assert that it 'has clearly articulated both the constitutional and statutory rights that have been violated by the Legislative Defendants and the actions that constituted those violations.'. . Even assuming that HIRA has alleged violations of constitutional and statutory rights that are not foreclosed by the Legislators' First Amendment rights, that would show only that HIRA has stated a claim; it does nothing to show the Legislators violated *clearly established* law. Although HIRA rightly notes that the Second Circuit's decision is not binding on this Court, the absence of precedent in its favor from the Supreme Court or this Court dooms its case. . . That, combined with an adverse precedent from our sister court, puts HIRA well short of showing that the rights it seeks to vindicate here were clearly established. So Vogel and Sainato are entitled to qualified immunity. . . . The recent Supreme Court decision in *Taylor v. Riojas*, —— U.S. ——, 141 S. Ct. 52, 208 L.Ed.2d 164 (2020), does not change our analysis in this case. The Legislators' actions were not so outrageous that 'no reasonable ... officer could have concluded' they were permissible under the Constitution, *Taylor*, 141 S. Ct. at 53, especially in light of *X-Men* and *Firetree*.")

Kamienski v. Ford, 844 F. App'x 520, ___ (3d Cir. 2021) ("Whatever we might make of the allegations' merits, under the qualified immunity framework [,] . . . withholding evidence did not violate a clearly established right at the time of the criminal trial in this case. In *Gibson*, the plaintiff alleged that police officers affirmatively concealed material evidence from the prosecutor. . . But it was not clearly established at the time of the 1994 trial that officers had a duty under *Brady* to disclose exculpatory information to prosecutors, so they were entitled to qualified immunity. . . And so too here. Mahony and Churchill are entitled to qualified immunity for their conduct at the time of the 1988 trial. . . Kamienski asks us to disregard *Gibson* because Mahony and Churchill were personally responsible for the disclosure to Kamienski—unlike the officers in *Gibson*, who were only under a duty to disclose the evidence to the prosecutor. But this request is self-defeating: if Mahony and Churchill had duties arising from the litigation, they would be intimately associated with the judicial phase of the criminal process and therefore entitled to absolute immunity. . . In sum, Kamienski cannot have it both ways. Either the detectives were responsible for complying with *Brady* by disclosing evidence to his defense team—in which case they were acting in a quasi-judicial role and entitled to absolute immunity—or they were investigators entitled to qualified immunity because their duty to disclose *Brady* material to the prosecutor was not clearly established at the time of the 1988 trial.")

El v. City of Pittsburgh, 975 F.3d 327, 337-43 & n.7 (3d Cir. 2020) ("Although we would not be required to defer to the District Court if the video showed its conclusion was 'blatantly and demonstrably false,'. . . the District Court's finding that Will was non-threatening is not blatantly contradicted by the video[.] . . The video clearly shows what happened between the police and the Els, and we have studied it extensively. Indeed, viewing the facts in 'the light depicted by the video[ ],'. . . confirms that the District Court did not make any demonstrably false findings about how the events unfolded. . . .The District Court correctly concluded that, taking the facts in the light most favorable to Will, a jury could conclude there was a violation of his right to be free from the unreasonable use of force. The factors laid out in *Graham v. Connor* . . . and *Sharrar* . . . show why. Under the *Graham* factors, the potential crime at issue (underage purchase of tobacco) was not severe; the Els did not pose an immediate safety threat; and they were neither resisting arrest nor trying to flee. . . Under the *Sharrar* factors, the Els were not violent or dangerous; they were unarmed; they were outnumbered six to two; and the situation unfolded over a few minutes, not a few tense and dangerous seconds. . . The final *Sharrar* factor, physical injury to the plaintiff, weighs in Will's favor, because he sustained a hip contusion—although the injury is relatively minor. . . The dissent disagrees with the definition of the right at issue, maintaining that the definition is not specific enough and should encompass facts not found by the District Court. We agree that the right must be defined with specificity. . . Here, however, the District Court followed that directive and did not speak at 'a high level of generality.'. . Moreover, the presence of the video in the record does not permit us to embark upon our own factfinding exercise. Rather, as noted, 'we must accept [the] set of facts' the District Court found . . . unless the video 'quite clearly contradicts' them,[.] . . *Scott*'s rule, permitting us to disregard factual findings that no reasonable jury could believe, is 'a narrow exception to the limits ... on our jurisdiction' on review of a denial of qualified immunity. . . We should apply *Scott*'s narrow exception carefully and strictly, rather than viewing it as an invitation to find our own facts. Therefore, the dissent's preferred articulation of the right at issue is not available to us within the limits of our jurisdiction. . . . In the absence of controlling authority from the Supreme Court or this Court, the District Court correctly looked to excessive force cases from our sister Circuits that involve police use of non-deadly force on unarmed, uncooperative citizens who were not suspected of serious crimes. . . These cases establish a consensus that such an individual has the right not to be taken to the ground during an investigatory stop when he stands up and takes one or two small steps towards a police officer who is standing a few feet away. . . . These cases from our sister Circuits establish a 'consensus ... of persuasive authority,'. . . that an unarmed individual who is not suspected of a serious crime—including one who is verbally uncooperative or passively resists the police—has the right not to be subjected to physical force such as being grabbed, dragged, or taken down.[7]

[fn. 7: The dissent states that our holding places 'unrealistic expectations' on Officer Welling because he "was supposed to realize – in an instant, from four factually dissimilar out-of-circuit decisions – that a grab-and-shove-to-secure under these circumstances was clearly established as unconstitutional.'. . We disagree that the out-of-circuit cases are factually dissimilar, as they involve unarmed individuals who were not suspected of a serious crime and were uncooperative or passively resistant. More fundamentally, the dissent's criticism takes issue not with our opinion, but with the qualified immunity analysis itself. It is black-letter law that an officer is not protected

from suit when he or she acts in a way that runs against 'a robust consensus ... of persuasive authority,'. . . regarding what conduct violates the Constitution. If it were too much to ask an officer to know constitutional principles established by a consensus of cases from outside his or her Circuit, the Supreme Court would need to solve that problem.**]** Officer Welling argues that even if Will had a Fourth Amendment right to be free of the kind of force he used, that right was not clearly established in July 2013, when the incident took place. To support this argument, he launches various attacks on the cases the District Court relied on—but none of these attacks succeed in dismantling the consensus of persuasive authority. . . . For his part, Will argues that we should affirm on an alternative ground—that his right to be free of the kind of force Officer Welling used is clearly established by the excessive force factors provided in *Graham* . . . and our opinion in *Sharrar*[.] . . The factor-based tests of *Graham* and *Sharrar*, however, are 'cast at a high level of generality' and 'can clearly establish the answer, even without a body of relevant case law,' only 'in an obvious case.'. . . We have concluded that cases are obvious, and that general standards clearly establish a right, in extreme situations such as when lethal force is used . . . or when a high school teacher sexually harassed and assaulted students[.] . . This case does not present that kind of situation, but the *Graham* and *Sharrar* factors nevertheless buttress the robust consensus of persuasive authority from our sister Circuits. As discussed above, the factors all tend to show that Officer Welling's force was excessive: there was no serious crime, no immediate safety threat, and no resistance or flight by the Els; they were not armed and were significantly outnumbered. . . While we would not hold that these factors, by themselves, clearly established Will's right to be free of the kind of force Officer Welling used, they support the consensus of cases that show clear establishment of the right. . . . Viewing the facts in the light most favorable to Will, as we must, the danger to the police and the community was virtually nil. Officers approached two young men who were not engaged in any facially suspicious behavior; they were leaving a corner store. It became clear almost immediately that the men were not armed and that if any offense was being committed, it was, at most, an underage tobacco purchase. The men were upset to be stopped and said so. They did not flee. They were outnumbered six to two. One of them created a hazardous or offensive condition by standing up and taking a few small steps. Under these circumstances, a jury could conclude that taking Will down was an unreasonable use of force. And a consensus of cases from our sister Circuits establishes that in a situation like this, a plaintiff has the right not to be taken to the ground. In reaching this conclusion, we are mindful that reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'. . There must be '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.'. . Officer Welling may have been called upon to make a split-second decision when Will stood up and took a few steps, but his decision was made with the knowledge that Will was unarmed and outnumbered. For these reasons, Officer Welling is not entitled to summary judgment based on qualified immunity.")

El v. City of Pittsburgh, 975 F.3d 327, 343-47 (3d Cir. 2020) (Phipps, J., concurring in part and dissenting in part) ("[I]n two respects I part ways with the Majority's affirmance of the order

denying qualified immunity to Officer Frank Welling at summary judgment. First, I do not believe that the Majority Opinion articulated the putative constitutional right at issue with the high level of specificity required for the qualified immunity analysis. Second, in my view, it is far from clearly established that Officer Welling's use of force against Will El – a grab-and-shove-to-secure, which resulted in a bruise on the hip – was unconstitutionally excessive. Thus, I respectfully dissent in part and would reverse the order denying qualified immunity to Officer Welling. . . . I do not believe that the Majority Opinion articulates the putative constitutional right with the requisite level of precision. The Majority describes the Fourth Amendment right in this way: The right of an unarmed individual not to be taken to the ground during an investigatory stop when he stands up and takes one or two small steps towards a police officer who is standing a few feet away. . . . But that articulation ignores important facts. It does not mention that Will El arose and extended an arm to point at an officer at close range. It also neglects that Officer Welling gestured for Will to sit down and that Will refused to. And Officer Welling did not initially take Will to the ground. Before the situation escalated, Welling grabbed and pushed Will back into a boarded-up window with Will maintaining his footing. . . . The inquiry into the putative right should be expressed this way: Whether an unarmed individual who arises to his feet in close range to a police officer, points at an officer, and ignores a gesture to sit back down has a Fourth Amendment right not to be grabbed and shoved backward into a vertical structure while not losing his footing. Such an articulation includes the three omitted events that would matter to every reasonable officer: that Will stood up and extended an arm to point at an officer at close range; that Will ignored Officer Welling's gesture to sit down; and that, as far as the complained of use of force, Welling did not tackle Will or take him to the ground. By excluding these important details, which are plainly evident from the video recording, the Majority Opinion does not identify the right with the '*high* "degree of specificity"' required. . . . Under either formulation (the Majority's or mine), the constitutional right at issue was not clearly established. For a constitutional right to be "clearly established," the legal principle 'must have a sufficiently clear foundation in then-existing precedent.'. . Such a foundation in precedent may rest on either 'controlling authority' or 'a robust consensus of cases of persuasive authority.'. . The Majority Opinion does not identify any 'factually analogous precedents of the Supreme Court [or] the Third Circuit.'. . Without controlling authority to meet the "clearly established" threshold, the Majority relies instead on four decisions from other federal appellate courts as persuasive authority. While the "clearly established" standard does 'not require a case directly on point,' those four cases fall well short of 'a robust consensus of persuasive authority.'. . None of them involves a sufficiently analogous situation to this one to be 'clear enough that *every reasonable official* would interpret [them] to establish the particular rule the plaintiff seeks to apply.'. . . In reaching this outcome, the Majority Opinion places unrealistic expectations on law enforcement officers. According to the Majority, Officer Welling was supposed to realize – in an instant, from four factually dissimilar out-of-circuit decisions – that a grab-and-shove-to-secure under these circumstances was clearly established as unconstitutional. Apparently, in that split-second, Officer Welling should have had recall of an Eighth Circuit case from 2012, a Fifth Circuit case from 2009, a Sixth Circuit case from 2006, and an Eleventh Circuit case from 1998 – all of which occurred in different contexts and involved much greater force than the grab-and-shove-to-secure at issue here. . . Not only that,

but Officer Welling – in the same moment – needed to determine whether those factually dissimilar, non-controlling cases represented a robust consensus of persuasive authority. Even if that were possible, that small handful of cases does not place Officer Welling's use of force 'beyond debate,' such that it was a clearly established Fourth Amendment violation. . . Make no mistake, the Majority imposes a heightened standard for qualified immunity so that it no longer protects ' "all but the plainly incompetent or those who knowingly violate the law."'. . Officers without the acumen to conduct a synapse-quick legal analysis of factually dissimilar, out-of-circuit precedent will be denied immunity and subject to suit for their actions. The Majority responds that it is not applying a heightened standard but rather the black-letter law of qualified immunity. . . But in articulating the doctrine, the Supreme Court has not imposed such a high standard on officers. . . To the contrary, the Supreme 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.'. . Rather than acknowledge that difficulty, or even that the appropriateness of Officer Welling's use of force is not 'beyond debate,'. . . the Majority faults Officer Welling for failing to instantaneously distill a loose collage of out-of-circuit caselaw into a robust consensus of persuasive authority that would apply to the particular circumstances of his use of force – which was *less than the amount of force used in any of those other cases*. . . . Under the *Graham* / *Sharrar* factors, this is not an 'obvious case' of excessive force. . . Instead, these factors generate uncertainty, and that further undermines the Majority's conclusion that Officer Welling violated a *clearly established* constitutional right. . . .In sum, I concur in part and respectfully dissent in part. As I understand the law, qualified immunity shields Officer Welling from suit because at the time of the incident, it was not clearly established that a grab-and-shove-to-secure, which resulted in a bruise on the hip, constituted excessive force in violation of the Fourth Amendment. Given the caselaw at the time, these events occurred in the 'hazy border between excessive and acceptable force' in which law enforcement officers are entitled to qualified immunity.")

Harvard v. Cesnalis, 973 F.3d 190, 207 & n.9 (3d Cir., 2020) ("We have never recognized an independent due process right to be free from a reckless investigation. . . We have also held that, even if such a claim were cognizable, it 'could only arise under the Fourth Amendment.'. . We will therefore affirm the District Court's grant of summary judgment for the defendants as to the reckless investigation claim. . . . Even if Harvard had brought the reckless investigation claim under the Fourth Amendment, the officers would nevertheless be entitled to qualified immunity because this right was not clearly established at the time of the investigation.")

Weimer v. County of Fayette, Pennsylvania, 972 F.3d 177, 190-92 (3d Cir. 2020) ("Weimer alleges that Vernon participated in the reckless and deliberately indifferent police investigation and 'had reasonable and realistic opportunities to intervene to prevent the violations of ... Weimer's constitutional rights.'. . Vernon responds that she is entitled to qualified immunity because, 'at the time of the allegations, no clearly established [law] existed to put [her] on notice' that, as a prosecutor, her failure to intervene in the police investigation would violate Weimer's rights. . .

We agree. It is well established in our Circuit that both police and corrections officers must 'take reasonable steps to protect a victim from another officer's use of excessive force.'. . But we have not extended this duty to prosecutors who fail to intervene to prevent police from conducting unconstitutional investigations. Accordingly, we cannot say that 'any reasonable [prosecutor]' investigating Haith's murder would have understood that she was violating Weimer's constitutional rights in failing to intervene to prevent improper investigatory conduct by police. . . Put differently, the facts here are simply too dissimilar from those in the excessive force cases for us to hold that those cases would have put Vernon on notice that her actions were unlawful. Although the District Court acknowledged that there was no 'case law in the Third Circuit holding a prosecutor liable for a failure to intervene in the conduct of police officers,' it identified '[a] subsequent decision from the [Western District of Pennsylvania that] ha[d] extended liability for a failure to intervene claim to prosecutors who [were] engaging in investigative conduct.'. . Thus, the District Court permitted Weimer's claim to proceed '[g]iven the recent developments in this area of the law and the early stage of this case.'. . However, a district court opinion from 2018 cannot serve as a basis for holding that a prosecutor's duty to intervene to prevent an unconstitutional police investigation was clearly established between 2001 and 2006. For a legal principle to be clearly established, it must be based on precedent *existing at the time* of the official's act, and the holding of one district judge, which 'is not controlling authority in any jurisdiction, much less in the entire United States,' is insufficient to clearly establish a violation of a constitutional right. . . . Our opinion on appeal in *Fogle* merely affirmed the trial court's denial of the prosecutors' motion to dismiss Fogle's claims based on absolute immunity. . . Here, in contrast, Vernon has not only requested absolute immunity on the failure to intervene claim, but she also claims that if absolute immunity does not shield her from suit on this claim, qualified immunity applies. . . . District courts appear to disagree as to whether prosecutors have a duty to intervene in police investigations. . . Disagreement among district judges may, in and of itself, be a reason to recognize a qualified immunity defense. . . . Whatever might be said of the investigation, the question here is whether Weimer had a clearly established right to have Vernon take reasonable steps to protect her from an unconstitutional police investigation. The Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . Weimer's reframing of the constitutional violation at issue does not change the fact that there was no clearly established law at the time of Vernon's allegedly violative conduct that would have placed the constitutional question she confronted—to intervene in the police investigation or not to intervene—'beyond debate.'")

Starnes v. Butler County Court of Common Pleas, 50th Judicial Dist., 971 F.3d 416, 428 (3d Cir. 2020) ("Doerr argues Starnes did not allege a clearly established right because we have not previously held that a hostile work environment is cognizable under § 1983. But we have been clear that § 1983 shares the same elements for discrimination purposes as a Title VII action. . . And a robust consensus of persuasive authority exists to clearly establish that creating a hostile work environment constitutes a § 1983 violation.")

Starnes v. Butler County Court of Common Pleas, 50th Judicial Dist., 971 F.3d 416, 431 (3d

Cir. 2020) ("Neither the Supreme Court nor this Court has held that unmarried, romantic partners have a fundamental right to intimate association. Nor is there a robust consensus of persuasive authority recognizing such a right.")

Wagner v. Northern Berks Regional Police Department, 816 F. App'x 679, ___ (3d Cir. 2020) ("Horner is entitled to qualified immunity because the law is not clearly established that an officer lacks probable cause where the affirmative defenses of compulsory joinder or Double Jeopardy bars a prosecution. . . . In fact, the law of this Circuit provides that similarly complicated affirmative defenses, such as necessity . . . and statutes of limitations. . . are not subjects an officer must consider when evaluating whether there is probable cause. By its own terms, the dissent's analysis shows that the purported unlawfulness of Horner's actions was not clearly established. The dissent fails to 'identif[y] a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances' where the compulsory joinder rule or Double Jeopardy strips an arresting officer of probable cause to make an arrest. . . Thus, at a minimum, qualified immunity would shield Horner from liability.")

Wagner v. Northern Berks Regional Police Department, 816 F. App'x 679, ___ (3d Cir. 2020) (Fuentes, J., dissenting) ("I must . . . disagree with the Majority's holding that, even if Officer Horner lacked probable cause, his conduct is protected by the doctrine of qualified immunity. Public officials are entitled to qualified immunity unless the plaintiff alleges a violation of a constitutional right that was 'clearly established' at the time of the official's conduct. . . When we define the right allegedly violated, we must frame it 'in light of the specific context of the case, not as a broad general proposition.'. .Ultimately, the dispositive inquiry is whether 'it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.'. . As we have previously stated, qualified immunity 'protects "all but the plainly incompetent or those who knowingly violate the law."'. . Although we must consider the facts in each qualified immunity case 'in light of [its] specific context,'. . it is not necessary for a plaintiff to point to 'earlier cases involving fundamentally similar facts.'. . In our prior cases involving evidence intentionally or recklessly omitted from an affidavit supporting probable cause, we have defined the right in question as the right to be free from prosecutions on criminal charges that lack probable cause.'. . As explained above, I do not think those cases, which clearly hold that officers cannot omit exculpatory evidence from probable cause affidavits, are meaningfully different from this one, in which Officer Horner is alleged to have clearly disregarded evidence known to him when filing the 2014 affidavit. . . Given our substantial case law explaining an officer's duty to disclose information that could affect probable cause, I would find that Officer Horner has not established his entitlement to qualified immunity at this stage. Unfortunately, today's Majority Opinion licenses any officer to deliberately withhold information in an affidavit for an arrest warrant, even if they know that information would relieve a defendant of criminal liability for his actions. Qualified immunity and related principles of law are intended to shield officers who act reasonably in discharging their duties in good faith. The law is intended as a shield for such officers, not as a sword for officers who, as is alleged here, attempt to wield their authority to maliciously prosecute defendants. For these reasons, I respectfully disagree with my colleagues

and would find that Officer Horner has not shown that he is entitled to qualified immunity and Wagner's allegations—that Officer Horner deliberately omitted material information from the affidavit in order to harass him—should have survived a motion to dismiss.

Knight v. Bobanic, 807 F. App'x 161, ___ (3d Cir. 2020) ("Appellees moved for summary judgment. Applying the second 'clearly established right' prong of the qualified immunity doctrine, the District Court granted their motion. After extensively summarizing the underlying (undisputed and disputed) facts, the District Court offered the following formulation of the right at issue in this case:

Heeding the Supreme Court's recent admonitions to the trial court, considering the above material facts (both undisputed and those that are disputed as viewed in favor of Plaintiff) the Court formulates the right at issue as follows: the right of an individual to be free from the infliction of deadly force by a police officer, where such deadly force was employed without warning or hesitation from the officer, and where the individual himself is in his home, lawfully armed, suspected of domestic violence, has raised at least slightly (but not aimed) one of his weapons, as he was quickly approaching the officers from the interior of his home.

Knight v. Bobanic, No. 2:15-cv-00820, 2019 WL 2151293, at *9 (W.D. Pa. May 17, 2019) (footnote omitted). The District Court then thoroughly examined Supreme Court and Third Circuit 'excessive force' precedent as well as excessive force decisions from other circuit and district courts. In the end, it concluded that neither controlling legal authority nor a robust consensus of persuasive legal authority clearly established, as of the date of the shooting, that all reasonable police officers would have known that Appellees' conduct in this case was unconstitutional. . . . Appellant asserts that the District Court engaged in improper fact-finding in favor of Appellees with respect to whether Shawn Knight had one of the guns raised because he pushed open the screen door. However, it is undisputed that Shawn Knight was holding a revolver in each hand and then opened the screen door that led to the front porch. 'For him to push that screen door open, he would have needed to raise one of his hands, which was holding a revolver, at least slightly.'. . In any event, the record supports the District Court's conclusion that Shawn Knight, at most, raised one of the weapons slightly for just a moment of time. According to Appellant, our 2002 ruling in *Curley v. Klem*, 298 F.3d 271 (3d Cir. 2002), 'squarely governs' the facts in this case. The defendant state trooper in *Curley* shot and seriously injured the plaintiff, a police officer whom he mistook for an armed criminal suspect (who had already killed himself). . . Admittedly, we found that there was a factual dispute as to whether the plaintiff had pointed his gun at the defendant (while the District Court here assumed that Shawn Knight did not aim his weapons at Appellees). . . Furthermore, there was a genuine issue of material fact as to whether the plaintiff had looked inside the vehicle stolen by the suspect, where he would have seen the suspect's body. . . Viewing the evidence in the light most favorable to Appellant, Trooper Bobanic initially forced his way into the home (even though the alleged domestic violence victim and her mother indicated that the situation had deescalated and that no further police involvement was needed), and Appellees did not identify themselves as police officers or provide any sort of warning (which could have led Shawn Knight, who was sleeping at the time, to believe that the state trooper was a home invader). However, *Curley* was still a case of mistaken identity, and the plaintiff 'claims that his gun was

never aimed in Klem's direction, that he had turned to retreat in a direction away from Klem at the time he was fired upon, and that there was ample evidence indicating that he was not the suspect, including the fact that he was wearing a standard Port Authority police uniform.'. .'By contrast, in this case, Shawn Knight was exactly the individual that the Troopers believed that he was, namely, a now-armed private citizen suspected of engaging in domestic violence, rushing out of his home in their direction with a gun in each hand.'. . Accordingly, we agree with the District Court that 'the facts of *Curley* are "distinguishable in a fair way from the facts presented in the case at hand," so *Curley* does not "clearly establish" the right at issue here."'. . For the foregoing reasons, we will affirm the order of the District Court.")

James v. New Jersey State Police, 957 F.3d 165, 168-73 (3d Cir. 2020), *reh'g and reh'g en banc denied sub nom Gibbons v. New Jersdy State Police*, 969 F.3d 419 (3d Cir. 2020), *pet. for cert. filed sub nom James v. Bartelt*, No. 20-997 (U.S. Jan. 4, 2021) ("We will not review the District Court's holding that Trooper Bartelt may have violated a constitutional right—the first prong of qualified immunity. The District Court based this holding on its conclusion that 'genuine issues of disputed fact' existed, but it did not identify these disputed facts. . . To the extent that the District Court is correct that these unstated facts are material to the inquiry, we lack jurisdiction under the collateral-order doctrine to review its holding on this prong. . . Thus, we will assume without deciding that Trooper Bartelt violated one of Gibbons's constitutional rights and proceed to qualified immunity's second prong. . . . On appeal, Trooper Bartelt argues that he did not violate a clearly established right. We agree because, at the time, no Supreme Court precedent, Third Circuit precedent, or robust consensus of persuasive authority had held that 'an officer acting under similar circumstances as [Trooper Bartelt] ... violated the Fourth Amendment.' . . Because the events here occurred on May 25, 2011, we will consider only precedents that clearly established rights as of that date. . . .First, we consider whether Trooper Bartelt violated a right that was clearly established by Supreme Court precedent. . . He did not. The closest factually analogous Supreme Court precedent, *Kisela v. Hughes*, . . . is instructive. . . . Many of the same distinguishing facts are present here: (1) Gibbons was armed with a gun; (2) Gibbons ignored Trooper Bartelt's orders to drop his gun; (3) Gibbons was easily within range to shoot Troopers Bartelt or Conza; and (4) the situation unfolded in 'seconds.'. .In sum, Trooper Bartelt did not violate a right that had been clearly established by Supreme Court precedent. . . . Next, we consider whether Trooper Bartelt violated a right that had been clearly established by Third Circuit precedent. None of our relevant precedents present a sufficiently similar factual scenario at the 'high "degree of specificity"' that Supreme Court precedent requires. . . So we conclude that he did not. . . . Three factual differences lead us to conclude that Trooper Bartelt did not violate a clearly established right. First, Trooper Bartelt's pre-standoff knowledge of Gibbons differs from the *Bennett* officer's pre-standoff knowledge of the suspect. Trooper Bartelt was aware of several facts from which he could reasonably conclude that Gibbons posed a threat to others. . . .Second, Gibbons was much closer to and less compliant with Trooper Bartelt than the suspect in *Bennett*. . . .Third, Trooper Bartelt's standoff with Gibbons lasted only moments, unlike the nearly hour-long standoff in *Bennett*. Trooper Bartelt's interaction with Gibbons was over within seconds of his arrival on the scene. He necessarily 'had mere seconds to assess the potential danger' posed by the armed and non-

compliant Gibbons. . . . For these reasons, although *Bennett* may be the most analogous precedent from our Court, its holding does not '"squarely govern[ ]" the specific facts at issue' here. . . And because no other Third Circuit precedent is factually analogous to this case, we conclude that Trooper Bartelt did not violate a clearly established right under our precedent. . . .The caselaw of our sister circuits prohibits the use of deadly force against non-threatening suspects, even when they are armed and suicidal. . . But none of the cases that stand for this general principle involve the 'high "degree of specificity"' required to clearly establish a right under the circumstances Trooper Bartelt faced.")

But see ***Gibbons v. New Jersey State Police***, 969 F.3d 419, 419, 425-28, 435-38 (3d Cir. 2020) (McKee, J., with whom Greenaway, Krause, and Restrepo, JJ., join, dissenting from denial of rehearing en banc) ("Today, we deny the Petition for Rehearing in this case even though our Opinion squarely contradicts controlling precedent established by our decision in *Bennett v. Murphy*. . . . Obviously, *Bennett* does not apply if an individual threatening self-harm also poses a risk to others. Just as the circumstances in *Bennett* (construed in the plaintiff's favor) compelled the conclusion that a reasonable officer could not have believed that David Bennett posed a threat to anyone but himself, the circumstances here, viewed in a light favorable to Gibbons, compel the conclusion that Willie Gibbons only posed a threat to himself. When asked whether Gibbons had threatened him "in any way," Bartelt responded unequivocally: "No." Thus, when he opened fire, Bartelt violated clearly established law. . . .[M]ore than once, this Court has advised that 'a court ruling on summary judgment in a deadly-force case' must be careful 'to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify."' The Supreme Court has likewise emphasized 'the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.' Instead, the Opinion improperly resolves multiple disputed issues of material fact in Bartelt's favor when determining if clearly established law applies. For example: whether Gibbons' right arm was raised in surrender or at his side (ignored by the Opinion), whether it was light or dark when Bartelt shot Gibbons (ignored), whether Bartelt told Gibbons to drop his gun or spoke unintelligibly (Opinion repeatedly assumes Bartelt gave the order), whether Bartelt even gave Gibbons a chance to comply with any command he may have given or opened fire immediately after issuing such command (Opinion repeatedly assumes Gibbons chose not to comply), and most importantly, whether Gibbons threatened Bartelt in any way (ignored). The Opinion implicitly or explicitly resolves each of these inferences against Gibbons when determining whether clearly established law governs this case. But it does not stop there: Bartelt never stated that Gibbons threatened him or anyone other than himself. In fact, Bartelt admits Gibbons made no threat. Here, there is no factual dispute. So the Opinion simply invents one and then resolves it in favor of Bartelt. That is not merely wrong, it is indefensible. . . . The Fifth Circuit's careful en banc decision in *Cole v. Carson* amplifies the relevance of *Tolan*. There, officers pursued a suicidal young man, Ryan Cole, and fatally shot him while he pressed a gun to his own head. As here, it was disputed whether the officers warned the victim before opening fire, and, if so, whether they gave him an opportunity to comply. The circumstances are not identical; Ryan Cole survived and his suit subsequently alleged that the officers conspired to

lie about the threat he posed in order to justify having shot him. A panel of the Fifth Circuit initially denied qualified immunity, but the Supreme Court summarily reversed and remanded for reconsideration in light of *Mullenix v. Luna*. On remand, the panel reaffirmed its earlier decision, and the Fifth Circuit granted rehearing before the full court. The en banc court explicitly followed *Tolan*'s requirement that disputed facts be viewed in the non-movant's favor, and found from that perspective:

Ryan was holding his handgun pointed to his own head, where it remained. [He] never pointed a weapon at the Officers, and never made a threatening or provocative gesture towards [the] Officers. [The officers] had the time and opportunity to give a warning for Ryan to disarm himself. However, the officers provided no warning ... that granted Ryan a sufficient time to respond, such that Ryan was not given an opportunity to disarm himself before he was shot.

Viewed in that light, the en banc court affirmed the denial of qualified immunity. The court explained: '[w]e conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in ... the record as to the [plaintiffs'] excessive-force claim.' While Gibbons' death leaves us reliant on the officers' recounting of events, there are many similarities between *Cole* and *James*. In both cases, *Tolan* requires that the facts be viewed in the non-movant's favor. As noted before, the Opinion entirely ignores *Tolan*; it also ignores *Cole*. Under *Tolan*, we must view the facts in Gibbons' favor; when we do so, *Bennett* clearly governs this case. . . . I realize that, given the controlling precedent of *Bennett*, precedents from other Circuits are not relevant to our qualified immunity analysis. Nevertheless, before concluding, I think it helpful to note that every Circuit Court of Appeals that has addressed this issue in a precedential opinion, and there are ten of them, has held that it is a *clear violation* of the Constitution to shoot someone who is only threatening self-harm. To summarize: *Bennett* controls this analysis and failing to grant the Petition for Rehearing is a serious mistake. There will always be differences between two events featuring different participants, separated by time and place. The Supreme Court has never required a prior case that is absolutely identical to the circumstances surrounding a plaintiff's claim, nor could it. No such case will ever exist and requiring one tacitly transforms qualified immunity into absolute immunity. What is required is notice. Controlling precedent that is based upon circumstances sufficiently similar (when analyzed at an appropriate level of generality) to inform a reasonable officer that his/her conduct violates clearly established law. *Bennett* is exactly such a case. To reiterate once again our unqualified pronouncement there, if the victim 'did not pose a threat to anyone but himself, the force used against him, i.e. deadly force, was objectively excessive.' For the reasons I have explained, *Bennett* remains the law of this Circuit even after the denial of this Petition for Rehearing. However, institutionally, en banc reconsideration of the Opinion is certainly preferable to relying on the operation of I.O.P. 9.1 to prevent an officer from subsequently attempting to claim that our law on this issue is not clearly established. It is, and it will remain so after today. While remaining appreciative and cognizant of the risks that law enforcement officers face daily, we must nevertheless take care not to transform the shield of qualified immunity into a sword that licenses unreasonable force. I therefore must respectfully dissent from my colleagues' decision to deny the petition for rehearing in this case. I do not reach that conclusion lightly. This is only the second time in 26 years on our Court that I have thought it necessary to draft an opinion dissenting from a denial of rehearing. But, in Justice

Frankfurter's words: 'justice must satisfy the appearance of justice.' Given our controlling law here, that appearance is sorely lacking if we grant Trooper Bartelt immunity as a matter of law.") [footnotes omitted]

Thomas v. Tice, 948 F.3d 133, 141 (3d Cir. 2020) (on rehearing) ("Our precedent makes clear that, without some penological justification, an inmate may not be administratively confined in a dry cell. . . While the penological purpose must always be legitimate, . . . we have never determined the exact quantum or nature of penological interest that is needed to justify confinement in a dry cell. But we are satisfied that there must be at least *some* interest. Here, the PRC failed to present evidence of *any* continuing penological interest after its initial interview with Thomas. Without such a penological justification for Thomas's continued confinement in the dry cell, the PRC members are not entitled to qualified immunity.")

Thomas v. Tice, 948 F.3d 133, 145-48 (3d Cir. 2020) (on rehearing) (Greenaway, Jr., J., concurring in part, dissenting in part) ("Put simply, we cannot say as a matter of law that Defendants did not have personal knowledge of, and thus were not personally involved in, the conditions of Thomas's confinement in the dry cell. Especially since we must make all reasonable inferences in Thomas's favor, this factual dispute precludes summary judgment. . . In entirely overlooking these facts, the Majority makes a glaring error. . . .Upon summarily affirming the District Court's personal involvement analysis, the Majority explicitly declines to determine whether Defendants are entitled to qualified immunity on Thomas's conditions claim. But because, as explained above, we cannot determine as a matter of law that Defendants were not personally involved in the conditions of Thomas's dry cell, we must answer this qualified immunity question. In so doing, our precedent demands that we resolve this issue in Thomas's favor. . . . In short, then, qualified immunity does not shield Defendants from Thomas's conditions claim. Among others, *Young*, *Hope*, and the cases on which *Mammana* relies clearly established before Thomas's confinement in the dry cell that the conditions he suffered there taken together violate the Eighth Amendment. Hence, Thomas's conditions claim must proceed to a jury. . . . Here, Thomas was housed in a dry cell in utterly undignified conditions. On that, the record is clear. As to whether Defendants were personally involved in these conditions, the record reveals a genuine dispute of material facts that precludes summary judgment. Qualified immunity, moreover, is of no aid to Defendants given the ample precedent deeming similar conditions as violative of the Eighth Amendment. I would vacate in full the District Court's grant of summary judgment and remand to the District Court for trial on both Thomas's duration and conditions claims. Given my divergence of viewpoint, I dissent from the Majority's disposition of Thomas's conditions claim.")

FOURTH CIRCUIT

Sheppard v. Visitors of Virginia State University, 993 F.3d 230, 240 (4th Cir. 2021) ("[W]e conclude the right Sheppard asserts was not clearly established. The Supreme Court and this Court's assumptions, without express recognition, hardly amount to a clearly established right. Sheppard, in fact, admits as much. . . Further, Sheppard's additional arguments regarding an

implied contract or general property interest in policies and procedures underscore the unestablished nature of any right. We agree with the district court that Debose is entitled to qualified immunity because there was no clearly established right to continued enrollment in higher education, and, having so concluded, we need not evaluate whether or not Sheppard received procedural due process.")

Mays v. Sprinkle, 992 F.3d 295, 300-03 & n.4, 305 (4th Cir. 2021) ("[E]ven though Mays's claim arises under the Fourteenth Amendment, we have traditionally looked to Eighth Amendment precedents in considering a Fourteenth Amendment claim of deliberate indifference to serious medical needs. . . . Mays now argues that the Supreme Court's decision in *Kingsley*. . . altered this deliberate-indifference standard when applied to pretrial detainees. *Kingsley*, he claims, requires turning the subjective element into a purely objective one. . .We need not resolve this argument as that standard would make no difference here because of qualified immunity. . . . On the night of Mays's death, it was clearly established that 'a pretrial detainee ha[d] a right to be free from any form of punishment under the Due Process Clause of the Fourteenth Amendment.'. . And that right required 'that government officials not be deliberately indifferent to any serious medical needs of the detainee.'. . At that time, our caselaw considered a deliberate-indifference claim to require both an objectively serious medical condition and subjective knowledge by a prison official of both the 'serious medical condition and the excessive risk posed by the official's action or inaction.'. . . In the wake of *Kingsley*, the Second, Seventh, and Ninth Circuits adopted a completely objective standard for pretrial-detainee-medical-deliberate-indifference claims that requires showing that a reasonable officer would have recognized the serious medical condition and appreciated the excessive risk to the detainee's health. [citing cases] The Fifth, Eighth, and Eleventh Circuits cabined *Kingsley* to its facts—pretrial-detainee-excessive-force claims—and continue to require subjective knowledge of the condition and risk for pretrial-detainee-deliberate-indifference claims. [citing cases] While we have not directly addressed the import of *Kingsley*, we did recently state that a pretrial detainee's claim of inadequate medical care requires proof '(1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it.' *Doe 4 ex rel. Lopez*, 985 F.3d at 340. But there, neither party raised *Kingsley* and the discussion should not be read to resolve this issue. . . .The clearly established inquiry asks whether 'any reasonable official in the defendant's shoes would have understood that he was violating' then-existing law, including any then-existing objective or subjective elements. . . . We had not decided whether *Kingsley*'s excessive-force-claim rationale extended to deliberate-indifference claims by the time Mays died. And we still have not. Both before and after Mays's death, we said a pretrial-detainee-medical-deliberate-indifference claim required both an objectively serious medical condition and subjective knowledge of the condition and the excessive risk posed from inaction. . . So regardless of *Kingsley*, qualified immunity turns on whether 'any reasonable official in the defendant's shoes would have understood that he was violating' that objective and subjective standard. . . Without allegations that plausibly satisfy both the objective and subjective elements, the officers would have a right to dismissal based on qualified immunity. . . Said another way, if the allegations show that the officers lacked the required subjective knowledge, then the officers would not have violated *clearly established* law. Only if the

allegations plausibly show an objectively serious medical condition and subjective knowledge by the officers will Mays's claim clear the qualified-immunity hurdle. And by clearing the qualified-immunity hurdle, Mays would have also plausibly alleged a violation of his rights under the Fourteenth Amendment, whatever the standard. The officers' subjective knowledge necessarily establishes any post-*Kingsley* objective standard (that is, whether every reasonable officer would have recognized the serious medical condition and appreciated the excessive risk to the detainee's health. . . If the deliberate-indifference standard for pretrial detainees continues to include a subjective component (and is thus unchanged by *Kingsley*), then the qualified-immunity finding satisfies the constitutional-violation standard as well. So no matter if the deliberate-indifference standard for pretrial detainees continues to include a subjective component, the qualified-immunity determination resolves whether Mays's allegations establish a plausible claim. . . So this appeal hinges on whether Mays pleaded sufficient facts to show both that he had an objectively serious medical condition and that the officers had subjective knowledge of the condition and the excessive risk posed by inaction. . . .[W]e conclude that the complaint plausibly alleges that Mays had an objectively serious medical condition requiring medical attention and that the officers subjectively knew of that need and the excessive risk of their inaction. That is enough to overcome qualified immunity and survive a motion to dismiss.")

Halcomb v. Ravenell, 992 F.3d 316, 319-22 (4th Cir. 2021) ("Here, we conclude that even assuming a violation of Appellee's due process rights, Appellant is entitled to qualified immunity because the right at issue was not clearly established at the time of the alleged violation. . . . We agree with the district court that the right is appropriately framed as the right to *fair* notice of a security detention hearing, rather than a specific right to 48 hours' notice. It is true that the right to fair notice is somewhat general, but it is also true that the right to fair notice is a specific subset within the more general right to due process. . . . Having defined the right at issue as the right to fair notice of a security detention hearing, we turn to the law surrounding Appellee's claimed right to fair notice to determine whether this right was 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . . We need not decide which merits argument wins the day on this point. Instead, we conclude only that Appellee's right to fair notice of a security detention hearing was not 'clearly established at the time of the alleged violation'; that is, it was not 'sufficiently clear that every reasonable official would have understood that [failing to provide prior notice of a security detention hearing] violates [the right to fair notice].'")

Wingate v. Fulford, 987 F.3d 299, 310-12 (4th Cir. 2021) ("Read together, *Brown* and *Hiibel* illustrate that a valid investigatory stop, supported by *Terry*-level suspicion, is a constitutional prerequisite to enforcing stop and identify statutes. . . Necessarily so. The prevailing seizure jurisprudence flows from the idea that, short of an investigatory stop, a person is 'free to disregard the police and go about his business.'. . To be sure, officers may always request someone's identification during a voluntary encounter. . . But they may not compel it by threat of criminal sanction. Allowing a county to criminalize a person's silence outside the confines of a valid seizure would press our conception of voluntary encounters beyond its logical limits.

We therefore decline to do so here. As discussed, Deputy Fulford's initial stop was not justified at its inception. The Officers do not argue, nor does the record suggest, that they acquired constitutionally adequate suspicion of criminal activity between the deputy's initial stop and the Officers' eventual arrest. . . Accordingly the Officers' enforced Stafford County's stop and identify statute outside the context of a valid *Terry* stop, and arrested Mr. Wingate on that basis. The arrest was therefore unconstitutional. The district court erred in holding otherwise. . . The question remains whether Deputy Fulford and Lt. Pinzon are entitled to qualified immunity for their violations of Mr. Wingate's Fourth Amendment rights. . . . Deputy Fulford is not entitled to qualified immunity for his unconstitutional investigatory stop. As Mr. Wingate argues, the circumstances here are nearly indistinguishable from those in *Slocumb*, . . . a case where we found officers lacked the requisite suspicion to conduct an investigatory stop. . . . Deputy Fulford's suspicion of criminal activity in this case is on par with that which we found insufficient in *Slocumb*, and pales in comparison to that which we found lacking in *Massenburg*. Because these cases placed Deputy Fulford on notice that suspicion of criminal activity must arise from conduct that is more suggestive of criminal involvement than Mr. Wingate's was, he is not entitled to qualified immunity for his unlawful investigatory stop. The Officers are, however, entitled to qualified immunity for their unlawful arrest under Stafford County Ordinance § 17–7(c). Until today, no federal court has prescribed the constitutional limits of § 17–7(c)'s application. And although the proper reading of *Brown* encompasses Stafford County's ordinance, it was not 'plainly incompetent' for the Officers to believe that § 17–7(c) fell outside the decision's reach. . . The law at issue in *Brown* criminalized a person's refusal to identify himself to an 'officer who ha[d] lawfully stopped him.'. . Because the Texas provision only applied in the context of lawful investigatory stops, the need to comply with *Terry*'s requirements was evident from the text of the statute. Stafford County's ordinance, on the other hand, does not predicate enforcement upon the investigation of criminal activity. Rather, it criminalizes a person's refusal to provide his identity upon an officer's request 'if the surrounding circumstances are such as to indicate to a reasonable man that the *public safety* requires such identification.'. . A reasonable officer could infer—albeit incorrectly—that *Terry*'s requirements did not apply to stop and identify statutes rooted in public safety rather than crime prevention. Deputy Fulford and Lt. Pinzon violated Mr. Wingate's Fourth Amendment rights by enforcing § 17–7(c) outside the context of a valid *Terry* stop. But because this right was not clearly established at the time of the arrest, the Officers are entitled to qualified immunity on this claim.")

Wingate v. Fulford, 987 F.3d 299, 313 (4th Cir. 2021) (Richardson, J., concurring) ("I readily concur with the majority's resolution of this case. But I have one reservation. The majority holds that constitutionally enforcing Stafford County Ordinance § 17-7(c) requires 'a valid investigatory stop, supported by *Terry*-level suspicion.'. . And in the circumstances this case presents, I agree that enforcing the ordinance required *Terry*-level suspicion. But I would be clear that we address only this case and not the constitutionality of applying an ordinance like this one outside the context of investigatory stops. Consider, for example, an officer requiring a driver's identification at a constitutionally proper, but suspicionless, sobriety checkpoint. Or an officer at a border crossing or secure facility who asks for identification from someone seeking entry. In those

instances (and others), the encounter *might* constitutionally permit enforcing a law requiring identification. Those circumstances were not addressed in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) or *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). And I would make plain that we are not expanding their guidance here, where we are without briefing on those issues and those circumstances are not before us.")

Dean v. Jones, 984 F.3d 295, 310-11 (4th Cir. 2021) ("The officers argue that because there is no published circuit precedent finding an Eighth Amendment violation where force is used shortly after an inmate has assaulted an officer, Dean's right to be free from Officer Hobgood's use of pepper spray or Sergeant Jones's blows was not 'clearly established' at the time of the incidents in 2015. . . For two reasons, we disagree. First, it was clearly established in 2015 – and for many years before that – that inmates have a right to be free from pain inflicted maliciously and in order to cause harm, rather than in a good-faith effort to protect officer safety or prison order. . . And our case law long has made clear that correctional officers cross this line when they use force to punish an inmate for prior misconduct or intransigence. . . So assuming – as we do, for purposes of this alternative argument – that the officers here acted with a wrongful and punitive motive, then they violated clearly established Eighth Amendment law. And as we have explained before, that clearly established Eighth Amendment principle was enough by itself to put reasonable officers on 'fair notice' that their use of force against Dean – assuming, again, that it was intended to retaliate against Dean for his head-butts and not to protect officer safety – would violate the Constitution. . . In this 'unusual' qualified immunity context, we are 'dealing with a constitutional violation that has "wrongful intent" as an element.'. . The case law, in other words, is 'intent-specific,'. . . which means that liability turns not on the particular factual circumstances under which the officer acted – which may change from case to case as the precedent develops – but on whether the officer acts with a culpable state of mind. And because an officer necessarily will be familiar with his own mental state, he 'reasonably should know' that he is violating the law if he acts with a prohibited motive. . . Second, even if the officers were entitled to some additional notice, we had explained before 2015, 'at the appropriate level of specificity,"'. . . that a correctional officer uses excessive force if he maliciously uses force against an inmate who has been subdued, even if force might have been justified to control the inmate only moments before. . . . It was enough to put officers on clear notice, in 2015, that the use of pepper spray – or kicks and punches, *see, e.g., McMillian*, 503 U.S. at 4, 112 S.Ct. 995; *Thompson*, 878 F.3d at 102 (discussing cases) – against Dean after he had been fully subdued and no longer posed a risk to their safety could give rise to an inference of 'wanton punishment' in violation of the Eighth Amendment, even if force appropriately might have been used just a few seconds earlier. . . The officers insist that *Iko* is not sufficiently on point, because in that case, the initial justification for the use of force was the enforcement of prison rules and not, as here, the protection of officer safety after Dean's two head-butts. But the point is precisely the same – once the justification for the use of force has expired, any additional force may be deemed 'malicious' and hence unconstitutional – and it applies with 'obvious clarity' whatever the original justification. . . And in any event, the rationale for force in *Iko* was not as singularly focused on prison discipline as the

officers suggest. Instead, the purported need to compel compliance with prison rules was intertwined with concerns for officer safety: Iko's refusal to obey orders to present his hands for cuffing posed a danger to the officers attempting to carry out a cell extraction. . . In sum, the officers here were on 'fair notice' of Dean's right not to be subjected to force in the form of pepper spray or a beating if that force was deployed to retaliate against Dean after he was subdued, and not to protect officer safety. For that reason, the officers cannot prevail on their alternative argument that they are entitled to summary judgment on qualified immunity grounds even if they violated Dean's Eighth Amendment rights.")

Barrett v. Pae Gov't Services, Inc., 975 F.3d 416, 432-33 (4th Cir. 2020) ("Because the undisputed evidence establishes that the Arlington County defendants had probable cause to detain Plaintiff, qualified immunity bars her § 1983 claim under the first prong of the qualified immunity test, and summary judgment was properly awarded. But even if we were to assume that probable cause to detain Plaintiff was lacking, the Arlington County defendants are also entitled to qualified immunity under the second prong because 'the unlawfulness of their conduct was [not] clearly established at the time' the decision was made. . . . [W]e reject Plaintiff's argument that the law at the time of the officials' conduct 'was sufficiently clear that every reasonable official would understand that what he is doing is unlawful,' placing the unconstitutionality of the officials' conduct 'beyond debate.'. . On the contrary, '[r]easonable [officials], relying upon our decision[s] ... would have concluded that involuntarily detaining [Plaintiff] was not only reasonable, but prudent.'")

Haze v. Harrison, 961 F.3d 654, 661 (4th Cir. 2020) ("Defendants are entitled to qualified immunity with respect to Haze's Fourth Amendment claim. Neither we nor the Supreme Court has previously considered the question of whether incarcerated persons have a reasonable expectation of privacy in their legal mail. Nor is there a consensus of persuasive authority on the matter — indeed, neither party identifies a single case, in any Circuit, where interference with an incarcerated person's legal mail was held to be violative of the Fourth Amendment. Consequently, Defendants have met their burden to show that their actions did not violate clearly established law for purposes of Haze's Fourth Amendment claim.")

Livingston v. Kehagias, 803 F. App'x 673, ___ (4th Cir. 2020) ("The ultimate question, as the district court recognized, is whether under the *Graham* factors and in light of all the circumstances, the officers used proportionate force in what they allege was an effort to arrest Livingston for two misdemeanor offenses committed after they attempted to search his home in the middle of the night and without a warrant. On the record as it comes to us on this interlocutory appeal, the officers were faced with an individual who had committed, at most, minor offenses; did not attempt to attack the officers; was not and did not appear to be armed; and offered no resistance until after he was suddenly brought to the ground, and only passive resistance after that. The force the officers deployed against Livingston included elbowing him in the head, causing it to bleed; kneeing and kicking him; threatening to kill him with a gun to the head; and repeatedly pepper-spraying and using a taser against him. Like the district court, we think the mismatch here between provocation

and response is great enough to render the officers' actions 'unnecessary, gratuitous, and disproportionate' in violation of the Fourth Amendment. . . We likewise agree with the district court that it would have been 'clear to a reasonable officer,' at the time and under the circumstances, that the non-deadly force used against Livingston was constitutionally excessive. . . As the officers stress and the district court recognized, '[w]hether a right was clearly established must be particularized to the facts of the case and may not be defined at a high level of generality.'. . It is not enough, in other words, that it was clearly established in November of 2015 that the Fourth Amendment prohibits the use of excessive force generally; what matters is whether it was clearly established that the Fourth Amendment prohibited this use of force under these circumstances. Like the district court, we think it was. Since at least 1994, when we decided *Rowland v. Perry*, 41 F.3d 167 (4th Cir.), it has been clear that serious physical force – there, a wrestling maneuver that cracked a suspect's knee – is constitutionally excessive when used against an individual suspected, at most, of a minor crime, who is unarmed, and who does not attempt to flee or physically attack the officer – even if the suspect offers passive resistance, struggling with the officer after an initial use of force against the suspect. . . .We relied and elaborated on *Rowland* in *Smith v. Ray*, decided in March of 2015, before the incident here. In that case, we held that it was clearly established in 2006 that the constitutional line had been crossed when an officer, confronted with an individual suspected only of a misdemeanor and who passively resisted by refusing to give up her hands, responded by throwing her to the ground, kneeing her, and twisting her arm. . . . We think *Rowland* and *Smith* made plain enough, in November of 2015, the excessive nature of the force used here. . . . In arguing that the excessiveness of the non-deadly force they used in an effort to arrest Livingston was not clearly established, the officers point to fine factual distinctions between this case and *Rowland* and *Smith*, as well as other cases relied upon by the Estate. But as the district court explained, we 'do not require a case directly on point' where existing authority puts a reasonable officer on notice of the relevant constitutional limits. . . And as we explained in *Rowland* and *Smith*, the *Graham* factors themselves, when they point clearly enough in one direction, can be enough to give an officer 'fair warning,'. . . that his conduct is unconstitutional. . . .[L]ike the district court, we are unpersuaded by the officers' argument that it was not until 2016 that we established in *Armstrong* that use of a taser against a non-violent resister violates the Fourth Amendment. . . This case involves more than use of a taser, and when we look at the force used as a whole – not element by element or moment by moment, *see Rowland*, 41 F.3d at 173 (rejecting "segmented view of the sequence of events" and considering the total force used "in full context") – it is clear, and would have been clear to a reasonable officer at the time, that the cumulative force deployed against Livingston was under the circumstances constitutionally excessive.")

Livingston v. Kehagias, 803 F. App'x 673, ___ (4th Cir. 2020) ("The officers appeal only the denial of summary judgment on Cardwell's unreasonable seizure claim. Here, the officers have raised a legal argument that we may review in this interlocutory posture, contending that on the facts as viewed by the district court, they are entitled to qualified immunity as a matter of law: Either they did have probable cause to seize Cardwell for a mental health evaluation or, if they did not, then the lack of probable cause was not 'clearly established' at the time of the incident. We

agree with the officers on their second point, and hold that they are entitled to summary judgment on their qualified immunity defense because it was not clearly established that they lacked probable cause for a mental health seizure. . . .In order to undertake a mental health seizure, 'an officer must have probable cause to believe that the individual posed a danger to [him]self or others.'. . That much is clear. But what exactly counts as probable cause in this context, we have recognized, is less certain: There is a 'distinct lack of clarity in the law governing seizures for psychological evaluations, compared with the painstaking definition of probable cause in the criminal arrest context.'. . .We think this case falls somewhere between *Bailey* and *Cloaninger*, the cases most directly on point, so that a reasonable officer would be left without clear guidance as to whether probable cause existed. Some of the indicia on which we relied to find probable cause in *Cloaninger* are absent here: Cardwell did not refuse to respond to the officers when they arrived, and there was no knowledge of a prior suicide attempt or guns on the premises. But as the officers argue, *Bailey*, too, is distinguishable: Here, the call that gave rise to a suicide concern came not from a third party but from Cardwell himself, and when the officers arrived, instead of a person calmly eating lunch, they were confronted with an agitated Cardwell pacing his driveway at midnight, venting his frustrations, and throwing a beer can. We need not decide on what side of the probable-cause line this case falls. It is enough to say that it was not clearly established, at the time of the incident, that the officers lacked probable cause for a mental health seizure, and that they therefore are entitled to qualified immunity as a matter of law.")

Ray v. Roane, 948 F.3d 222, 228-30 (4th Cir. 2020) ("The problem with Roane's argument, and thus with the district court's decision adopting it, is that it requires us to ignore certain factual allegations in Ray's complaint and to draw reasonable inferences *against* Ray on a motion to dismiss. . . According to the complaint, Roane stopped backing away from Jax when the dog reached the end of the zip-lead, and then took a step toward the dog before firing his weapon. . . These factual allegations yield the reasonable inference that Roane observed that the dog could no longer reach him, and, thus, could not have held a reasonable belief that the dog posed an imminent threat. Taking these factual allegations as true and drawing these reasonable inferences in Ray's favor, Roane's seizure of Jax was unreasonable because Jax no longer posed any threat to Roane. Tellingly, in reaching the opposite conclusion, the district court relied on cases that were all decided on summary judgment involving one or more dogs that, like here, were barking or advancing toward an officer but, unlike here, were unleashed or unrestrained and posed an immediate danger to the officer. . . . Accordingly, we conclude the district court erred in holding that the complaint failed to allege a violation of Ray's Fourth Amendment rights. We next turn to whether Roane is entitled to qualified immunity at this stage of the litigation. . . .The question of whether a right is clearly established is a question of law for the court to decide. . . The question of whether a reasonable officer would have known that the conduct at issue violated that right, however, cannot be decided prior to trial if disputes of the facts exist. . . Thus, 'while the purely legal question of whether the constitutional right at issue was clearly established is always capable of decision at the summary judgment stage [or on a motion to dismiss], a genuine question of material fact regarding [w]hether the conduct allegedly violative of the right actually occurred ... must be reserved for trial.'. .In addition, to determine whether a right was clearly established, we

first look to cases from the Supreme Court, this Court, or the highest court of the state in which the action arose. . . In the absence of 'directly on-point, binding authority,' courts may also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'. . The Supreme Court has ruled against defining a right at too high a level of generality and held that doing so fails to provide fair warning to officers that their conduct is unlawful outside an obvious case. . . On appeal, Ray argues that since at least 2003, we have 'placed Roane on fair notice/warning that [she] had a clearly established right to enjoy her dog Jax, free from Roane using unreasonable deadly force against Jax,' particularly where her dog Jax was secured, controlled, and could no longer reach Roane. According to Ray, Roane's actions—killing a pet while that pet poses no immediate threat of harm to a law enforcement officer—are unreasonable and contravene well-recognized precedents. In response, Roane contends neither our precedents nor the body of case law involving police-dog shooting address the 'particularly unusual circumstances' Roane had faced at Ray's home. According to Roane, there is no authority involving 'a 150-pound dog that had advanced toward [an officer] to within a step, "alarmed" and barking'; a '25-foot zip-lead contraption'; or other relevant facts similar to the ones here. As a result, qualified immunity protects 'mistakes in judgment' and gives officers like Roane 'breathing room to make reasonable but mistaken judgments.' Moreover, this Court should not engage in 'Monday morning quarterback[ing]' to find an officer, like Roane, 'could have or should have done something different.' We disagree with Roane's contentions with respect to qualified immunity, for the same reasons already set forth in our discussion of whether the complaint states a claim for a violation of the Fourth Amendment. Viewing all facts in the complaint and inferences arising therefrom in Ray's favor, it is clear that Roane shot Jax at a time when he could not have held a reasonable belief that the dog posed a threat to himself or others. Accepting these facts, we hold that a reasonable police officer would have understood that killing Jax under such circumstances would constitute an unreasonable seizure of Ray's property under the Fourth Amendment. We acknowledge that there is no 'directly on-point, binding authority' in this circuit that establishes the principle we adopt today. . . Until now, we have never had the occasion to hold that it is unreasonable for a police officer to shoot a privately owned animal when it does not pose an immediate threat to the officer or others. Still, even without 'directly on-point, binding authority,' qualified immunity is inappropriate if 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'. . This is such a case. . . .Based on this preexisting consensus of persuasive case law, together with the general principles we announced in *Altman,* we hold that a reasonable officer in Roane's position would have known that his alleged conduct was unlawful at the time of the shooting in this case. . . . Notably, Roane does not contest the legal principle we adopt today, namely, that it is unreasonable for an officer to shoot a privately owned dog when the dog poses no objective threat to the officer or others. Instead, Roane's arguments exclusively focus on the underlying facts, and ultimately amount to the factual assertion that Roane reasonably perceived Jax as a threat at the time of the shooting. But this is an appeal from a motion to dismiss, which tests the sufficiency of the complaint, not its veracity. For the reasons discussed above, we cannot accept Roane's version of the facts at this stage of the proceedings, in which we must grant all reasonable inferences in favor of Ray.")

Calloway v. Lokey, 948 F.3d 194, 202-03 (4th Cir. 2020) ("[W]e now make clear that, as the parties agree, the standard under the Fourth Amendment for conducting a strip search of a prison visitor — an exceedingly personal invasion of privacy — is whether prison officials have a reasonable suspicion, based on particularized and individualized information, that such a search will uncover contraband on the visitor's person on that occasion. . . .Sgt. Lokey and Unit Manager Brown, who together made the decision that Calloway be strip-searched, did so based on reasonable suspicion. The strip search of Calloway — though embarrassing and perhaps frightening — did not violate her Fourth Amendment rights.")

Calloway v. Lokey, 948 F.3d 194, 206, 211 n.3 (4th Cir. 2020) (Wynn, J., dissenting) ("Upon viewing the evidence in this case—to determine whether Ms. Calloway's rights were violated—under the appropriate legal standard, which is in a light most favorable to her, it is evident that a reasonable jury could conclude the intrusive search was not supported by reasonable suspicion based on individualized, particularized facts. With respect for my colleagues in the majority, I must dissent. . . . The majority wisely does not address the qualified immunity analysis beyond concluding the search was supported by reasonable suspicion. As discussed, I disagree with the majority's conclusion that the information available to the decision-making officers amounted to reasonable suspicion. But even if the majority were to reach qualified immunity, I believe the right of prison visitors to be free from strip searches absent reasonable suspicion was clearly established at the time of this search. In determining 'whether a right was clearly established, we first look to cases from the Supreme Court, this Court, or the highest court of the state in which the action arose.'. . Looking to 'our sister circuits' decisions applying the reasonable suspicion standard to searches of prison visitors,' this Court has previously held 'prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person.'. . But even if *Leverette* and *Johnson* were somehow insufficient to put officials on notice that they may not strip search prison visitors without reasonable suspicion, cases from our sister circuits would surely suffice. 'In the absence of "directly on-point, binding authority," courts may also consider whether "the right was clearly established based on general constitutional principles or a consensus of persuasive authority."'. . The Second Circuit concluded it was clearly established in March 1989, 'under the law of the United States Supreme Court, the Court of Appeals for the Second Circuit, and the other circuit courts of appeals,' that a search of prison visitors without reasonable suspicion violated the Fourth Amendment. . . Many of our sister circuits have held similarly. [collecting cases]")

FIFTH CIRCUIT

Cope v. Cogdill, No. 19-10798, 2021 WL 2767581, at *3-7 (5th Cir. July 2, 2021) ("We are bound by the restrictive analysis of 'clearly established' set forth in numerous Supreme Court precedents. . . .Supreme Court cases have been repeated and consistent on this high standard at the second prong. . . . It might seem that things changed with the recent opinion in *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam). But, instead, that decision emphasizes the high standard. In *Taylor*, the

Supreme Court vacated our grant of qualified immunity to a group of corrections officers for an alleged Eighth Amendment violation. . . But that was based upon the Supreme Court's conclusion of how 'particularly egregious' and over the top the misconduct at issue was . . . . Accordingly, under *Taylor*, plaintiffs are only excused of their obligation to identify an analogous case in 'extreme circumstances' where the constitutional violation is 'obvious.'. . . The first issue we address is whether Laws's failure to immediately intervene after Monroe strangled himself and decision to instead wait until another jailer arrived was constitutionally unlawful under clearly established law. Laws's decision not to enter Monroe's cell was in line with his training and the jail's policy that jailers not enter the cell until back up arrives. . . .We conclude that Laws's decision to wait for Brixey before entering the cell did not violate any clearly established constitutional right. Specifically, it would not be 'sufficiently clear that every reasonable official would have understood that' waiting for a backup officer to arrive in accordance with prison policy 'violates [a pretrial detainee's] right.'. . Since our case law supports that jailers who follow policies aimed at protecting the jailer should not be considered deliberately indifferent to an inmate's medical need, . . . Laws is entitled to qualified immunity on this claim. . . . But watching an inmate attempt suicide and failing to call for emergency medical assistance is not a reasonable response. This was especially true in the situation at hand, where jail policy did not permit Laws to personally enter the jail cell to assist Monroe until a second staff member arrived. Calling for emergency assistance was a precaution that Laws knew he should have taken, and failing to do so was both unreasonable and an effective disregard for the risk to Monroe's life. . . For these reasons, we now make clear that promptly failing to call for emergency assistance when a detainee faces a known, serious medical emergency—e.g., suffering from a suicide attempt—constitutes unconstitutional conduct. As explained above, in determining whether the law was clearly established at the time the conduct occurred, constitutional rights must not be defined at a high level of generality. . . Until today, we have not spoken directly on whether failing to call for emergency assistance in response to a serious threat to an inmate's life constitutes deliberate indifference. . . . Unlike the officers in *Taylor*, Laws did nothing so extreme or even close as forcing an inmate to sleep naked in raw sewage. . . The failings of Laws are in a time of minutes and lack of complete action, not days and affirmative misconduct. . . Accordingly, even though Laws fails on the first prong, he is nonetheless entitled to qualified immunity.")

Cope v. Cogdill, No. 19-10798, 2021 WL 2767581, at *8-9 (5th Cir. July 2, 2021) ("Here, Brixey had placed Monroe on a temporary suicide watch, and Cogdill was aware that Monroe had attempted suicide by hanging the day before. However, the record does not suggest that any inmate had previously attempted suicide by strangulation with a phone cord; nor is there non-speculative evidence that Brixey and Cogdill were aware of this danger. . . The danger posed by the phone cord was not as obvious as the dangers posed by bedding, which is a well-documented risk that has been frequently used in suicide attempts. . . We therefore conclude, under these facts and circumstances, that Brixey's and Cogdill's holding of Monroe in a cell containing a phone cord did not violate a clearly established constitutional right.[12] **[fn.12** Recently, in *Sanchez v. Oliver*, we determined that summary judgment on the plaintiff's deliberate indifference claim was inappropriate where the defendant had placed a suicidal inmate 'in general population, with ready

access to blankets, other potential ligatures, and tie-off points.'. . *Sanchez* did not involve the possible dangers of phone cords; hence, whatever its import, *Sanchez* did not hold that, at the time relevant for this case, it was clearly established that a defendant violates the Constitution by placing a suicidal inmate in a cell containing a phone cord. In short, *Sanchez* is not contrary to our conclusion here.**]** . . . . Cope also alleges that Brixey and Cogdill acted with deliberate indifference when they staffed the jail with just one jailer even though they knew both that Monroe was on suicide watch and that the jail's policy did not allow for the jailer to intervene until backup arrived. Coleman County employs only one weekend jailer due to budgetary constraints. Our precedent suggests that municipalities, not individuals, should generally be held liable for city policies. . . Thus, at the time of the suicide, no clearly established precedent suggested that Brixey and Cogdill could be liable under an episodic-acts theory for staffing the jail in line with Coleman County's budget and policies. Cope has cited no case law providing that jailers must deviate from the typical staffing procedures if they believe that a detainee is a suicide risk. We, therefore, hold that Brixey's and Cogdill's decision to staff only one weekend jailer did not violate any clearly established constitutional right.")

Cope v. Cogdill, No. 19-10798, 2021 WL 2767581, at *9, *12-15, *20-22 (5th Cir. July 2, 2021) (Dennis, J., dissenting) ("Monroe's tragic death resulted not just from egregious acts and omissions by Coleman County Jail staff after he was taken into custody on September 29, 2017. The jail leadership's decision to implement policies that they knew to be inadequate also contributed to Monroe's avoidable suicide. In particular, the jail maintains only one jailer on duty during nights and weekends. But jail policy forbids a jailer from entering a cell without backup support**.** Thus, on nights and weekends, jail policy effectively prevents the lone jailer from rescuing a known suicidal detainee who is actively committing suicide inside a cell. . . . Detainee Monroe's death by his own hand with a thirty-inch cord in plain sight of a jailer while emergency medical services were on duty only five minutes away is especially tragic. In this interlocutory appeal from the district court's denial of qualified immunity, the legal questions for this court are (1) whether the acts and omissions of each of the defendants individually amounted to deliberate indifference and therefore violated Monroe's constitutional rights and (2) if so, whether Monroe's constitutional right to be free from each Defendants' deliberate indifference was clearly established at the time of the violation. . . . In this case, Defendants were all aware of Laws's risk of suicide. Their responses to this known risk convince me that a reasonable jury could find that they each effectively disregarded the risk by acting in a manner that they knew or believed was likely inadequate in light of the circumstances. . . . [V]iewing the evidence in the light most favorable to Plaintiffs and making all reasonable inferences in their favor—as we must in this appeal—the officers violated clearly established law. It should be for a jury to decide the factual question of whether Defendants 'responded reasonably' to the grave and urgent situation and thus were deliberately indifferent to the risk of suicide. . . Departing from longstanding and binding precedent, the majority erroneously grants the officers' qualified immunity defense by embracing an excessively narrow definition of the clearly established rights at issue and the risk of harm Monroe faced. Because I would follow our court's deliberate-indifference caselaw and affirm the district court's denial of qualified immunity on several of Plaintiffs' claims, I respectfully dissent.

. . . Given that the focus of a deliberate-indifference claim is on the jailer's subjective knowledge and intent, it is apparent that, in the uniquely extreme and consequential circumstance where a jail official is aware of a prisoner's risk of suicide but 'effectively disregards' that risk, the jailer has violated clearly established law. . . Put another way, it is always clearly, objectively unreasonable for a jail official to intentionally disregard a known suicide risk. Therefore, in this context—deliberate indifference by a jailer who knows that a detainee in his custody and care is at risk of suicide—establishing prong one of the qualified-immunity test necessarily satisfies the demands of prong two. A showing that a jailer violated the Fourteenth Amendment by being deliberately indifferent to a known suicide risk is necessarily also a showing that the official's conduct was 'objectively unreasonable in light of clearly established law.'. . Put simply, the two prongs of the qualified-immunity test merge in this specific situation. . . . There is no need for a prior case to put an officer on notice that a situation presents a risk of inmate suicide or that a particular sort of response is unreasonable because, by the very nature of a deliberate-indifference claim, the officer must actually know both of these things in order for a constitutional violation to occur. . . In sum, if an officer faced with the greatest possible risk—the loss of a human life that an officer is charged with protecting—intentionally disregards that known risk by either failing to act or acting in a manner that is so clearly inadequate as to permit the inference that the officer knew or believed that his 'response' was substantially likely to be ineffectual but did not care, the officer's conduct contravenes clearly established law. The majority asserts, however, that the determination that a jailer effectively disregarded a prisoner's known risk of suicide is not sufficient to satisfy the strictures of the qualified-immunity analysis. Their conclusion rests on two errors in the qualified-immunity analysis. First, the majority takes an incredibly narrow approach to defining the clearly established right at issue, claiming that the right must be defined much more specifically than simply the right of a suicidal detainee to be free from a deliberately indifferent response by officers charged with his supervision. Second, having defined the clearly established right in an overly narrow manner, the majority requires in effect that Plaintiffs point to a case with virtually identical facts to prove that this excessively narrow description of the right has been clearly established. . . Both of these propositions are contrary to what our precedent in the detainee-suicide context demands. . . . Though the majority cites *Taylor*, it fails to absorb and apply the case's lesson. In the majority's view, because the conduct of Defendants here was not as extreme as that of the guards in *Taylor*, the Supreme Court's decision is inapplicable. . . But this essentially repeats the very same analytical error this court made in *Taylor* and which the Supreme Court found necessary to correct. Rather than asking only whether the facts here are closely analogous to *Taylor* and thus if there exists an on-point precedent—which is essentially the majority's analysis—*Taylor* teaches that the proper qualified-immunity inquiry must also ask whether the violation was so obvious that 'any reasonable officer should have realized that' their conduct 'offended the Constitution.'. . And because, as discussed above, deliberate indifference by an officer in the face of an inmate's known risk of suicide is always objectively unreasonable in light of clearly established law, such a violation will necessarily be 'obvious' in that 'any reasonable officer should have realized that' their conduct 'offended the Constitution.'. . Where the violation at issue is *intentionally* disregarding a known suicide risk, this standard is clearly met. In sum, in the deeply alarming circumstance where a detainee is known by jail officials to be at risk of suicide, a response

by those officials that deliberately 'effectively disregards' that risk violates clearly established law in a manner that should be clear to all reasonable officers. . . Such facts would thus defeat qualified immunity if proven. . .For the reasons outlined below, a reasonable jury could infer that Laws was deliberately indifferent by failing promptly to contact emergency services once Monroe had begun actively choking himself and Cogdill and Brixey were likewise deliberately indifferent for housing Monroe by himself in a cell with a lengthy phone cord. . . . Cogdill and Brixey adhered to a policy of maintaining just one jailer on duty even when a suicidal detainee was in the jail's custody, despite knowing that this policy was unsafe, and instead of transferring suicidal detainees to better equipped facilities or keeping a second jailer on duty—policies that they knew were available to them. A jury could determine that the supervisors' were deliberately indifferent based on their 'failure to adopt [ ] polic[ies]' when they knew—as any reasonable jailer would know—that the consequence of not implementing these policies was likely to be an in-custody suicide. . . . To summarize, Cogdill and Brixey chose to house Monroe, who they knew was a suicide risk, alone in a cell with a thirty-inch long phone cord despite (1) their training, which generally advised against housing suicidal prisoners by themselves; (2) their knowledge that there were other, safer facilities to house Monroe and that they had a duty to relocate him if their jail could not adequately protect Monroe; (3) the risk posed by the lengthy cord, which was both obvious and a specific risk that a jury could infer that the officials were made aware of by the Texas Jail Commission. Considering this evidence in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, a juror could conclude that Cogdill and Brixey knew or believed that their response to Monroe's risk of suicide was deficient and therefore possessed a 'state of mind more blameworthy than lack of due care.'. . Put differently, one could conclude that the officers 'effectively disregarded' the risk of harm to Monroe. . . Plaintiffs have thus raised material questions as to whether each officer independently was deliberately indifferent and, as explained above, have therefore also established a violation of clearly established law. . . . Qualified immunity is not the judicial equivalent of the Armor of Achilles, an impenetrable shield that governmental actors can wield to insulate themselves from liability no matter how flagrant their conduct. As the Supreme Court has recently reminded this court, qualified immunity vanishes where an official's action or inaction so obviously violates the Constitution that 'any reasonable officer should have realized' the unlawfulness of the conduct. . . . And 'any reasonable officer' would know that it offends the Constitution to be deliberately indifferent to a detainee's known risk of suicide. Taking the facts and inferences in the light most favorable to Plaintiffs, a reasonable juror could conclude that the officers here responded with deliberate indifference to the risk that pretrial detainee Derrek Monroe would commit suicide, and therefore the officers are not entitled to qualified immunity. It should be left to a jury to weigh the competing evidence and resolve the factual disputes, most particularly Defendants' subjective states of mind. Instead, today's majority ends all claims against all officers by erroneously granting them qualified immunity. Because the majority misapprehends decades of clearly established law and denies Plaintiffs the jury trial to which they are entitled, I respectfully dissent.")

J.W. v. Paley, No. 19-20429, 2021 WL 2587555, at *1 (5th Cir. June 23, 2021) (not published) ("This is a suit against a school resource officer for tasing a special education student who was

trying to leave the school after engaging in disruptive behavior. The district court denied summary judgment based on its conclusion that the facts, taken in the light most favorable to the plaintiff, supported a finding of excessive force under a Fourth Amendment analysis. Although some of our cases have applied the Fourth Amendment to school official's use of force, other cases have held that such claims cannot be brought. That divide in our authority is the antithesis of clearly established law supporting the existence of Fourth Amendment claims in this context. As a result, the defendant prevails on his qualified immunity defense. . . . A plaintiff can overcome an official's qualified immunity if he can show '(1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'. . Courts can choose which of these elements to address first. . . We resolve this case on the second ground because our law does not clearly establish a student's Fourth Amendment claim against school officials. We start with an issue on which our law is quite clear even if it is at odds with the law in in other circuits: students cannot assert substantive due process claims against school officials based on disciplinary actions. *See Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990). . . . *Fee* has been criticized, . . . but remans binding in our circuit, *T.O. v. Fort Bend Ind. Sch. Dist.*, -- F.3d --, 2021 WL 2461233, at *2-3 (June 17, 2021). What about the Fourth Amendment right J.W. asserts? Perhaps the rejection of a substantive due process right does not also doom the more specific right to be free from unreasonable seizures. . . . And the Fourth Amendment's companion right to be free from unreasonable searches applies in schools, though its protections are lessened to account for pedagogical interests. . . J.W. can find some support in our caselaw for his Fourth Amendment claim. In a case dealing with a student's claim of excessive detention (though not excessive force), we said that the Fourth Amendment 'right extends to seizures by or at the direction of school officials.' *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995). . . . The problem for J.W. is that at least one decision from our court, albeit an unpublished one, rejected the notion of Fourth Amendment claims based on school discipline. We reasoned that allowing a Fourth Amendment challenge to a teacher's choking a student would 'eviscerate this circuit's rule against prohibiting substantive due process claims' based on the same conduct. *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 510 (5th Cir. 2004) (unpublished). The even bigger obstacle to J.W.'s claim may be *Fee*'s comment, though the case did not involve a Fourth Amendment claim, that 'the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure.' 900 F.2d at 810. The upshot is that our law is, at best for Paley, inconsistent on whether a student has a Fourth Amendment right to be free of excessive disciplinary force applied by school officials. That does not make for either the 'controlling authority' or 'consensus of cases of persuasive authority' needed to show a right is clearly established. . . The best case for J.W., and the one the district court understandably relied on, is *Curran*. Although that case did allow a Fourth Amendment claim against a school resource officer to get past summary judgment, the defendant had not argued that a student's Fourth Amendment claim was at odds with *Fee*. As qualified immunity is an affirmative defense, . . . the officer's failure to assert immunity on the grounds that students cannot bring Fourth Amendment excessive force claims meant the question was not squarely before the court. Citing many of the cases we have just discussed, our court recently held that a plaintiff could not identify a clearly established Fourth Amendment right against school officials' use of excessive force. *See T.O.*,

2021 WL 2461233, at * 4. That conclusion renders Paley immune from the Fourth Amendment claim asserted in this case.")

T.O. v. Fort Bend ISD, No. 20-20225, 2021 WL 2461233, at *4 (5th Cir. June 17, 2021) ("This court has not conclusively determined whether the momentary use of force by a teacher against a student constitutes a Fourth Amendment seizure. We have rejected Fourth Amendment claims brought by a student who was choked by a teacher on the basis that allowing such claims to proceed would 'eviscerate this circuit's rule against prohibiting substantive due process claims' stemming from the same injuries. But we have also noted that the claims of excessive force and unlawful arrest against other school officials 'are properly analyzed under the Fourth Amendment.' In light of this inconsistency in our caselaw, we cannot say that it was clearly established, at the time of the incident, that Abbott's actions were illegal under the Fourth Amendment. Plaintiffs-Appellants unpersuasively attempt to avoid this outcome by suggesting that *Fee* has been abrogated by *Knick v. Township of Scott* and *Kingsley v. Hendrickson*. Not so. *Knick* concerns Fifth Amendment Takings claims, and *Kingsley* concerns excessive force claims brought by pretrial detainees—circumstances markedly distinguishable from substantive due process claims brought in an educational context. In any event, *Knick* was decided after the offending incident in this case, and *Kingsley* has never been interpreted by this court as altering the law in the manner Plaintiffs-Appellants suggest. Even if these cases do call *Fee*'s validity into question, they would not have been sufficient to put Abbott on notice of the illegality of her conduct at the time of the incident. To defeat a claim of qualified immunity, the illegality of the conduct must be 'clearly established' at the time it took place. It is certainly true that '[b]y now, every school teacher ... must know that inflicting pain on a student ... violates that student's constitutional right to bodily integrity.' But, for more than thirty years, the law of this circuit has clearly protected disciplinary corporal punishment from constitutional scrutiny. Neither *Knick* nor *Kingsley* permits us to deviate from out established precedent in this regard." footnotes omitted)

Aguirre v. City of San Antonio, 995 F.3d 395, 411-21 (5th Cir. 2021) ("To summarize, the first *Graham* factor—the severity of any crime of which Aguirre was suspected—weighs in favor of it being unreasonable and excessive for the Officers to hold Aguirre in the dangerous maximal-restraint position for five and a half minutes, and there are at very least genuine disputes as to the second two *Graham* factors—whether Aguirre posed a safety threat to Officers or others or was resisting the Officer's efforts to remove him from the highway and hold him safely until the police wagon arrived. These disputes as to material facts alone are enough to preclude a finding at summary judgment that the force used by the Officers in holding Aguirre in a hog-tie like position was constitutionally reasonable, for, under *Graham* and its progeny, it is unreasonable for an officer to use injurious force against a non-resisting, non-dangerous individual who is not suspected of a serious crime, which we must assume occurred here under Aguirre's version of events. . . This is especially so when the force is applied after the suspect has been restrained and subdued, as may have been the case here. . . Indeed, several of our sister circuits have specifically applied these basic principles in cases involving maximal restraint techniques like the one the Officers employed against Aguirre. . . However, Plaintiffs also contend the Officers' use of force

was excessive for a second reason: it amounted to the unconstitutional use of deadly force. . . . Claims that law enforcement unreasonably utilized deadly force are treated as a special subset of excessive force claims. . . The Supreme Court held in *Scott* that there is no 'magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force,"' and such claims are broadly analyzed under the same general rubric of 'reasonableness' as other excessive force claims. . . At bottom, the Court held, a Fourth Amendment challenge to deadly force still calls for a 'balanc[ing of the] nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'. . Nevertheless, we have long held that the use of 'deadly force' is unreasonable where the officer does not have 'probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others,'. . . and we know of no case that has departed from this basic principle. . . And, although '[l]ower courts ... have struggled with whether to characterize various police tools and instruments as "deadly force,"' this court defines deadly force as force that 'creates a substantial risk of death or serious bodily injury.'. . .As discussed above, . . the record at the very least reflects a genuine dispute of fact as to whether Aguirre was resisting or otherwise posed a threat of serious physical injury to the Officers or others so as to make the use of the prone maximal-restraint position necessary or potentially reasonable. These same factual disputes, relevant to whether the force was generally excessive to the situation, also preclude summary judgment under our case law's 'deadly force' analysis. . . These facts are material because, if a jury concludes that the Officers had reason to believe Aguirre was on drugs and that he posed no threat of serious bodily harm at the time the Officers used the maximal restraint position against him, the Plaintiffs will have established that the Officers violated Aguirre's constitutional right to be free from the unreasonable use of deadly force. . . In sum, facts material to whether the Officers violated Aguirre's Fourth Amendment rights are genuinely disputed. The lack of visible resistance by Aguirre, the presence of numerous Officers surrounding him, and the fact that the Officers had already blocked off several lanes and caused traffic to slow significantly all weigh against the inference of any immediate safety threat or other need that would justify placing Aguirre in the prone maximal-restraint position. '[A] jury could conclude that no reasonable officer would have perceived [Aguirre] as posing an immediate threat to the officers' [or his own or the public's] safety,'. . . meaning that the Officers' use of what may have amounted to deadly force was necessarily excessive of any need to mitigate a public safety threat. Likewise, 'a jury could conclude that no reasonable officer on the scene would have thought that [Aguirre] was resisting arrest,'. . . meaning that the use of force far exceeded the amount necessary to effect Aguirre's arrest or ensure his safety. Although the Officers presented their own version of events that included claims of Aguirre's resistance—including, for example that he 'was resisting and trying to pull away from' the Officers while walking near the westbound side of the median, 'was still resisting' when placed on the hood of the car, and 'continued to resist by shifting his body around and trying to break free' while pinned against the hood of the patrol car—these averments in contravention of what the police dashcam videos show do no more than reinforce that genuine disputes as to material facts exist at this stage of the litigation. . . . As set out below, I conclude that this court's precedents demonstrate that, if they indeed employed excessive and deadly force in the specific manner that Plaintiffs contend they did, the Officers had '"fair warning" that their

conduct was unconstitutional.'. . '[I]n an obvious case, the *Graham* excessive-force factors themselves can clearly establish the answer, even without a body of relevant case law.'. . . It has long been clearly established that, when a suspect is not resisting, it is unreasonable for an officer to apply unnecessary, injurious force against a restrained individual, even if the person had previously not followed commands or initially resisted the seizure. . . Indeed, at least five other circuits have held that, even in the absence of a previous case with similar facts, 'it [is] clearly established ... that exerting significant, continued force on a person's back while that person is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.' [collecting cases] As discussed, 'a jury could conclude that no reasonable officer would have perceived [Aguirre] as posing an immediate threat to the [O]fficers' safety or thought that he was resisting arrest.'. . Thus, if the Officers unnecessarily placed Aguirre in the maximal-restraint position when there was no reason to believe he had committed a serious crime, that he posed a continuing threat to the Officers or public safety, or that he was resisting the Officers' seizure or holding of him, the Officers violated Aguirre's clearly established constitutional rights. . . But I need not rely solely on the *Graham* factors to find a violation of clearly established law. Plaintiffs' claim that the Officers unconstitutionally employed deadly force in the absence of any threat of death or serious injury to the Officers or the public presents facts very similar to those found in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). . . . As this court held in *Gutierrez* in 1998, it is clearly established that the use of hog-tie-like restraint may amount to deadly force 'in a limited set of circumstances'–that is, when employed against an individual who a reasonable officer would have cause to know is 'a drug-affected person in a state of excited delirium'—and there is a clearly established Fourth Amendment right to be free from the use of such deadly force when there is no probable cause to believe the force is necessary to ameliorate a threat of death or serious bodily injury. . . I recognize that this court has distinguished *Gutierrez* in factual scenarios different from the case at bar. In *Hill v. Carroll County*, for example, this court stated that '*Gutierrez* does not hold four-point restraint a per se unconstitutionally excessive use of force, nor does it extend beyond its facts as a mirror of the then-unchallenged San Diego Study' on which the Plaintiffs relied in *Gutierrez*. . . Instead, according to this court in *Hill*, 'neither the San Diego Study nor *Gutierrez* raises a triable fact issue in this case *where there is no evidence of drug abuse or drug-induced psychosis*.'. . But this goes not to the question of whether the law against the use of deadly force was clearly established, but rather to whether the use of a hog-tie under those circumstances constituted deadly force—an issue we have held is a question for the jury that is based on the evidence in the case. . . *Hill* therefore simply addressed the plaintiffs' failure to introduce evidence that a reasonable officer would have known that placing the individual in a hog-tie like position posed a risk of death or serious bodily injury, and it does not weigh against the conclusion that, when the evidence shows that the use of a hog-tie-like position does meet this test—and thus meets the constitutional standard for deadly force—the right to be free from such force when it is not reasonable or necessary is clearly established. Here, of course, unlike in *Hill*, the Plaintiffs point to evidence that Aguirre suffered from drug abuse and drug-induced psychosis and that a reasonable officer would have known this, including from his erratic conduct that actually lead the Officers to believe he was under the influence of drugs and from his blue lips and the fresh needle marks that the Officers noticed on

his arms. . . And, as discussed in detail . . . the Plaintiffs introduced a wealth of evidence from which a reasonable juror could conclude that the use of a hog-tie-like position in these circumstances was deadly force, including the opinion of a medical expert and a Department of Justice bulletin addressing the dangers of positional asphyxia when the maximally prone restraint position is used on detainees who suffer from 'cocaine-induced excited delirium.' *Hill* is therefore inapposite. . . . Though the facts here are not identical to *Gutierrez*, we need not find the facts to be precisely the same as a previous case to hold that the Officers would have had 'fair warning' that their handling of Aguirre was dangerous, unnecessary, and unconstitutional under the circumstances. . . The central holding in *Gutierrez* remains intact: 'hog-tying may present a substantial risk of death or serious bodily harm ... in a limited set of circumstances—*i.e.*, when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position.'. . And, as already established, a reasonable jury could conclude that the maximal prone restraint position was tantamount to and as dangerous as a hog-tie. I therefore conclude Aguirre's right to be free from this position under the facts we must accept here—where he was not resisting, posed no immediate safety threat, and was presenting reasons to believe he was on drugs and in a drug-induced psychosis—was clearly established at the time of the incident. Based on the foregoing, the Officers who participated in bringing Aguirre to the ground and restraining him in the prone maximal-restraint position—Officers Gonzales, Mendez, Morgan, and Arredondo—are not entitled to summary judgment on the basis of qualified immunity because genuine disputes exist regarding whether they violated Aguirre's clearly established Fourth Amendment rights. . . .Notwithstanding the foregoing, we affirm the district court's grant of summary judgment on the Plaintiffs' deliberate indifference claims. Unlike our inquiry into whether officers used excessive force, which judges '[t]he "reasonableness of a particular use of force ... from the perspective of a *reasonable officer* on the scene,'. . . and our qualified immunity analysis, which asks whether '[t]he contours of the right [are] sufficiently clear that a *reasonable official* would understand that what he is doing violates that right,'. . . the Fourteenth Amendment's deliberate indifference inquiry turns on law enforcement officials' '*subjective knowledge*.'. . Law enforcement officials violate an arrestee's Fourteenth Amendment due process rights when they have 'subjective knowledge of a substantial risk of serious harm to a pretrial detainee but respond[ ] with deliberate indifference to that risk.'. . Negligence or even gross negligence is not enough: the officials must have had actual knowledge of the substantial risk. . . .On appeal, Plaintiffs do not even claim, much less offer evidence to demonstrate, that any of the Officers were actually aware that Aguirre was losing consciousness or otherwise in danger. The Officers have consistently asserted, and the video evidence does not otherwise indicate, that none of them knew Aguirre was in medical distress until he became unresponsive. They stated that he continued to talk, yell, and move his head while on the ground, so they believed he was able to breathe. The Officers testified that they believed Aguirre's groaning and discolored lips were due to heavy drug use, not asphyxiation, and Plaintiffs do not offer evidence to dispute these accounts. Even if these asserted beliefs were unreasonable and their actions contrary to what they should have known from their training, that can only at most establish gross negligence, not the required deliberate indifference. Because Plaintiffs do not cite to, and we have not identified, any evidence that the Defendant officers were aware that Aguirre was in danger until he became unresponsive, we affirm the district court's grant of

summary judgment on this claim. Once the Officers realized Aguirre was unresponsive, however, there was a delay of several minutes before effective CPR was administered. Plaintiffs claim that Defendants were deliberately indifferent to Aguirre's serious medical needs by delaying CPR once they assessed that he was not breathing. Plaintiffs' medical expert points out that '[t]here appears to be a delay of approximately 4 minutes and 30 seconds from the time the SAPD officers turn ... Aguirre on his back to when functional CPR started,' and that there was a mere 'half hearted attempt at a few chest compressions' within three minutes of turning Aguirre over and seeing he was unresponsive, but effective CPR was not started for four and a half minutes. Delay of medical care can result in liability where there has been deliberate indifference, in that the officers were subjectively aware of the risk of serious harm but disregarded it. . . . But Plaintiffs have not established that the Officers were deliberately indifferent to the risk to Aguirre's health after they discovered he was no longer breathing. This is not a case where the Officers elected to do nothing in response to a known health risk. . . The videos illustrate, and Plaintiffs do not contest, that once the Officers discovered Aguirre was unresponsive, they flipped him over, unhandcuffed him, and Officer Juarez, the medic on the scene, went to retrieve his medical equipment. Juarez can be seen in the videos jogging to the trunk of his car to get medical equipment, returning just over a minute later. Approximately one minute after he returned, Officer Mendez performed a sternum rub, and approximately another minute thereafter, the Officers began full CPR, with continuous chest compressions until EMS arrived. While these measures may have been inadequate, Plaintiffs do not present any evidence that the Officers *knew* they were insufficient and intentionally failed to do more out of indifference to Aguirre's well-being. Plaintiffs point to the Officers demeanor in the dashcam video, arguing that their smiling and laughing suggests that they did not care about the obvious risk to Aguirre's health. However, the video depicts this behavior *before* Juarez's initial efforts to revive Aguirre were unsuccessful. The Officers quickly took on a sober aspect as Aguirre remained unresponsive, which suggests their initial manner was the result of subjective unawareness of the risk rather than knowledge of the risk and a deliberate choice not to take any precautions against the realization of the danger's fatal consequences. To be sure, we do not condone the Officers light-hearted attitudes, and it may well have been objectively unreasonable for them to have been ignorant of the serious threat to Aguirre's health. But gross negligence on the part of the Officers is not sufficient to establish the kind of subjective, deliberate indifference that must be demonstrated to establish a Due Process violation. . . Accordingly, we affirm the district court's finding of qualified immunity on these claims.")

Aguirre v. City of San Antonio, 995 F.3d 395, 423-24 (5th Cir. 2021) (Jolly, J., concurring in the judgment) ("The question here is excessive force, *vel non*. The force applied to subdue Aguirre cannot be properly evaluated without an appreciation of the context: a busy highway, cars at high speeds, and a suspect wandering in and out of lanes of traffic. During the event, a wreck occurred nearby. And once Aguirre was apprehended and placed on the hood of a police car, he attempted to break away from the officers in the midst of the traffic. In short, the context could hardly have been more tense, fast-moving, and dangerous. Because I view these facts differently from Judge Dennis, I believe that the restraint the officers employed was initially a justified use of force. This force may have even been justified for a brief period after Aguirre was thrown to the ground: to

me, the video indicates that Aguirre may have continued resisting for a bit. But there is a good deal that is going on that has not been captured by the camera and cannot clearly be discerned. After about three minutes, however, Aguirre was surrounded by nine officers, only three of whom were restraining him—and by that point, he does not appear to be resisting much, if at all. Multiple officers are seen mulling around. So it would appear that, with the additional surveilling officers, the need for the extreme restraint may have lessened. Despite this change, the officers continued to apply the maximal restraint position for another two minutes. For those two minutes, there is a material factual dispute as to whether the restraint continued to be necessary to keep Aguirre from fleeing, given the number of officers available to prevent Aguirre from bolting into traffic. This disputed issue of fact requires a full airing of all the evidence before a fact-finder. Were a jury to find that the restraint used became, at some point, unnecessary to keep Aguirre from escaping into traffic, continuing this restraint against this particular person with some known health risks would constitute excessive force as a matter of law because an objective, reasonable officer would know that such force would not constitute a measured, appropriate degree of force. . . Excessive force is unreasonable; unreasonable force, unconstitutional. Furthermore, if a jury concludes that the restraint was unnecessary, it would have been 'obvious' to a reasonable officer that the use of such a severe tactic against this particular person would be constitutionally proscribed, and he would have no recourse to qualified immunity. *See Taylor v. Riojas*, —— U.S. ——, 141 S. Ct. 52, 52–54, 208 L.Ed.2d 164 (2020). I therefore concur with the result reached.")

Aguirre v. City of San Antonio, 995 F.3d 395, 424-25 (5th Cir. 2021) (Higginson, J., concurring in the judgment) ("I write separately only as to our reversal of the district court's grant of summary judgement on qualified immunity grounds with respect to the plaintiffs' excessive force claims. I concur on the narrow ground that our court's clearly established law, though lacking clarity in some respects, had converged by spring of 2013 to stand at least for the proposition that police officers use constitutionally excessive force when they put a handcuffed arrestee, no longer resisting or posing a safety threat to himself or others, and whom the officers observed in an excited state of delirium and suspected to have ingested drugs, on the ground, face down in an asphyxial position, i.e., pulling back his leg and arms into prone restraint, and simultaneously apply vertical pressure to such a prone, immobile arrestee for sufficient time to see his lips turn blue and his breathing stop. Put otherwise, our caselaw had converged by spring 2013 around the clearly established proposition that while such an initial restraint is not per se unconstitutional, the continued application of asphyxiating force may be unreasonable where there is no ongoing threat posed by the suspect. . .Of course, this evidence of police suffocation of a restrained, prone suspect is in the light most favorable to plaintiffs. One or more circumstance may prove untrue whereupon qualified immunity may attach.")

Brown v. Tarrant County, Texas, 985 F.3d 489, 496-97 (5th Cir. 2021) ("[W]hen the question is pitched at the right level of specificity, Anderson's actions do not appear 'objectively unreasonable in light of clearly established law ... at the time the defendant acted.'. . The sole relevant act Brown attributes to Anderson is signing the MOU or otherwise agreeing to confine him. But, as Anderson aptly explains, he had solid reason to believe that Brown's confinement in the Cold Springs Jail

was lawful under Brown's commitment order, the SVPA, and the MOU. Moreover, at the time of the confinement, the Supreme Court had 'repeatedly upheld civil commitment laws' similar to Texas' SVPA against various constitutional challenges, as the district court pointed out. . . And, as we noted in our 2018 opinion, the Texas Supreme Court upheld the constitutionality of the original SVPA in 2005. . . Brown does not point to any authority that would have alerted Anderson to the unconstitutionality of Brown's confinement. . . Because 'it cannot be said that all reasonable sheriffs would recognize the unconstitutionality of [Anderson]'s supervisory or personal acts or omissions,'. . . Anderson's acts were not objectively unreasonable. Anderson is therefore entitled to qualified immunity, as the district court correctly concluded.")

Cunningham v. Castloo, 983 F.3d 185, 193-94 (5th Cir. 2020) ("The district court's reliance on broad pronouncements from *Constantineau* and *Bledsoe* evinces a methodological error: It defined clearly established law too generally for any controlling relevance in this case. Courts must 'frame the constitutional question with specificity and granularity.'. . The district court did not do that. Instead, the district court appears to have asked whether, generally, the procedural-due-process right to a name-clearing hearing was clearly established. That wording is the wrong way to frame the question, as the Supreme Court repeatedly has told us. . . 'The dispositive question,' we emphasize, is whether 'the violative nature of *particular* conduct is clearly established.'. . The answer here is no. To further explain that compact response, we begin by describing the particular conduct for which Cunningham seeks to hold Sheriff Castloo liable. . . Sheriff Castloo's subordinates—Chief Deputy Sanders, Lieutenant Burge, and Captain Holland—met with Cunningham and fired her for 'improper use of chain of command and lying,' without further explanation. In response, Cunningham asked 'to speak with the Sheriff,' but Sheriff Castloo's subordinates did not 'allow' her to do so. Sheriff Castloo was not present at the meeting, and there is no evidence that he instructed his subordinates to deny Cunningham's request 'to speak with' him. . . Having first described Sheriff Castloo's particular conduct, as reflected by the summary-judgment record and viewed in Cunningham's favor, we now ask whether the 'violative nature,' vis-à-vis the Constitution, was clearly established. . . We conclude that it was not. . . Specifically, the law was not clearly established that Cunningham's request 'to speak with' Sheriff Castloo constituted a request for a name-clearing hearing in the context of our 'stigma-plus-infringement' test, such that denying the request would amount to a procedural-due-process violation. Our cases are quite unclear, even confusing, on what constitutes a request for a name-clearing hearing. . . What is clear, however, is that none of our cases—and certainly none from the Supreme Court—holds that an employee requests a name-clearing hearing, triggering procedural-due-process protections, when she asks only 'to speak with' her boss in the context of her discharge. Of importance, granting Cunningham's request 'to speak with' Sheriff Castloo would not have provided Cunningham a 'public forum' of any sort; it would have resulted only in a private audience with Sheriff Castloo. . . . All told, Cunningham has failed to cite 'adequate authority at a sufficiently high level of specificity' to put Sheriff Castloo 'on notice that his conduct is definitively unlawful.'. .She therefore failed to satisfy her burden of defeating Sheriff Castloo's claim of qualified immunity. Sheriff Castloo is entitled to qualified immunity, and the district court erred in denying that defense.")

Estate of Bonilla by & through Bonilla v. Orange County, Texas, 982 F.3d 298, 307 (5th Cir. 2020) ("The more specific rights that Plaintiffs claim for Bonilla lack adequate support in the case law to be 'clearly established.' For instance, Plaintiffs identify no cases establishing a clear constitutional right to adequate suicide screening or to screening only by medical professionals. In *Taylor v. Barkes*, a case involving a factually similar instance of suicide by a pretrial detainee, the Supreme Court observed: 'No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols.'. . The Supreme Court has not revisited *Taylor*. Further, since no 'robust consensus of cases' has developed within this circuit on the issue of suicide screening, there is no basis for asserting such a 'right' is clearly established. . .Similarly, Plaintiffs identify no cases establishing that adequate medical care requires the distribution of prescription narcotics to an inmate within hours of her intake.")

Cotropia v. Chapman, 978 F.3d 282, 287-88 (5th Cir. 2020) ("As Chapman concedes, "*Zadeh* already contains the very holding Cotropia asks the Court to announce in accordance with this constitutional analysis.' Chapman thus violated Cotropia's constitutional rights when she copied documents in Cotropia's office without any precompliance review of the administrative subpoena. . . With the first prong satisfied, we address whether Cotropia's right to precompliance review was clearly established at the time of the search. In *Zadeh*, even though we concluded that the TMB's subpoena authority for searching pain management clinics was unconstitutional, we could not conclude that 'every reasonable official prior to conducting a search under the circumstances of this case would know this *Burger* factor was not satisfied.'. . *Zadeh* was issued in 2019; Chapman searched Cotropia's office in 2015. Thus, at that time, it was not clearly established that her search per §§ 153.007(a), 168.052, 179.4(a), and 195.3 was unconstitutional. Cotropia seeks to avoid that conclusion by differentiating *Zadeh* in several respects. . . Cotropia tries to distinguish *Zadeh* by reasoning that, unlike the office in *Zadeh*, Cotropia's office was 'undisputedly *not* a [PMC].' Because 'it was clearly established at the time of this search that the medical profession as a whole is not a closely regulated industry,'. . Cotropia contends that '[e]very reasonable officer should have known that the closely regulated industry exception did not apply to the instant search of Cotropia's office.'. .Cotropia is correct that his office was not registered as a PMC. The statute that provided the TMB authority to search Cotropia's documents, however, gives the TMB authority to investigate not only 'a [PMC] certified under this chapter' but also 'a physician who owns or operates a clinic in the same manner as other complaints under this subtitle.'. . For instance, in *Zadeh*, . . . the relevant clinic was not required to be registered as a PMC for an officer reasonably to have relied on the regulatory scheme relevant to PMCs. It is thus irrelevant whether Cotropia registered his office as a PMC. The question, instead, is whether Chapman was investigating a complaint that Cotropia was operating his clinic in the same manner as a PMC. . . The record provides ample evidence that could lead a reasonable officer to believe that Cotropia operated New Concept in the same manner as a PMC. The TMB received allegations that Cotropia was operating an unregistered PMC. Cotropia, by his own admission, prescribed opioids through March 20, 2015, and previously had operated an unregistered PMC. His practice

involved the care of patients whom he had taken over from Tommy Swate, whose medical license was revoked in 2014 for improper treatment of chronic-pain and addiction patients. Based on those undisputed facts, Chapman acted reasonably in relying on § 168.053 as authorizing her to investigate the allegations regarding Cotropia's practice.")

Taylor v. McDonald, 978 F.3d 209, 214 (5th Cir. 2020) ("[W]e need not, and do not, decide whether the A1-3 Suicide Prevention Program, or others like it, are qualitatively different enough to trigger a liberty interest. It is enough to note that 'clearly established law should not be defined at a high level of generality,' but instead, 'must be particularized to the facts of the case.'. . Even viewing the program in the light most favorable to Taylor, as we must on motion for summary judgment, the A1-3 program is not factually similar enough to any behavioral change program we've held triggers a liberty interest to constitute clearly established law. And as demonstrated in the above paragraph, whether the program is qualitatively different is not 'beyond debate.'. . Therefore, the defendants are entitled to QI.")

Lansdell v. Miller, No. 20-60143, 2020 WL 4873224, at *1 (5th Cir. Aug. 19, 2020) (not reported) ("We have held that 'handcuffing too tightly, without more, does not amount to excessive force.' *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). Lansdell cites no controlling precedent that would put every reasonable officer on notice as to how to arrest someone with a preexisting injury. Lansdell points to out-of-circuit precedent, but we can only rely on out-of-circuit cases as part of the clearly-established inquiry when they demonstrate 'a robust consensus of persuasive authority.'. . As the First Circuit has observed, the circuit courts 'have reached different holdings on the constitutionality of handcuffing an allegedly injured arrestee behind his or her back.' *Hunt v. Massi*, 773 F.3d 361, 369 (1st Cir. 2014). There is therefore no robust consensus on the issue. Accordingly, at the time of Lansdell's arrest, it was not clearly established that Miller could not use two sets of cuffs to handcuff Lansdell behind his back.")

Morgan v. Chapman, 969 F.3d 238, 245-50 (5th Cir. 2020) ("In *Castellano v. Fragozo*, an *en banc* majority of this court extinguished the constitutional malicious-prosecution theory. . . *Castellano* explained that claims under § 1983 are only 'for violation[s] of rights locatable in constitutional text.'. . This makes sense: the people have a constitutional right to be free from unreasonable searches and unreasonable seizures. In so far as the defendant's bad actions (that happen to correspond to the tort of malicious prosecution) result in an unreasonable search or seizure, those claims may be asserted under § 1983 as violations of the Fourth Amendment. But that makes them Fourth Amendment claims cognizable under § 1983, not malicious prosecution claims. There is a constitutional right to be free of unreasonable searches and seizures. There is no constitutional right to be free from malicious prosecution. Therefore, qualified immunity bars Morgan's § 1983 malicious prosecution claims against Chapman and Kopacz. . . . We recognize that previous decisions of this court may have left open the possibility that the freedom-from-abuse-of-process right lay hidden in the constitutional ether. . . We close the door on that possibility. Putting together *Beker*, *Brown*, and *Castellano*, we observe that facts that constitute the state tort of abuse of process can also constitute an unreasonable search, unreasonable seizure,

or violation of another right 'locatable in constitutional text.'. . Such claims, rooted in the violation of constitutional rights, are actionable under § 1983. But those claims 'are not claims for [abuse of process] and labeling them as such only invites confusion.'. . Because there is no constitutional right to be free from abuse of process, the district court erred by failing to grant defendants qualified immunity on that claim. . . . The *Zadeh* search violated the Fourth Amendment even if pain management clinics were a closely regulated industry, we explained. Nonetheless, we concluded that the law was not clearly established at the time, because 'the defendants reasonably could have believed that the administrative scheme here provided a constitutionally adequate substitute for a warrant.'. . The *Zadeh* court also concluded, under an alternative theory, that the searches at issue were not pretextual. . . A search is not really administrative if it is used solely to find evidence of criminal wrongdoing. . . Neither the closely regulated industry holding nor the pretextual search analysis would stop Morgan's claims. In *Zadeh*, the defendants received qualified immunity because the law of *instanter* searches of closely regulated pain management clinics was unclear. . . Here, accepting the plaintiff's allegations as true, it is uncontroverted that Morgan was *not* operating a pain management clinic. Indeed, he alleges that he 'has never obtained, stored, maintained or dispensed any controlled substances of any kind from either medical practice.' Because Morgan was not operating a pain management clinic, the qualified immunity available to the defendants in *Zadeh* would be inapplicable here. The pretext analysis in this case also departs from *Zadeh*. In *Zadeh*, we concluded that the searches were not pretext for criminal investigation because there was no evidence that the 'investigation resulted in a criminal prosecution' and because the TMB took 'subsequent administrative action against' the physician. . . Therefore, we reasoned, the search was not pretextual because it 'was not performed "solely to uncover evidence of criminality."'. . Here, neither of those two facts are present. The search *did* result in a criminal prosecution, and TMB did *not* take any subsequent administrative action against Morgan. Based on this case law, we cannot say it would be futile for Morgan to add a Fourth Amendment claim for an unreasonable search. . . . A Fourth Amendment unreasonable seizure claim arising from Morgan's arrest on false charges would also be familiar. We recently concluded that an unlawful seizure claim was cognizable and qualified immunity did not apply where a plaintiff 'was wrongfully arrested due to the knowing or reckless misstatements and omissions' in a law enforcement officer's affidavits. . . . We also must address whether it would be futile to remand to allow the district court to consider a due process claim. This court recently announced that there is a 'due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person.' *Cole v. Carson*, 802 F.3d 752, 771 (5th Cir. 2015) (*"Cole I"), cert. granted, judgment vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016) *and opinion reinstated in part*, 935 F.3d 444 (5th Cir. 2018) (en banc). And, although *Cole* had a peripatetic procedural history, that holding is binding Fifth Circuit precedent today. . . Given the on-point *Cole* holding, the due process claim would similarly not represent a futile amendment. Remand to allow the district court to consider that claim would not be futile. . . It would not be *futile* on the merits for Morgan to pursue an unreasonable search, unreasonable seizure, or due process claim. But the decision as to whether Morgan *should* be allowed to amend is not ours to make. It is unclear what legal theories the plaintiff presented in the district court. And his claims seem to have transformed on appeal. We

remand for the district court to consider amendment and, if necessary, issues of waiver and forfeiture.")

Dyer v. Houston, 964 F.3d 374, 381-85 (5th Cir. 2020) (*on denial of reh'g and reh'g en banc*) ("Pointing to inconsistency in our court's deliberate-indifference standards, the district court reasoned that 'there is no clearly established right in the Fifth Circuit to be free from medical inattention by officers who do not actually intend to cause harm.' The court therefore granted summary judgment dismissing the Dyers' deliberate-indifference claims against all three Officers. . . Turning first to the district court's prong one ruling, we agree that the record discloses genuine disputes of material fact regarding whether Officers Heidelburg and Gafford acted with deliberate indifference. But we disagree as to Officer Scott, finding similar fact disputes as to him. The district court correctly found a genuine dispute concerning whether Gafford and Heidelburg were deliberately indifferent to the serious medical needs of a detainee in their custody. A reasonable trier of fact could find that those Officers were aware that Graham, in the grip of a drug-induced psychosis, struck his head violently against the interior of Heidelburg's patrol car over 40 times en route to jail and thereby sustained severe head trauma. . . . Yet the Officers sought no medical care for Graham when they arrived at the jail. Nor did they alert jail officers (who had no way of knowing what had happened en route to the jail) of the possibility that Graham had seriously injured himself. . . . A reasonable jury could find that Graham's injuries—from which Graham would die within roughly 24 hours—were so severe, and their cause so plainly evident to the Officers, that the Officers acted with deliberate indifference by failing to seek medical attention, by failing to inform jail personnel about Graham's injuries, and by informing jail personnel only that Graham had been 'medically cleared' before arriving at the jail. . . A reasonable jury could find otherwise, of course, but the district court correctly concluded that the Dyers presented enough evidence that the Officers 'were aware of a risk of injury to Graham that they did nothing to alleviate,' allowing the Dyers to survive summary judgment on prong one. . . . The district court's prong two analysis was legally erroneous. Instead of asking whether controlling authority placed the unconstitutionality of the Officers' alleged conduct 'beyond debate,'. . . the court instead found that our deliberate-indifference case law was too muddled even to attempt the inquiry. Specifically, the district court pointed to 'confusion' in our cases over whether deliberate indifference requires proof of an officer's 'actual intent to cause harm in medical-inattention claims.' The court therefore concluded that 'there is no clearly established right in the Fifth Circuit to be free from medical inattention by officers who do not actually intend to cause harm.' We disagree with the district court's prong two analysis. Admittedly, the district court was correct that our deliberate-indifference cases are not a paradigm of consistency. As discussed *supra*, a panel of our court recently observed that, whereas many of our decisions hew to the traditional deliberate-indifference standard from *Farmer v. Brennan*, . . . others appear to add the element that the officer 'subjectively intended that harm occur.'. . Contrary to the district court's reasoning, however, this apparent tension in our cases does not *ipso facto* 'doom[ ]' the Dyers' deliberate-indifference claim. To the contrary, the district court was still required to analyze whether the Officers' alleged conduct contravened clearly established law as set by the controlling precedents of this court and the Supreme Court. Reviewing the record *de novo*, we conclude a reasonable jury

could find the Officers' conduct contravened clearly established law. . . . *Thompson* defines clearly established law in sufficient detail to have notified the Officers that their actions were unconstitutional. . . Similar to the jail sergeant in *Thompson*, here the Officers had custody of a delusional detainee who was severely harming himself, and yet—despite being aware of the detainee's dire condition—they did nothing to secure medical help. Arguably, this situation presents a clearer case of deliberate indifference than *Thompson*. There, although providing Thompson some care, the jailer recklessly misjudged the severity of Thompson's condition that led to the seizure that caused his death. . . Here, the Officers actually witnessed Graham violently slamming his head against the patrol car over and over again, inflicting the cerebral trauma that would kill him within about a day's time. . . And yet, instead of seeking medical assistance, the Officers deposited Graham at the jail, told jailers nothing about what Graham had done to himself en route, and informed the jail sergeant only that Graham 'had been medically cleared at the scene.' In sum, *Thompson* gave officers 'fair warning[]'. . . that their behavior was deliberately indifferent to Graham's serious medical needs.")

Wigginton v. Jones, 964 F.3d 329, 335-39 (5th Cir. 2020) ("We regularly grant qualified immunity in substantive due process cases where the plaintiff fails to establish a clearly-established property interest . . . Because Wigginton fails to identify any state or federal law that placed defendants on notice that his alleged contractual right to a fair tenure-review process was a constitutionally-protected interest, we reverse. . . . The district court acknowledged that Wigginton did not have a protected property interest in 'continued employment,'. . . but it concluded that he presented sufficient evidence to establish a different kind of protected interest—an interest in 'a fair merit-based inquiry free from irrationality as to whether he should receive tenure and promotion.' We hold that the district court erred in denying defendants' motion for qualified immunity because there was neither controlling authority nor a robust consensus of persuasive authority that placed Wigginton's rights beyond debate. . . . As the party defending against a claim of qualified immunity, Wigginton bears the burden of demonstrating that clearly-established law placed defendants on notice that they were violating his protected property interest. . . The cases he relies upon do not define his asserted property right with sufficient particularity to defeat defendants' qualified immunity defense. . . .Because Wigginton has failed to demonstrate that clearly-established law placed defendants on notice that he had a protected property interest, we reverse the district court's denial of their qualified immunity defense.")

Goode v. Baggett, 811 F. App'x 227, ___ (5th Cir. 2020) ("[A] jury could find that the Officers lacked reason to believe that Troy committed a crime, posed a threat to anyone, or actively resisted arrest when they hog-tied him. On those facts, a jury could reasonably conclude that the Officers used excessive force in violation of the Fourth Amendment. . . The Officers argue that even if they used excessive force, they're entitled to qualified immunity because the unlawfulness of their conduct was not clearly established at the time. . . . [T]he question is whether the state of the law in 2015 gave the Officers fair warning that hog-tying Troy would constitute excessive force under the circumstances. To answer that question, we look first to 'controlling authority,' i.e., published opinions of the Supreme Court and the Fifth Circuit. . . If we find controlling authority on point,

our inquiry ends. . . Absent controlling authority, we look to our sister circuits to see whether 'a robust "consensus of cases of persuasive authority"' established the unlawfulness of the conduct at issue. . . At the time in question, the Fifth Circuit had decided three cases addressing whether officers used excessive force when they hog-tied arrestees. . . . As shown by our precedent, *Gutierrez* presents us with 'several yardsticks' by which to measure claims for excessive force involving restraints. . .Unless justified by a threat of serious harm, hog-tying a drug-affected person in a state of drug-induced psychosis and placing him face down in a prone position for an extended period constitutes excessive force. . . Thus, if the facts here are sufficiently similar to those in *Gutierrez*, then the Officers would not be entitled to qualified immunity. The Officers argue that *Gutierrez* didn't clearly establish the unlawfulness of hog-tying under any circumstances because the medical study it relied on has been called into question by a study co-authored by Dr. Tom Neuman and three others, including one of the defense experts here[.] . . . In *Gutierrez*, we relied on a study by the San Diego Police Department and the research of Dr. Donald T. Reay as evidence that hog-tying can become deadly force. . . We were aware of Dr. Neuman's study, however, and acknowledged that it possibly 'call[ed] the validity of Dr. Reay's research into question,' but we didn't consider it because it wasn't in the record. . . We similarly noted Dr. Neuman's study in *Hill* and *Khan*, but it didn't affect our analysis in those cases; we still applied the *Gutierrez* factors. . . Dr. Neuman's study has no bearing on whether the law was clearly established. First, the various studies are relevant to whether hog-tying in certain circumstances is 'deadly force.' But 'whether a particular use of force is "deadly force" is a question of fact.'. . We must accept the truth of Kelli's evidence on the degree of force used. . . Second, Dr. Neuman's study can't unsettle the law in this circuit. Although a circuit split can sometimes show that the law wasn't clearly established, . . . the same isn't true of a 'battle of the experts' like we have here[.] . . . Even when other circuits are split, . . . our inquiry ends if 'the law was clearly established in this circuit.'. . *Gutierrez* remains binding precedent. We conclude that *Gutierrez* clearly established the unlawfulness of hog-tying in certain circumstances. The next step is to determine whether the facts here are similar enough to those in *Gutierrez* for that case to have given the Officers fair warning that hog-tying Troy would constitute excessive force. . .The facts here mirror those in *Gutierrez* in all relevant respects. First, the Officers knew that Troy was 'under the influence of drugs.'. . Second, Troy exhibited signs of excited delirium. . . In fact, he was running around in circles, sweating profusely, yelling incoherently, and 'acting really strange,' similar to how Gutierrez was acting. . . Third, despite Troy's drug use and bizarre behavior, the Officers hog-tied Troy. . . Fourth, the Officers placed Troy 'in a face-down prone position' while hog-tied. . . And unlike the officers in *Khan*, who removed the restraints almost immediately, the Officers here left Troy hog-tied for ninety minutes—three times as long as the thirty-minute period in *Hill*, which we described as an 'extended period of time.'. . Finally, there's a dispute as to whether Troy posed a threat to anyone when the Officers hog-tied him, just as there was in *Gutierrez*. . . Thus, *Gutierrez* squarely governs this case. . . . In sum, hog-tying a nonviolent, drug-affected person in a state of drug-induced psychosis and placing him in a prone position for an extended period is objectively unreasonable. In light of the similarities between the facts of *Gutierrez* and those here, the state of the law in 2015 was sufficiently clear to provide fair warning to the Officers that their alleged conduct was unlawful. . . . On the facts as we must take

them, the Officers' conduct in hog-tying Troy violated clearly established law. Of course, at trial, Kelli will bear the burden of proving the many facts and inferences that we assume in her favor. Depending on the facts proven at trial and the inferences drawn by the jury, a very different picture may result than the one we confront here. The Officers may ultimately be protected by qualified immunity in the end. But they aren't entitled to qualified immunity at this stage.")

Keller v. Fleming, 952 F.3d 216, 224-27 (5th Cir. 2020) ("[W]ithout a valid exception to the probable cause requirement, the seizure is . . . presumptively unreasonable, and a constitutional violation is present. . . Plaintiffs must still demonstrate that there was a clearly established right at the time of the challenged actions. Thus, the question becomes whether there is precedent that put Deputy Fleming on notice that he was committing a constitutional violation when he drove Simpson several miles to the county line and dropped him off. For purposes of determining whether the right was clearly established, '[t]he relevant question ... is ... whether a reasonable officer could have believed [his or her conduct] to be lawful, in light of clearly established law and the information the ... officers possessed.'. . In other words, Plaintiffs must point this court to a legislative directive or case precedent that is sufficiently clear such that every reasonable official would have understood that what he is doing violates that law. . . Here, Plaintiffs' burden is not met. Plaintiffs' clearly established law contentions in their briefing are in fact a narrative as to why Deputy Fleming's seizure was unreasonable. Plaintiffs' narrative argument is of no import of a pre-existing or precedential case. . . In turn, there is no binding Supreme Court or Fifth Circuit precedent to anchor our de novo review of whether a similarly situated officer violated a constitutional right acting under similar circumstances. . . Without setting forth a clearly established right for which the analysis can continue, Plaintiffs have not defeated Deputy Fleming's qualified immunity defense. . . Of note, the dissent cites to *Hope v. Pelzer* for the proposition that 'general statements of the law are not inherently incapable of giving fair and clear warning' and 'general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . The dissent argues that Deputy Fleming was on clear notice that the reasonableness of the seizure of Simpson would be subject to a Fourth Amendment balancing test (weighing individual intrusion against legitimate government interests). Weighing the cognizable interests of Simpson against the government interests here, the dissent's position is that the scale tips starkly in Plaintiff's favor in light of *Papachristou v. City of Jacksonville*'s holding that 'anti-vagrancy' laws are void for vagueness as they permit 'unfettered discretion' in seizing an individual like Simpson. . . Assuming that general statements (under *Hope*) may suffice, the balance of interests here are not so lopsided. As stated herein and by the district court, there is an argument for the community caretaker function (for example) which would be a legitimate government interest as to public safety. . . Because there are legitimate interests on both sides, this is not a one-sided balancing test where the officer 'do[es] not have any relevant, legitimate interests to put on their side of the[ ] scales.'. . Accordingly, Deputy Fleming's qualified immunity defense as to Plaintiffs' Fourth Amendment claim prevails because Plaintiffs failed to prove that a reasonable officer like Fleming would have understood his actions violated clearly established law. Judgment is therefore rendered in Deputy Fleming's favor as he is entitled to qualified immunity on this claim. . . . Plaintiffs submit that Deputy Fleming's

conduct created the 'special relationship' under *DeShaney v. Winnebago County Department of Social Services* and a 'state-created-danger' resulted thereof. . . The district court held that Fleming was not entitled to qualified immunity under this claim because, *inter alia*, there were genuine issues of material fact as to whether there was a 'special relationship' between Fleming and Simpson that deprived Simpson of his liberty. Deputy Fleming argues that the law does not clearly establish that a special relationship would have existed under the facts of this case. We agree with Fleming because even if a 'special relationship' existed, Plaintiffs must show that Simpson's Fourteenth Amendment right was clearly established at the time of the alleged violation. The Supreme Court has 'repeatedly told courts not to define clearly established law at a high level of generality.'. . Again, the dispositive question is 'whether the violative nature of particular conduct is clearly established.'. . Here, while Simpson was killed by a motorist after Fleming dropped him off at the county line, the High Court in *DeShaney* held that states and their officials have no affirmative duty to protect individuals from violence by private actors. . . . [T]he Fifth Circuit has never recognized this 'state-created-danger' exception. Plaintiffs therefore have not demonstrated a clearly established substantive due process right on the facts they allege. Accordingly, we reverse the district court's denial of summary judgment and render judgment that Deputy Fleming is entitled to qualified immunity on Plaintiffs' Fourteenth Amendment claim.")

Keller v. Fleming, 952 F.3d 216, 227-29 (5th Cir. 2020) (Dennis, J., dissenting) ("The district court found that it was genuinely disputed whether Darrin Fleming picked up and transported Gerald Simpson out of the county pursuant to a local unwritten custom of ousting those perceived as vagrants from the jurisdiction, and we must accept these facts as true at this juncture. . . . I agree with the majority that, under these facts, Fleming violated Simpson's Fourth Amendment rights. I disagree, however, that Plaintiffs failed to demonstrate that these rights were clearly established. . . . [Q]ualified immunity works only 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'. . Under this framework, a right may be clearly established even without on-point precedent where a defendant's conduct clearly and obviously violates the Constitution. . . At the time the incident at issue here occurred, Supreme Court precedent provided clear notice that 'the reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'. . When the question of whether a constitutional violation occurred depends on this sort of balancing of interests, qualified immunity should not apply when, 'given the factual disputes identified by the district court and taking the plaintiffs' side of those disputes, [a] case does not require any real balancing at all' because the officers 'do not have any relevant, legitimate interests to put on their side of the[ ] scales.'. . . Accepting the facts that the district court found to be genuinely disputed, there is simply no legitimate government interest against which to balance the significant intrusion posed by Deputy Fleming's decision to seize Simpson and dump him in the next jurisdiction without his valid consent. The Supreme Court has long made clear that the Constitution does not permit police to 'roundup ... so-called undesirables' merely because they are 'poor people, nonconformists, dissenters, idlers.' *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). With a balance so one-sidedly contrary to an individual's Fourth Amendment rights, every reasonable officer would have understood that seizing Simpson

under these circumstances was arbitrary and unreasonable. . . Further, precedent from the Supreme Court provided notice when these events occurred that a law that provides officers with 'unfettered discretion' to arrest persons as vagrants merely on suspicion of future criminality is impermissibly vague. . . .Given the Supreme Court's well-established jurisprudence limiting an officer's discretion to act pursuant to an established vagrancy or vagrancy-related law, it follows *a fortiori* that an unwritten custom—which would provide even vaguer standards and grant greater discretion—is necessarily unreasonable as a matter of law. When combined with this principle, it is even more apparent that the clearly one-sided balancing of interests served as clear and obvious notice to any reasonable officer in Deputy Fleming's position that seizing Simpson and driving him to the county line violated Simpson's Fourth Amendment rights. . . Under the facts the district court found genuinely disputed, which we must accept for purposes of this appeal of a denial of qualified immunity, Deputy Fleming's conduct clearly and obviously violated Simpson's Fourth Amendment rights. Accordingly, I would affirm the district court's denial of summary judgment on Plaintiffs' Fourth Amendment claim.")

Blanchard-Daigle v. Geers, 802 F. App'x 113, ___ (5th Cir. 2020) ("Deputy Geers' decision did not violate clearly established law. 'Our circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon.' *Valderas v. City of Lubbock*, 937 F.3d 384, 390 (5th Cir. 2019); *see also Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (collecting cases). We have found that officers reasonably used deadly force when a suspect reached for his waistband, *see Salazar-Limon v. City of Houston*, 826 F.3d 272, 279–80 (5th Cir. 2016), when a suspect reached under a seat while sitting in a parked car, *see Manis*, 585 F.3d at 844–45, and even when a suspect reached into a nearby boot, *see Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009). In light of these precedents, we cannot say that every reasonable officer would have known that it was unconstitutional to use deadly force against a suspect who reached for something—particularly when Mr. Blanchard had driven 1,000 feet down a private road before pulling over and then exiting his vehicle unprompted. Qualified immunity thus defeats Ms. Blanchard-Daigle's claim against Deputy Geers.")

McCoy v. Alamu, 950 F.3d 226, 233 & n.8 (5th Cir. 2020), *cert. granted, vacated and remanded in light of Taylor v. Riojas*, 592 U.S. ___ (2020) (per curiam), 141 S. Ct. 1364 (2021) ("[O]ur caselaw 'does not require a case directly on point for a right to be clearly established.'. . Indeed, QI 'will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.'. . Thus, it's irrelevant that we hadn't previously found a use of *pepper spray*—as distinguished from some other instrument—to violate the Eighth Amendment. . . But for the law to be clearly established, it must have been 'beyond debate' that Alamu broke the law. . . 'The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'. . . Thus, for the law to be clearly established, it must be beyond debate that the spraying crossed the line dividing a *de minimis* use of force from a cognizable one. . . Above, we held that the spraying crossed that line.

But it was not *beyond debate* that it did, so the law wasn't clearly established.[8] [fn. 8: Some might find this a puzzling result, insofar as QI might have us find a violation in one breath, but, in the next, hold it too debatable to prevent immunity. No matter. What the first prong gives, the second prong will often snatch back. The Supreme Court has repeatedly reversed courts of appeals for failing to define established law narrowly, and we must follow that binding precedent.] This was an isolated, single use of pepper spray. McCoy doesn't challenge the evidence that Alamu initiated the Incident Command System immediately after the spray, nor that medical personnel promptly attended to him and provided copious amounts of water. Nor does he provide evidence to contest the Use of Force Report's finding that Alamu used less than the full can of spray. In somewhat related circumstances, we held that spraying a prisoner with a fire extinguisher 'was a *de minimis* use of physical force and was not repugnant to the conscience of mankind.'. . Similarly here, on these facts, it wasn't beyond debate that Alamu's single use of spray stepped over the *de minimis* line. For that reason, the law wasn't clearly established. In contending that the law was clear, McCoy points to the general principle that prison officers can't act 'maliciously and sadistically to cause harm.'. . That won't do. The Supreme Court has repeatedly admonished courts not to define the relevant law too capaciously. . . Fact-intensive balancing tests alone (such as the *Hudson* factors) are usually not 'clear' enough. . . because the illegality of the *particular conduct* at issue must be undebatable. . . And even if general standards can clearly establish the law where the constitutional violation is 'obvious,'. . . this is not such a case. Above, we found that two of *Hudson*'s five factors (injury, and efforts to temper force) weighed for Alamu, so the result was hardly obvious. . . Accordingly, we affirm the summary judgment.")

McCoy v. Alamu, 950 F.3d 226, 234-37 (5th Cir. 2020) (Costa, J., dissenting in part), *cert. granted, vacated and remanded in light of Taylor v. Riojas*, 592 U.S. ___ (2020) (per curiam), 141 S. Ct. 1364 (2021) ("If a prison guard punched an inmate 'for no reason,' that assault would violate clearly established law. . . The same would be true if a guard hit an inmate with a baton 'for no reason.'. . A guard who tased an inmate without provocation could also be held accountable. . . Should the result be different because Alamu's weapon of choice was pepper spray? Our precedent answers 'No'. . . . Qualified immunity is about notice. . . If a public official knows that using force is unlawful in a given circumstance, there is no reason to 'protect [him for] apply[ing] excessive and unreasonable force merely because [his] means of applying it are novel.'. . So just as the use of force in *Newman* violated clearly established law even though there were no 'tasing' cases on the books, . . . Alamu's gratuitous use of force on an inmate also violated clearly established law despite the lack of published 'pepper spraying' cases so holding. Despite recognizing that an unprovoked assault violates the Constitution, the majority grants the guard immunity because we have not decided a similar case involving pepper spray. That holding is at odds with *Newman*, which recognizes that the circumstances surrounding the use of force—the need for applying force, 'the relationship between the need and the amount of force used,' *etc.*—are what matter. . . The chosen instrument of force does not. . . And apart from its wisdom in the first place, *Newman* has put officials on notice for the last seven years that using a unique 'instrument' of force does not allow them to escape liability for constitutional violations. That notice alone defeats qualified immunity. Although the majority purports to recognize that the instrument of

force does not matter in a 'no provocation' case, its grant of immunity ultimately turns on the fact that the guard used pepper spray instead of a fist, taser, or baton. It relies on the absence of law clearly establishing that wantonly spraying a prisoner with a chemical agent involves more than a *de minimis* use of force. The same could have been said in *Newman* about tasing. Unexplained in the majority opinion is why tasing is a more serious use of force than pepper spraying. The use of pepper spray is no small thing. The chemical agent, which temporarily blinds its recipients, is—unlike tasers—banned for use in war. . . And numerous federal courts have treated pepper spray as a dangerous weapon in criminal cases, which requires a finding that the 'instrument [is] capable of inflicting death or serious bodily injury,'. . a much higher force threshold than clearing the *de minimis* hurdle. . . Like tasing, pepper spraying is a far more significant use of force than the 'push or shove' the Supreme Court has held out as examples of *de minimis force.* . . The majority neglects that the gratuitous tasing in *Newman* was deemed an 'obvious' case of excessive force, . . . a label that also fits the pepper spraying of McCoy 'for no reason.' Qualified immunity is often a game of find-that-case, but not always. Common sense still plays a role; when the violation of constitutional rights is 'obvious,' there is no immunity. . . . And it is obvious in prison use-of-force cases that 'the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'. . . McCoy's testimony, which we must accept at this stage, is that there was 'no reason at all' to spray him. How could any guard not know that an unprovoked use of pepper spray is unlawful? Yet the majority concludes it would have been reasonable for a guard to think the law allowed him to gratuitously blind an inmate. Although the obviousness exception does not often apply, it plays an important role in qualified immunity doctrine. It ensures vindication of the most egregious constitutional violations. Requiring an on-point precedent for obvious cases can lead to perverse results. Because cases involving the most blatantly unconstitutional conduct will not often end up in the courts of appeals, it may be harder to find factually similar caselaw for such cases than it is for cases with conduct presenting closer constitutional questions. But cases involving obvious constitutional violations should be the easiest ones in which to find that an officer was 'plainly incompetent or ... knowingly violate[d] the law.'. .The panel agrees that if the jury finds the facts as McCoy presents them—a guard's infliction of painful force on a compliant, nonthreatening inmate—then Alamu violated the law. Any reasonable guard would know that such an unprovoked use of pepper spray violates the Constitution, so I would allow a jury to decide if that is what happened. Because McCoy's excessive force claim should go forward under current qualified immunity law, it does not depend on the success of recent calls to reconsider or recalibrate the doctrine. *See, e.g.*, *Kisela v. Hughes*, —– U.S. ——–, 138 S. Ct. 1148, 1162, 200 L.Ed.2d 449 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abbasi*, —– U.S. ——–, 137 S. Ct. 1843, 1871–72, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring); *Zadeh v. Robinson*, 928 F.3d 457, 479–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). But with so many voices critiquing current law as insufficiently protective of constitutional rights, the last thing we should be doing is recognizing an immunity defense when existing law rejects it.")

Ratliff v. Aransas County, Texas, 948 F.3d 281, 288-89 (5th Cir. 2020) ("Prior to *Garza*, our cases had clearly established that deadly force is not unreasonable when an armed suspect has ignored

multiple orders to disarm and has either pointed his weapon at a person or used the weapon in such a manner as to make a threatening gesture. . . . The plaintiff in *Garza* argued, as Ratliff argues now, that 'a reasonable jury could find that [the suspect] never pointed his gun at the officers.'. . In support of this argument, the plaintiff relied on an affidavit from one of the officer-defendants, which stated that the suspect 'did not at any time point the gun [at the] cops.'. . Although we found that video evidence had conclusively contradicted the affiant's statement, we explained that this fact was not essential to the outcome and further held that a 'reasonable officer in any of the defendants' shoes would have believed that [the suspect] posed a serious threat regardless of the direction [of his] gun.'. .Thus, in *Garza*, we found that it is not unreasonable for law enforcement officers to use deadly force against an armed suspect, irrespective of the pointed direction of that suspect's weapon, when the suspect has ignored orders to drop the weapon and has displayed erratic or aggressive behavior indicating that he may pose an imminent threat. We can concede that, here, unlike in *Garza*, the video evidence is inconclusive with respect to the direction of Ratliff's gun. Moreover, we are willing to accept that the gun's direction is genuinely disputed. But we cannot agree that the pointed direction of Ratliff's gun is material in the context of these facts. Once Ratliff had ignored repeated warnings to drop his weapon, the deputies here, like the officers in *Garza*, had ample reason to fear for their safety.")

SIXTH CIRCUIT

Clemons v. Couch, No. 19-6411, 2021 WL 2821074, at *4-6 (6th Cir. July 7, 2021) ("*Caniglia* makes clear that Couch cannot justify his warrantless entry into Richard's home by calling on the community-caretaker exception. Without any other valid justification for his entry, we hold that Couch violated Richard's Fourth Amendment rights. . . Here, we must determine whether the law regarding the community-caretaker exception was clearly established such that it would have been apparent to a reasonable officer in Couch's position that the exception did not apply to his warrantless entry into Richard's home. We now know, based on *Caniglia*, that the community-caretaker exception, to the extent it exists at all, does not apply to the home. . . But *Caniglia*, of course, had not been decided by the date of the events in question, March 27, 2016. At that time, a reasonable officer in Couch's position could have determined—based on *Cady*, and our pre-2016 precedent interpreting *Cady*—that the community-caretaker exception applied to an officer's home entry, at least as a general matter. . . . That does not, however, absolve Couch of potential liability. For it was clearly established before March 27, 2016, that if the exception applied to home entry, it could 'not provide the government with refuge from the warrant requirement except when delay is reasonably likely to result in injury or ongoing harm to the community at large.'. .That principle made clear that Couch's actions could not fall within the community-caretaker exception. . . Couch may have been engaged in community caretaking when he accompanied Christina to collect her and her son's belongings. Christina was afraid to go to the Clemonses' house alone, perhaps for good reason, and Couch was her requested escort. But the need for entry was not urgent. Construing the facts in the light most favorable to Richard, any delay in Couch's entry into the residence—to obtain a warrant or court order permitting his entry—was not 'reasonably likely to result in injury or ongoing harm to the community at large.'. . We

decline to hold that sufficient injury would have or could have resulted if Christina had been forced to delay the collection of her and her son's belongings. True, the son was to attend school the next day and required his school supplies and attire, but that type of harm does not reach the level of harm required by *Washington* to permit the state's warrantless entry into Richard's home. . . . The facts in this case more closely mirror those in cases where we refused to apply the community-caretaking rationale to warrantless home entry. . . . At bottom, Richard Clemons has produced evidence that would allow a reasonable jury to conclude that Couch's conduct was in violation of Richard's clearly established Fourth Amendment right to be free from the state's warrantless entry into his home. Couch is therefore not entitled to summary judgment based on qualified immunity. . . .With this decision, we do not intend to cast aspersions on the work done by law enforcement. Although it may seem that holding Trooper Couch potentially liable for his warrantless entry reinforces the old adage that no good deed goes unpunished, that is not our aim. Today we simply acknowledge the sanctity of the home, a notion 'embedded' in our constitutional tradition 'since the origins of the Republic,' that protects against warrantless government intrusion. . . It is not our role as judges to change constitutional safeguards to further what some may argue is better policy. . . Accordingly, we reverse the magistrate judge's grant of summary judgment to Couch based on the community-caretaker exception and remand for proceedings consistent with this opinion.")

Clemons v. Couch, No. 19-6411, 2021 WL 2821074, at *6-7, *9, *11 (6th Cir. July 7, 2021) (Nalbandian, J., concurring in part and dissenting in part) ("First, I agree that the community caretaking exception (CCE) does not extend to Trooper Couch's conduct here—as well-intentioned as it was. I do not, however, agree that it was clearly established at the time that what Trooper Couch did was unconstitutional. So I would affirm the district court's grant of qualified immunity. . . Second, in the absence of qualified immunity, I concur with the majority that the consent issue is a matter for further consideration in the trial court, . . . and I would clarify the legal framework that should guide the consent inquiry. . . . When Trooper Couch helped Christina collect her belongings, little about our circuit's CCE jurisprudence could have been considered clearly established. . . . Before *Caniglia* cleaned the slate, our circuit's discordant trains of thought on the CCE failed to establish clear rules for officers. . . Since Trooper Couch did not disregard clearly established law when he acted, . . . he should not bear the consequences of our failure to elucidate. I would affirm the district court's grant of qualified immunity. . . . In sum, single-tenant consent can authorize entry even when it cannot authorize a search. In *Caniglia*, the Court instructed us to process difficult issues like these in the context of the three ways that officers may enter a home: a warrant, an exigency, and consent. Now that the CCE is no longer smothering the finer distinctions between exigency and consent, courts need to pick up where *Randolph* left off in parsing consent, trespass, and search. In my opinion, the best reading of *Randolph* is that single-tenant veto negates consent to search but not consent to enter to protect a co-tenant, even without an exigency. Since the majority is not granting qualified immunity, I agree that the consent issue needs further attention in the district court. I leave it to the district court on remand to consider how this issue impacts the case.")

Hughey v. Easlick, No. 20-1804, 2021 WL 2641884, at *3–5, *7 (6th Cir. June 28, 2021) ("We apply the three-prong handcuffing test to one specific act: a law-enforcement official's allegedly placing too-tight handcuffs on a person's wrists. If a plaintiff creates a genuine dispute of material fact that they complained that their handcuffs were too tight, the officer ignored those complaints, and the plaintiff experienced 'some physical injury' from the physical contact between cuffs and wrists, summary judgment is unwarranted. If a plaintiff's sole allegation is that the cuffs around their wrists were too tight, we need apply only the handcuffing test and our analysis terminates there. But if a plaintiff alleges that excessive force otherwise occurred—even if related to the handcuffing process—we apply the general Fourth Amendment framework to all allegations underlying the excessive-force claim. If the plaintiff creates a genuine dispute of material fact about whether the officer acted unreasonably, summary judgment is likewise inappropriate. Thus, in Hughey's case, we first apply the handcuffing test to her allegation that Easlick placed overly tight cuffs around her wrists. We then administer the general excessive-force framework to all the alleged events that sustain Hughey's excessive-force claim, including what transpired before, during, and after the handcuffing. . . .At bottom, Hughey testified that she complained to Easlick about the tightness of the handcuffs, that the handcuffs left rings on her wrists, that a nurse saw these marks, and that Easlick acknowledged that the cuffs caused the marks—all of this being enough to satisfy the handcuffing test's third element at the summary-judgment stage. . . . No doubt, when we view the facts in the light favoring Hughey, as we must on summary judgment, Easlick violated Hughey's clearly established rights. We have held that the right to be free from too-tight handcuffing had been 'clearly established' by 1991. . . As we pointed out in *McGrew*, we clearly established that handcuffing that results in wrist marks is unconstitutional no later than 2009, when we issued *Morrison*. *McGrew*[.] . . At bottom, 'this Court [has] directly and unequivocally determined, time and time again, that unduly tight or excessively forceful handcuffing is a clearly established violation of the Fourth Amendment.'. . The plethora of excessive-force handcuffing cases from the last three decades put Easlick on notice that the way that he yanked Hughey's arm, placed overly tight handcuffs around her wrists, and ignored her complaints of pain violated her right to be free from excessive force.")

Clark v. Stone, 998 F.3d 287, 298-302 (6th Cir. 2021) ("When a qualified immunity defense is asserted at the pleading stage, we have historically found that the inquiry should be limited to the 'clearly established' prong of the analysis if feasible. . . In the qualified immunity context, a right is considered clearly established when existing precedent has placed the question 'beyond debate' and 'any reasonable official in the defendant's shoes would have understood that he was violating [the right]'. . . 'When determining whether the right is clearly established, "we look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal."'. . . While the plaintiffs cite an ample number of cases that support the general notion that the Due Process Clause protects the right to bring up one's children, they point to no case law from either the Supreme Court or this circuit that indicates there is a clearly established right to use corporal punishment that leaves marks. . . . While we can state with ease that there is a general right to use reasonable corporal punishment at home and in schools, that right is not an unlimited one. The Clarks have offered no authority that

imposing corporal punishment that leaves marks is reasonable and is therefore a protected right. We find, therefore, that the district court did not err in dismissing the Clarks' Fourteenth Amendment claims. . . .Social workers are generally governed by the Fourth Amendment's warrant requirement. . . Here, the court order fell well below the requirements of a valid warrant. The order contains no facts that detail probable cause, nor does it describe with any particularity the area of the home to be searched. . . The defendants do not assert that they entered the home due to exigency or under any other exception to the warrant requirement. The district court was therefore correct in finding that the entries into the Clarks' home were Fourth Amendment violations. Our inquiry then becomes whether a reasonable social worker would have known based on these particular circumstances that their actions were violating the Clarks' constitutional rights. . . .As the district court recognized, . . . *Andrews* does not clearly establish that a reasonable social worker in *this situation* would know that his conduct was violating the Fourth Amendment. First, Judge Goff stated in open court that the Fourth Amendment did not fully apply in this context. While his statement may have been in error, it was not unreasonable for the defendants to rely upon instruction from a judge to conclude that their conduct was allowed. More importantly, each home visit by CHFS workers was conducted under the direct provenance of a court order issued specifically for this case. No such order existed in either *Andrews* or *Kovacic*, and it is significant in our assessment of what a social worker ought to have known about the legality of their conduct. Given that we have previously found that social workers may rely on police officers in assessing whether they are allowed to enter a home, it is hard to imagine that a reasonable social worker would not also believe that they could rely on an order from a judge, an even more authoritative source on the law. And indeed, at their first home visit Stone and Campbell were accompanied by a police officer. Despite Jacob's assertion that his rights were being violated, Stone and Campbell proceeded with the visit. If nothing else, this demonstrates an implicit endorsement from the police officer, upon which Stone and Campbell were entitled to rely. . . Because the presence of the court order meaningfully distinguishes this case from *Andrews*, a reasonable social worker in the position of the defendants would not have understood that he was violating the Clarks' Fourth Amendment rights. Indeed, this case represents precisely the type of haziness that *Andrews* alluded to in this area of law. Since the doctrine of qualified immunity is designed to protect 'all but the plainly incompetent or those who knowingly violate the law,' we agree with the district court that the plaintiffs have not overcome the qualified immunity defense.")

Clark v. Stone, 998 F.3d 287, 303-04 (6th Cir. 2021) ("The Clarks assert that they had a clear First Amendment right to record the home visits conducted by Hazelwood, Stone, and Campbell. In doing so, they cite to numerous cases from other circuits and one from the Northern District of Ohio that stand for the proposition that there is a constitutional right to film an encounter with a police officer. [collecting cases] . . . .The Clarks reason that because we have held that social workers are held to the same standard as police officers when it comes to other constitutional rights, the cases listed above are sufficient to demonstrate that the right to film interactions with a social worker is clearly established. We disagree. First and foremost, the Clarks have not cited a single case that applies this right to social workers. While we have clearly established that a social worker is not excepted from the Fourth Amendment, this concerns an entirely different set of

rights. We should not take the equivalence of social workers and police officers in one context as determinative in a completely different area of civil rights law. Doing so would violate our mandate to avoid construing rights too generally. . . Furthermore, the cases cited by the plaintiffs do not demonstrate that the right to film a social worker during a home visit was clearly established. A single district court opinion (and here, a district court opinion emanating from an entirely different district than where the events at issue took place) is not sufficient to demonstrate that a right is clearly established in this circuit for purposes of qualified immunity. . . And, as the district court recognized, other district courts in this circuit have found that the right is not clearly established. . . The existence of this conflict is itself evidence that the right was not sufficiently established such that any reasonable social worker in the defendants' shoes would have clear notice of the right.")

Moderwell v. Cuyahoga County, Ohio, 997 F.3d 653, 662 (6th Cir. 2021) ("[T]his Court has held that '"claims of excessive force do not necessarily require allegations of assault," but rather can consist of the physical structure and conditions of the place of detention.'. . . Therefore, Plaintiff's claims of excessive force based on the Corrections Defendants subjecting Johnson to the horrible conditions of CCCC's Red Zone, despite his suicidal condition and in response to a non-violent minor infraction, are not categorically barred by the Amended Complaint's failure to allege that the Corrections Defendants assaulted Johnson. Because it was unnecessary for Plaintiff to allege an assault in conjunction with her excessive force claim, there is no reason to depart from 'our general preference' not to grant qualified immunity based only on the pleadings. . . To understand 'the "facts and circumstances of [this] particular case,"' and to decide whether, faced with those facts and circumstances, a reasonable official would have understood that placing Johnson in CCCC's Red Zone constituted objectively unreasonable force, Plaintiff must be provided the opportunity to develop the factual record. *Kingsley*, 576 U.S. at 397, 135 S.Ct. 2466 (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). Although there is limited precedent addressing claims of excessive force without an assault, at this stage, we cannot determine whether discovery will nonetheless establish that the Corrections Defendants' actions were so 'egregious' that 'any reasonable officer should have realized that' the force used against Johnson 'offended the Constitution.' *Taylor*, 141 S. Ct. at 54.")

Strickland v. City of Detroit, 995 F.3d 495, 508-09 (6th Cir. 2021) ("There is a genuine dispute of fact as to whether Officer Schimeck ignored Plaintiff's complaint that his handcuffs were too tight. Plaintiff testified in his deposition that '[w]hen I told [Officer Schimeck] the cuffs were too tight, there wasn't a response.'. . The district court recognized 'there is some question of fact as to how Defendant Schimeck responded to Plaintiff's complaint that the handcuffs hurt....'...Qualified immunity should have been denied on that basis. However, the district court went on to observe that the disputed fact as to how Officer Schimeck responded to Plaintiff's complaint was not material because 'the issue was ultimately addressed: Plaintiff's handcuffs were loosened and locked into place by Schimeck's partner, and they were ultimately removed upon Plaintiff giving notice to Bliss that they were too tight.'. . It concluded that 'Plaintiff's complaints were not ignored' because someone eventually loosened his handcuffs. . . Officer Schimeck is not immune from suit because it is a disputed fact whether she ignored Plaintiff's complaint of

excessively tight handcuffs. Granting summary judgment because Plaintiff's handcuffs were loosened at some later point by someone else was not appropriate. Our decision in *Baynes v. Cleland* provides much guidance. In *Baynes*, we reversed a district court's grant of qualified immunity to sheriff's deputies who had ignored the plaintiff's complaints that his handcuffs were too tight. The analysis of the excessive force claim against Deputy Brandon Cleland is particularly instructive. Like Officer Schimeck, Deputy Cleland did not actually handcuff the plaintiff, instead another officer did so. . . As with Officer Schimeck, Deputy Cleland took custody of the plaintiff after the handcuffing, and there was evidence that he ignored complaints that the handcuffs were too tight. . . And just like Officer Schimeck, another law enforcement officer removed the plaintiff's handcuffs sometime after the complaints had been made to Deputy Cleland. . . In *Baynes*, this was enough for us to conclude that the district court had erred in granting Deputy Cleland qualified immunity on the plaintiff's excessive force claim based on tight handcuffing. . . And the same result is required here. Qualified immunity is inappropriate just because another officer eventually loosens and removes a plaintiff's handcuffs.")

Anders v. Cuevas, 984 F.3d 1166, 1178-79 (6th Cir. 2021) ("Assuming Star Towing's allegations are correct in that Cuevas' removal of Star Towing from the non-consent tow list was based on Anders' speech to state investigators, the law was clearly established that so doing would violate the First Amendment. Indeed, our decision in *Lucas*, a case in which we had the benefit of looking at summary judgment evidence, is on point and renders the unlawfulness of such conduct, if true, apparent. *Marohnic* and *See* also provide strong and firmly grounded Circuit precedent identifying that speech made in the context of cooperating with law enforcement is protected under the First Amendment. And, as explained above, the Amended Complaint contains enough factual allegations to find that Anders' speech was a motivating factor in Anders' alleged adverse actions taken against Star Towing. Cuevas disputes that *Marohnic* and *See* provided him with sufficient notice that he may have been violating the Constitution. He argues that, unlike the plaintiffs in *Marohnic* and *See*, 'Anders was not a public employee and was directly involved in the wrongdoing.'. . However, our cases foreclose any suggestion that these distinctions should alleviate Cuevas' understanding of the clearly established law in this Circuit. Specifically, in *Lucas*, we rejected the argument that only public employees or contractors are entitled to First Amendment protection. . . . Factual development of this case might reveal that Anders cooperated with the state investigation in order to insulate himself from any accusation of wrongdoing. However, we cannot make that assumption from the Amended Complaint, and even if we could, Anders' motives underlying his speech should not determine whether it is protected by the First Amendment. Against the backdrop of this Circuit's precedents, we conclude that a reasonable government officer would have known at the time in question that he would be violating the Constitution if he retaliated against Star Towing for Anders' cooperation with law enforcement.")

Johnson v. City of Saginaw, 980 F.3d 497, 513 (6th Cir. 2020) ("We conclude that Johnson's right to procedural due process prior to the deprivation of water service was clearly established

and the denial of qualified immunity to Appellants on Johnson's procedural due process claim was proper.")

Johnson v. City of Saginaw, 980 F.3d 497, 518-20 (6th Cir. 2020) (Sutton, J., concurring in part and dissenting in part) ("Johnson cannot possibly overcome qualified immunity. She has not identified any case clearly establishing that government officials must provide pre-deprivation process before discontinuing utilities to a business that endangered the public in so many life-threatening ways. Her key case, *Memphis Light*, gives comparison a bad name. It concerned the *routinized* discontinuance of *residential* water services due to *nonpayment*. It has nothing to say about the *targeted* discontinuance of *commercial* water services due to repeated *public safety and welfare* violations. As one might suspect, the prevailing law in truth tacks hard the other way, supporting Saginaw, not Johnson. The Supreme Court and this court have both authorized more dramatic and final government actions without process when officials identified a concern for the safety and welfare of others. . . . I remain bewildered by Johnson's claim that the city's actions violated clearly established law. *Memphis Gas & Light* is no more useful here than it was above. That case involved an automatic shutdown of water for nonpayment of a bill to a home whose residents could use the water and indeed needed the water to live. This case involves an earned shutdown of water to a business based on serial violations of public safety, and the owner could not use the water until the business could obtain its license to operate again.")

Lipman v. Budish, 974 F.3d 726, 750 & n.13 (6th Cir. 2020) ("[C]ases finding qualified immunity in the *DeShaney* context have relied on the fact that the plaintiff failed to show that state actors actually 'created the danger—either by increasing the risk of harm to third parties by its affirmative conduct or by doing something that endangers a discrete member or group of the public.'. . But the right to be free from such state-created danger was clearly established at the time of Defendants' actions. Accordingly, their assertion of qualified immunity must fail. . . .While not addressed by Defendants in their limited discussion of qualified immunity, it is worth noting that describing the right at issue as the right against a state-created danger of bodily harm does not broadly expose officers to suit any time they take an affirmative act. This is because, while an affirmative act that increases the plaintiff's risk of harm can give rise to a due process claim, this is only true when the defendant commits this act with the necessary mental state, usually meaning deliberate indifference as to whether her actions will harm the plaintiff. . . Thus, while the right at issue within the qualified immunity inquiry should be defined with an appropriate level of specificity, because the right at issue here is the right against a state official acting to increase an individual's risk of private violence with the knowledge of or at least deliberate indifference to that increased risk, the right is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'")

Hammond v. County of Oakland, Michigan, 825 F. App'x 344, ___ (6th Cir. 2020) ("Any reasonable officer would have understood that commanding a dog to bite a handcuffed suspect who was not attempting to flee would violate the Fourth Amendment. Cadotte thus is not entitled to qualified immunity with respect to the bites. Hammond also claims that Deputies Salyers and

Welch violated the Fourth Amendment when they failed to stop the bites. Whether they did depends upon whether they 'had both the opportunity and the means to prevent the harm from occurring.'. . But Hammond cites no caselaw clearly establishing that officers who are not trained as dog handlers have a duty to intervene and control a dog notwithstanding the presence of the dog's handler. Salyers and Welch are therefore entitled to qualified immunity from Hammond's claim.")

Abdur-Rahim v. City of Columbus, Ohio, 825 F. App'x 284, ___ (6th Cir. 2020) ("Analysis of the propriety of the district court's call on Masters's entitlement to immunity here encompasses two questions: (1) whether Masters violated Abdur-Rahim's constitutional rights; and (2) whether those rights were clearly established. . . Because the second disposes of the issue, we opt to address only it. . . A clearly established right must be 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . Existing precedent must place the constitutional question 'beyond debate.'. . The court cannot 'define clearly established law at a high level of generality.'. . Instead, caselaw must 'clearly and specifically hold that what the officer did—under the circumstances the officer did it—violated the Constitution.'. . Specificity proves especially important in the excessive force context, 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.'. . As an initial matter, Masters contends that he did not seize Abdur-Rahim and that the district court therefore erred by analyzing the excessive force claim under the Fourth Amendment, rather than under a heightened Fourteenth Amendment standard. Rather than confront this issue, we assume that the Fourth Amendment governs because, in any event, no clearly established law barred Masters's conduct. In finding that Masters violated clearly established law, the district court failed to define the right with requisite specificity and failed to identify a case where an officer acted under similar circumstances. First, the district court found that 'the right to be free from physical force when one is not resisting the police is a clearly established right.'. . Perhaps, but defining the right at this level of generality misses the Supreme Court's admonition that 'the clearly established law must be "particularized" to the facts of the case.'. . Indeed, in the sole published case cited for this proposition, an officer tasered a lone arrestee—a markedly different circumstance. . . . Second, the district court found that Masters had 'notice that the use of force after mace has incapacitated a suspect is excessive.'. . But again, none of our cases has extended that proposition to apply when using pepper spray to disperse a crowd. Rather, the cases cited by the district court and Abdur-Rahim each pertain to the reasonableness of using force against an individual arrestee whom officers already have restrained or subdued. . . .Abdur-Rahim has not provided a Sixth Circuit case that would have put Masters on notice that it constitutes excessive force to pepper spray directly a lingering individual blocking an intersection after forty-five minutes of dispersal orders and warnings, followed by a general spray over a crowd. Abdur-Rahim also suggests out-of-circuit cases to support her stance. We generally, however, disregard such authority because 'we can't expect officers to keep track of persuasive authority from every one of our sister circuits.'. . Regardless, those cases address distinguishable circumstances that don't clearly establish the specific right alleged here. . . . With no existing precedent that '"squarely governs" the specific

facts at issue' in this appeal, qualified immunity shields Masters from Abdur-Rahim's excessive force claim, and we reverse the denial of qualified immunity to Masters.")

Bard v. Brown County, Ohio, 970 F.3d 738, 754-55 (6th Cir. 2020) ("The clearly-established prong of the qualified-immunity analysis is straightforwardly satisfied here. As the Supreme Court observed in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), 'there is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.'. . . At the time of the alleged unconstitutional conduct, the proscription against the excessive use of force was clearly established. As to the objective reasonableness of the use of force, the fact that both the excessive-force and qualified-immunity analyses involve assessing whether the force was objectively unreasonable does not render the latter assessment 'merely duplicative' of the former. . . Indeed, '[t]he qualified immunity inquiry ... has a further dimension' that 'acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct.'. . As discussed above, the only theoretical reason for yanking Goldson out of the vehicle by his lower body, guaranteeing that his upper body would immediately fall to the ground, was that Goldson had recently attempted to escape from the officers. But we have repeatedly rejected this argument when the officer 'used [such] force well *after* securing [the individual] and defusing the situation.'. . 'A reasonable officer would understand that, after compliance is secured and a threat is no longer posed, force should not be employed.' *Cole v. City of Dearborn*, 448 F. App'x 571, 576 (6th Cir. 2011). Because there is no indication in the record that Goldson posed a threat to the officers, I believe that the district court erred in concluding that Huff's use of force was objectively reasonable and granting him qualified immunity on this basis.")

Stewart v. City of Euclid, Ohio, 970 F.3d 667, 673-75 (6th Cir. 2020), *), cert. denied,* 141 S. Ct. ___ (2021) ("As a threshold issue, it should be noted that Rhodes's choice to enter the vehicle, and his choice not to exit the vehicle when it was stopped for ten to fifteen seconds, is irrelevant in assessing the reasonableness of his use of force. . . But having no duty to retreat does not mean Rhodes could use deadly force; his actions must still be reasonable under the circumstances. Here, some of the circumstances support the reasonableness of Rhodes's actions. Stewart drove into a police car at the beginning of the interaction; his vehicle, for whatever reason, unexpectedly stopped in the middle of an intersection; and twice he drove onto a pedestrian sidewalk. All of this occurred at approximately 7:00 a.m. in a residential neighborhood with a school nearby. Stewart certainly presented some danger to the general public in the area. So too do the circumstances show some danger to Rhodes. He was unsecured in a vehicle doing those things listed above. From the beginning to the end of the interaction, Stewart continued to put the car in drive and rev the engine, showing his commitment to driving the vehicle despite Rhodes's efforts to stop him. But the question is 'whether the *totality* of the circumstances' justifies deadly force. . . It does not. . . . Most importantly, Rhodes admits the car was in neutral at the time of the shooting and, in a light most favorable to the plaintiff, the car was not moving forward. Even were Stewart to get the car back in gear, it seems doubtful that Stewart's driving alone was threatening enough to justify shooting him. . . . Here, Stewart went up on the curb twice at low speeds as Rhodes hit and tasered

him. . . . A jury could find that Stewart's use of the vehicle was not threatening lives around him and thus Rhodes's use of force was unreasonable. . . Finally, no reasonable officer in Rhodes's position would believe he was being kidnapped by Stewart. In fact, the circumstances here are the opposite of a kidnapping: Stewart was attempting to flee officers. While Rhodes had no duty to retreat from the vehicle, his entry into the vehicle and the availability of an exit speak to the totality of the circumstances informing his use of deadly force. A reasonable officer in Rhodes's position would have known that it was his own choice, and not any sort of pressure by Stewart, that caused him to enter the car. While these are acts Rhodes was legally entitled to do, a reasonable officer in his position would have understood he was not being kidnapped. Some of the circumstances in this case suggest that Rhodes's use of deadly force was reasonable. Others—specifically, Stewart's lack of aggression toward Rhodes, the low speeds at which he was driving, and the fact that the car may have been already stopped at the time he was shot—allow a reasonable jury to find facts showing Stewart did not present an immediate danger of serious physical injury and thus the use of deadly force was unreasonable. . . . Regardless of whether a constitutional violation occurred, however, the district court was correct to find the contours of the right were not clearly established in these circumstances. . . . Other than in the 'obvious' case, . . . the Supreme Court has indicated these general propositions are 'not enough' to delineate the contours of the right—to alert officers to the beginning and end of the right in the particular circumstances they face. . . Given the competing concerns noted earlier, this is not an obvious case. Stewart has pointed to no cases in this circuit involving an officer being driven in a suspect's car, much less a case that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness. While it is correct that the Sixth Circuit has established precedent for use of deadly force on those who flee in a vehicle, the two cases cited by Stewart involve officers standing outside a vehicle with wholly different concerns than an officer inside the vehicle. Those cases primarily focused on whether the officer was at risk of being hit or run over by the vehicle, a threat Rhodes did not face inside Stewart's car. . . Put simply: cases about when officers may use deadly force against the driver of a vehicle bearing down on them explain very little about whether that force is appropriate as a passenger of the vehicle. While plaintiff need not provide a case factually on all fours, existing precedent must be similar enough to place the question beyond debate. . . This circuit has not debated the types and level of threat faced by an officer inside a fleeing suspect's vehicle, much less placed it beyond debate. . . Further, Stewart's reference to two out of circuit cases does not provide the 'robust consensus' required for the right to be clearly established. . . Neither controlling nor persuasive precedent has clearly established Stewart's rights in the 'particular circumstances' Rhodes faced. . . Indeed, few cases have ever considered the danger faced by an officer inside a fleeing suspect's vehicle and at what point it justifies the use of deadly force. Rhodes is entitled to qualified immunity.")

Stewart v. City of Euclid, Ohio, 970 F.3d 667, 677-84 (6th Cir. 2020),), *cert. denied,* 141 S. Ct. ___ (2021) (Donald, J., concurring in part and dissenting in part) ("While I agree that the district court should be reversed on the state law claims and that Officer Rhodes violated Luke Stewart's Fourth Amendment right to be free from unreasonable seizures, I would also find that the constitutional right was clearly established and that, therefore, Rhodes is not entitled

to qualified immunity. The majority evaluates the clearly-established prong too narrowly and provides immunity to an officer who created a dangerous situation and then used that situation to justify the fatal shooting of a man who did not present an immediate danger of serious physical injury to the officer. In fact, it is debatable whether Stewart presented any danger to the officer or the public, or if he even knew that Rhodes was a law enforcement officer, since neither Rhodes nor Catalani announced themselves as police officers. . . . Despite § 1983's categorical decree that all persons under color of state law who cause the deprivation of a constitutional right 'shall' be subject to liability, the Supreme Court overlaid qualified immunity onto the statute's directive in an effort to balance its underlying policies. . . More specifically, the doctrine—as we know it today—was deemed necessary to protect public officials from unforeseeable developments in the law. . . Today, the seemingly endless struggle with applying the doctrine is in defining the extent of a clearly established right. . . .Judge Willett from the Fifth Circuit recently highlighted some of the issues with the clearly-established standard in his dissent in *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting). Noting the courts' division over what level of 'factual similarity must exist,' he wrote that 'the "clearly established" standard is neither clear nor established among our Nation's lower courts.' *Id.* He also emphasized that deciding immunity issues based on a too-narrow construction of clearly established law prevents the vindication of constitutional rights[.] . . . Of course, the problems do not end there, as courts have increasingly begun to skip the constitutional question and simply ask whether the right was clearly established. . . . Here, the majority answered the constitutional question first but construes the clearly-established prong too narrowly. The sole purpose of the clearly-established prong, as created and announced by the Supreme Court, is to protect officials from unforeseeable or unknowable developments in the law. . . It is not a blank check to engage in specific acts that have not previously been considered by a court of controlling authority. . . Nor is it 'a license to lawless conduct.'. . When defining clearly established rights, we must have in the forefront of our mind this question: would a reasonable officer have known that his actions were unconstitutional? . . . . The majority notes that Rhodes had no duty to retreat. However, Rhodes likewise had a duty to only use such force as was necessary under the totality of the circumstances. The fact that Rhodes shot Stewart five times at near point-blank range defies reasonableness. This is the type of wantonness that does not require a case on point to put an officer on notice that his conduct is unreasonable. As Judge Gorsuch opined, 'some things are so obviously unlawful that they don't require detailed explanations' or happen so rarely that there will be no case on point. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015). Had Rhodes been standing outside of the car when he used lethal force, this would be a very simple case—he would not be entitled to qualified immunity. . . . However, in this Circuit, the Court has not encountered the exact situation that occurred in this case—the officer being *inside* of the car at the time of the shooting. That lack of precisely-analogous controlling law can oftentimes sound the death knell to a § 1983 claim. . . Here, the majority sounds the death knell for Stewart's § 1983 claims and finds that the right was not clearly established, but I disagree. In addition to this being a situation where precisely-analogous law should not be required, both in-circuit cases and out-of-circuit cases show that Rhodes violated Stewart's clearly-established right to be free from excessive force when he shot Stewart five times and killed him, even though he posed no imminent threat of physical injury

or death to the officer or the public. . . . The law is clearly established in this Circuit that an officer may not use deadly force against a fleeing suspect unless the suspect is presenting an imminent threat of physical injury or death to the officer or the public. . . . Although Rhodes asserts that he felt that he was in danger while the car was moving, and that he feared that he may be in danger if the car were to begin moving again, the fact remains that the car was not moving at the time Rhodes chose to shoot Stewart. This lack of imminent threat of serious physical injury renders lethal force objectively unreasonable in this circumstance (despite Rhodes' individualized concern to the contrary). . . .Although this case presents unique factual circumstances within this Circuit, there are at least *four* factually similar cases from other jurisdictions. [discussing cases] While it is arguable that these four cases establish the 'robust consensus' that would put a reasonable officer on notice of Stewart's specific rights, . . . what is more persuasive is that these four cases illuminate the application of the specific—and clearly established—right that an individual has to be free from lethal force when fleeing arrest in a car that is not presenting an imminent threat of serious physical harm to anybody. . . Moreover, these four cases applied that specific right when the suspect's car was actually moving, whereas in our case Stewart's car was *stopped* when he was killed. That distinction makes it even more apparent that a reasonable officer would have known that lethal force was inappropriate in this case. As such, I would find that Stewart's rights were clearly established at the time that Rhodes shot and killed him. . . . I find myself writing separately about the dangers of unchecked police powers with unsettling and increasing frequency. Six years ago, I dissented from a decision affirming summary judgment for several officers who killed Leroy Hughes, an African American man suffering from mental illness, by shocking him with tasers twelve times in five minutes. *See Sheffey v. City of Covington*, 564 F. App'x 783, 796-97 (6th Cir. 2014) (Donald, J., dissenting). The first eight shocks occurred in a single minute. . . The total delivery exceeded 14,000 volts. . . In that dissent, I recalled the names of Amadou Diallo, Sean Bell, Oscar Grant, Jonathan Ferrell, and others. . . And I exhorted this Court and its readers not to 'ignore the seeds of systemic inequalities sown in our Nation's history and lain bare by diligent review.'. . We have new names today: George Floyd, Elijah McClain, Rayshard Brooks, and too many others. The world knows why they died. The same seeds whose bitter fruit killed Leroy Hughes killed them too. And on March 13, 2017, in Euclid, Ohio, they killed Luke Stewart. That the seeds of these senseless killings are systemic should not absolve the shooters. Our system of justice bestows upon police great powers and a sacred trust. We rightly protect police from penalties that otherwise would follow from poor conduct when officers act with reason. But when officers fail to act with reason, when they are motivated by impulses that spring from dark corners of the psyche or simply fail implicitly to acknowledge the humanity of the people before them, they violate our sacred trust. And then the same system that empowers and protects police must, if it is to function properly, if it is to be worthy of recognition as a system of justice, strip those powers and protections away. Luke Stewart should be alive today. He was unarmed, unsuspected of committing a serious felony, and behind the wheel of a stationary vehicle when Rhodes opened fire into his torso, chest, neck, and wrist. Qualified immunity should not shield Rhodes from the consequences of that unreasonable decision. I dissent.")

Tlapanco v. Elges, 969 F.3d 638, 650, 653-55 (6th Cir. 2020) ("For several of Tlapanco's claims, . . . the 'breathing room' granted to officers by qualified immunity is not dispositive given the facts of this case. . . Specifically, with regard to all of Tlapanco's Fourth Amendment claims against Elges except the mirroring claim, the primary issue to resolve is whether a reasonable jury could find that, when he applied for the search and arrest warrants, Elges intentionally or recklessly disregarded material facts negating probable cause. Further, while it will sometimes be possible for officers to make 'reasonable but mistaken judgments' about the materiality of the information omitted, that is not true here. . . In this case, as described below, the information Elges left out of the warrant applications obviously negated probable cause because it demonstrated that Tlapanco was not the Kik user harassing A.F. Thus, under the circumstances of this case, Elges is not entitled to qualified immunity as long as a reasonable jury could find that his omission of this information was intentional or reckless. . . . Because a reasonable jury could find that Elges's sworn statements supporting the arrest warrant were recklessly indifferent to the truth that Tlapanco did not hack or communicate with A.F., and Tlapanco's right to be free from arrest without probable cause was clearly established, Elges is not entitled to qualified immunity on this claim. . . . Despite Tlapanco's substantial showing that Elges possessed information establishing that Tlapanco did not hack A.F. nor communicate with her on Kik, Tlapanco was arrested pursuant to a warrant and therefore needs to prove: '(1) that the officer applying for the warrant, either knowingly and deliberately or with reckless disregard for the truth, made false statements or omissions that created a falsehood[,] and (2) that such statements or omissions were material to the finding of probable cause.'. . . A reasonable jury could find that Elges did not have probable cause to conclude that Tlapanco was connected to the conduct at issue, and that the judge would not have issued the arrest warrant but for recklessly false statements or material omissions by Elges. A reasonable jury could find that Tlapanco was arrested without probable cause, a violation of a clearly established right. Accordingly, Elges is not entitled to qualified immunity. . . . Tlapanco has provided evidence from which a reasonable jury could find that Elges violated Tlapanco's 'clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has "made, influenced, or participated in the decision to prosecute the plaintiff" by ... "knowingly or recklessl" making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.'. . Elges is not entitled to qualified immunity on this claim.")

Proctor v. Krzanowski, 820 F. App'x 436, ___ (6th Cir. 2020) ("Here, Proctor claims a property interest in not being restricted from using his medical license to issue certifications to patients seeking a medical marihuana registry card. That right is far from clearly established. As Krzanowski and Mitchell point out, the ' "contour" of the [right to] professional licensing and medical marihuana has not been made clear in the federal realm.' . . Federal district courts have consistently rejected claims that state laws permitting medical marihuana possession can create a constitutionally protected property interest in medical marihuana or medical marihuana patient cards. . . Thus, if in 2016 Krzanowski and Mitchell had surveyed the limited legal landscape of Fourteenth Amendment protections for medical marihuana, they would have found only decisions declaring that the nature of the property interest (in possessing a substance deemed contraband by federal law) disentitled the interest to Fourteenth Amendment protections. . . This is true even

though state law imposed substantive restrictions on when medical marihuana licenses could be denied—traditionally an indicator of constitutionally protected property interests. Krzanowski and Mitchell would understandably believe that if the 'nature' of the patient's interest in a medical marihuana registry card disentitled the interest to constitutional protection, the same would be true of the nature of Proctor's interest in helping patients obtain a registry card. Similarly, Krzanowski and Mitchell might reasonably believe that a physician's interest in providing a medical certification required for obtaining that patient card is not sufficiently weighty to warrant constitutional protection. Against a backdrop of federal district court cases declining to recognize a constitutionally protected property interest in medical marihuana registry cards, it could not have been obvious to Krzanowski and Mitchell that Proctor had a constitutionally protected interest participating in a process to assist others to obtain a medical marihuana patient registry card.")

Ouza v. City of Dearborn Heights, Michigan, 969 F.3d 265, 280-84 (6th Cir. 2020) ("[W]e have . . . recognized that 'just as a court can generalize too much, it can generalize too little. If it defeats the qualified-immunity analysis to define the right too broadly ... it defeats the purpose of § 1983 to define the right too narrowly.'. . In the present case, we are guided by the Supreme Court's opinion in *Wesby*, which was also a false arrest case. . . . [I]t was certainly clearly established at the time of Plaintiff's arrest in 2014 that 'absent probable cause to believe that an offense had been committed, was being committed, or was about to be committed, officers may not arrest an individual.'. . In *Logsdon*, this Court held that this standard alone, absent any 'sea change in this body of law since [the plaintiff's] arrest,' was sufficient to overcome the defendant's qualified immunity defense. . . Nevertheless, the district court in this case chose to define the right more narrowly. It considered whether Plaintiff had a clearly established right to be free 'from the type of arrest Plaintiff experienced: arrest based on the testimony of one eyewitness who has an apparent bias in the matter.'. . And our case law establishes that she did under these circumstances. In a series of cases, we have refined the governing standard for when an eyewitness' allegations are sufficient to establish probable cause. [discussing cases] . . . . These cases and their progeny clearly establish that Plaintiff had a right to be free from arrest based solely on Mohamad's unreliable and uncorroborated accusation. This is especially true where Mohamad's account was the only piece of evidence from which Officer Dottor could even conceivably (although unreasonably) have concluded that he had probable cause to arrest Plaintiff. Our conclusion that Officer Dottor had 'fair warning' that his conduct would be unlawful is further supported by our precedent establishing that an officer must consider both inculpatory and exculpatory evidence when assessing probable cause. . . . Moreover, this Court does not require 'a prior, "precise situation," a finding that "the very action in question has previously been held unlawful," or a "case directly on point"' in order to hold that a right was clearly established. . . Thus, under the applicable case law, we must reject the dissent's proposed qualified immunity standard because it is too rigid and unyielding. Qualified immunity is not absolute immunity, and our case law establishes that individuals must have some right to sue government officials who knowingly or unreasonably violate their constitutional rights. At the time of the arrest, our case law clearly established that Plaintiff had a right to be free from an arrest unsupported by probable cause. . . And we had clearly

held that a single witness' unreliable accusation is insufficient to create probable cause to arrest a person without further corroboration (especially when that witness is himself a suspect, as here). . . . Accordingly, under the standard announced in *City of Escondido* and *Wesby*, Officer Dottor had fair notice that his arrest of Plaintiff would be unlawful in the circumstances with which he was confronted.")

Ouza v. City of Dearborn Heights, Michigan, 969 F.3d 265, 290-94 (6th Cir. 2020) (Griffin, J., concurring in part and dissenting in part) ("I join the majority opinion regarding plaintiff's excessive-force claim, however regarding the false-arrest and municipal-liability claims, I respectfully dissent because I conclude the district court correctly granted summary judgment in defendants' favor. . . Time and again, . . . the Supreme Court has admonished lower courts that broad statements of 'clearly established law do not provide the 'specificity' required to put a police officer on notice that his 'conduct in the particular circumstances before him' is unconstitutional[.]. . Accordingly, when a court denies qualified immunity to a police officer on a Fourth Amendment claim, it must normally 'identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. . Because no such similar case clearly establishes defendant police officer Jordan Dottor unconstitutionally arrested plaintiff Ehsan Ouza, the majority opinion errs in denying him qualified immunity on her § 1983 false-arrest claim. . . .The district court defined the right at issue as whether one may be 'arrest[ed] based on the testimony of one eyewitness who has an apparent bias in the matter.' The majority opinion agrees. . . It then relies on three cases to conclude this right was clearly established at the time of plaintiff's arrest. . . None, however, satisfy the Supreme Court's similar-circumstances mandate. [distinguishing cases] Qualified immunity is a 'demanding standard [that] protects all but the plainly incompetent or those who knowingly violate the law.'. . No case unquestionably put Officer Dottor's decision to arrest plaintiff on the wrong side of constitutionality. At that time, our caselaw was unclear both as to (1) whether an eyewitness's statement alone is enough to establish probable cause and (2) how much credence a police officer must give to an eyewitness's account when he may have some reason to doubt at least some aspect of that account. 'Tellingly,' neither plaintiff nor my colleagues 'have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances.'. . Nor am I aware of a case generally holding that it is unconstitutional for an officer to rely on a complaining witness's version of events to arrest an individual when an officer *might* have *some* reason to discredit *some* portions of the complaining witness's story, let alone one involving the 'complex emotional causes of behavior' that frequently accompany domestic-violence situations. . . That is the precise circumstance here and caselaw requires that we defer to Officer Dottor's contemporaneous judgment call regarding the existence of probable cause when he arrested plaintiff. Accordingly, the unlawfulness of [Officer Dottor]'s conduct does not follow immediately" from a review' of the majority's three case[.] . . Officer Dottor is entitled to qualified immunity, and I would therefore affirm the district court's grant of qualified immunity to Officer Dottor.")

Siders v. City of Eastpointe, 819 F. App'x 381, ___ (6th Cir. 2020) ("To deny qualified immunity here would be to hold that a suspected domestic-violence perpetrator has

a clearly established constitutional right to thwart the responding officer by getting into a car and closing the door, to resist restraint by kicking the officer and clinging to the car's seat, and to refuse the officer's orders for handcuffing. There are no such rights. To be sure, a reasonable person viewing the video of this incident could characterize the officer's actions as impatient, overzealous, and perhaps unnecessary. But whether we personally condone or condemn the officer's conduct is immaterial; the question is whether our constitutional precedent so clearly forbids it that we cannot even construe the officer's actions as a reasonable mistake. Even if we were to agree that the officer was impatient or overzealous, his actions were not wholly unreasonable under the circumstances, and those actions did not violate the suspect's clearly-established constitutional rights. Therefore, he is entitled to qualified immunity. . . .[I]n deciding this appeal, we rely primarily—almost entirely, in fact—on our own plenary review of the videotape recordings.")

Siders v. City of Eastpointe, 819 F. App'x 381, ___ (6th Cir. 2020) (Stranch, J., dissenting) ("To have jurisdiction over Defendants' interlocutory appeal, we must view the facts in Siders' favor. . . . The majority opinion fails to do so. When the most favorable view of the facts is conceded in Siders' favor, . . . genuine disputes remain over whether Defendants are entitled to qualified immunity. I therefore respectfully dissent. . . . Application of the *Graham* factors to the facts taken in the light most favorable to Patricia shows: (1) that Patricia's misdemeanor offenses were not serious, (2) there was little basis to believe Patricia was a threat to the officers or others, (3) Patricia's withdrawal into the van was at most a passive refusal to comply with an unwarranted threat ('close the door and you're going to get ripped out of the car'), and (4) she had stopped resisting when Piro tasered her. The majority opinion's contrary conclusions rely on Defendants' challenges to Patricia's version of events, which have no place in our qualified immunity analysis in an interlocutory appeal. The facts viewed most favorably to Patricia, as we must at this stage, state a constitutional violation. We should therefore reach the next constitutional question—whether the violated right was clearly established at the time of the alleged violation. Framed properly, we should ask 1) whether a potential misdemeanant, who has not been placed under arrest and who has neither fled nor resisted investigation, has a clearly established right not to be forcibly removed by her ankles from a passenger seat of her car, and 2) whether a potential misdemeanant has a right not to be tasered when she is lying on the ground and has stopped resisting. I would answer these questions affirmatively because Piro had 'fair warning' that his actions were unconstitutional. . . . The majority opinion is fair in acknowledging that Piro could have achieved his goal of investigating or arresting Siders without using any force: 'he might have been more patient and less threatening (and less profane); he might have ordered Patricia to exit the minivan and given her time to comply voluntarily; or he might have coerced her from the minivan with the threat of tasing, rather than physically overwhelming her and pulling her out.'. . This honest acknowledgement suggests that the amount of force used was not reasonable and, in my view, shows that the force used was objectively unnecessary to investigating Siders or effecting her arrest. It was therefore excessive in violation of the Fourth Amendment. . .Because Patricia had a clearly established constitutional right not to be pulled from her car by the ankles onto concrete in front of her children when she was, at most, passively resisting investigation, and because she also had a clearly established right not to be gratuitously tasered

after ceasing resistance, I would affirm the district court's denial of summary judgment with respect to the excessive force claim against Piro.")

Kesterson v. Kent State University, 967 F.3d 519, 525-26 (6th Cir. 2020) ("[W]e think the case law, by 2014, had put beyond debate that a coach at a state university cannot retaliate against a student-athlete for speaking out by subjecting her to harassment and humiliation. For decades, employees at 'state colleges and universities' have known that those institutions 'are not enclaves immune from the sweep of the First Amendment.'. . Students may exercise their First Amendment rights unless doing so would 'materially and substantially disrupt' school operations. . . And school officials may not retaliate against students based on their protected speech. . . More specifically, long before these events, our court explained that coaches could not retaliate against a player 'for reporting improprieties.'. . Based on these cases, a reasonable coach would have known at the time Linder acted that she could not retaliate against a student athlete for reporting a sexual assault. All that remains is for a jury to decide whether Kesterson can carry her burden of proof.")

Kesterson v. Kent State University, 967 F.3d 519, 533-34 (6th Cir. 2020) (Stranch, J., concurring in part and dissenting in part) ("I disagree. . . with the majority opinion's dismissive approach to the two cases clearly establishing that Linder's conduct would violate Kesterson's constitutional right to equal protection. In *Patterson v. Hudson Area Schools*, 551 F.3d 438, 448 (6th Cir. 2009), we declined to grant qualified immunity to school officials where the student suffered bullying that was 'severe and pervasive' and the officials' response was inadequate 'to deter other students from perpetuating the cycle of harassment.'. . And in *Shively*, where the defendants 'failed to enforce the school policy on harassment,' we relied on *Patterson* and held that it was well established by 2011 that school officials' deliberate indifference to reports of student harassment violate a student's equal protection rights. . .The majority distinguished *Patterson* on the basis that it involved a funding recipient's liability under Title IX. But we have already established that deliberate indifference in a § 1983 equal protection claim is 'substantially the same' as demonstrating deliberate indifference in Title IX cases. . . And the majority opinion's attempt to distinguish *Shively* because it dealt with gender and religious—as opposed to sexual—harassment is simply a distinction without a difference. The law is clear that the plaintiff need only offer evidence that she was subjected to peer harassment, regardless of its form, . . . and then focus on 'the recipient's response to [allegations of] harassment or lack thereof' in evaluating a deliberate indifference equal protection claim[.] . . The conclusion that the law requires a match of the particulars of the harassment endured is not a part of the applicable legal standard. Here a head coach learned that her son raped a student athlete and the coach intentionally ignored school policy mandating that she report the rape—a coach who had reported similar assaults not involving her family. . . . *Patterson* and *Shively* clearly established that Linder could be held liable for acting with deliberate indifference to Kesterson's claim of harassment. . . Under our precedent, I think qualified immunity should be denied for Kesterson's equal protection claim.")

Jones v. City of Detroit, 815 F. App'x 995, ___ (6th Cir. 2020) ("To the extent cases from outside our circuit figure into the 'clearly established' analysis—they usually do not, *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020)—they tell the same story. No case to our knowledge, and none cited by Jones, elaborates a Fourth Amendment standard for safety restraints, head-guiding, or headroom in transporting wheelchair users. . . . Jones claims the officers used excessive force when they transported him in a van without using traditional safety restraints to secure the wheelchair and without enough headroom. But our cases say the opposite when it comes to the closest analogy, transporting non-wheelchair users. Faced with that question, courts within and outside our circuit have repeatedly rejected constitutional challenges to transportation of detainees without seatbelts. [collecting cases] Jones does not cite any contrary authority. The closest analogy, in other words, would not have warned the officers of a constitutional requirement to transport Jones only with the aid of safety restraints to secure the wheelchair. And those cases would not have shown that what the officers did do—allow an individual to hold the wheelchair in place with his feet in a tight space that left little room for movement anyway—violated clearly established law. Our cases about transporting people in wheelchairs similarly tell the officers nothing about whether they transgressed constitutional boundaries in transporting Jones. Jones identifies just one case about transporting an arrestee who used a wheelchair. [court discusses *St. John* case] Only one other case in our circuit has involved a claim that an officer used excessive force while arresting a wheelchair user. That case upheld a jury verdict against an officer who pulled a paraplegic driver out of his car by his neck, dropped him on the ground, kicked and kneed him in the head, and dragged him across the ground by his forearms. *Koehler v. Smith*, 124 F.3d 198, at *5 (6th Cir. 1997) (table). Our circuit thus has decided two cases about excessive force against wheelchair-bound suspects, and neither one could have alerted the officers to constitutional headroom, head-guiding, or safety-restraint requirements. The case's scarce forebears suggest it 'presents a unique set of facts and circumstances' cutting in favor of qualified immunity, . . not a constitutional rule that is 'beyond debate[.]'")

Jones v. City of Detroit, 815 F. App'x 995, ___ (6th Cir. 2020) (Moore, J., dissenting) ("The majority opinion is vise-like in its analysis of whether Jones's constitutional rights are clearly established. Rather than considering '"the salient question" in evaluating the clearly established prong,' 'whether officials had "fair warning" that their conduct was unconstitutional,'. . . the majority frames the question at the most granular level. It concludes that '[n]o case ... elaborates a Fourth Amendment standard for safety restraints, head-guiding, or headroom in transporting wheelchair users.' . . If this definition of the constitutional right is not so narrowly defined as to 'defeat[ ] the purpose of [42 U.S.C.] § 1983,' then it is difficult to imagine what definition would be too narrow. . . The majority treats the fact that Jones is wheelchair-bound as a feature that makes it *less* likely that a reasonable officer would know that his actions violated our excessive-force precedent because few cases address arrestees in wheelchairs. But this misses the obvious point—because of Jones's apparent disability and because of the prevalence of persons without disabilities in our excessive-force precedent, we should conclude that this fact makes it *more* likely that a reasonable officer would be on notice that his treatment of Jones amounted to excessive force. . . .In *St. John*, we addressed the transport of a person with a physical disability who was in a

wheelchair. There, we concluded that the right at issue was 'the right of a nonviolent arrestee to be free from unnecessary pain knowingly inflicted during an arrest' and that the right 'was clearly established.'. . .This is how we should define the right at issue here. Jones was also a nonviolent arrestee and the portion of his arrest where the defendants pushed his head down is materially indistinguishable from the arrest in *St. John*. Jones was arrested for disorderly conduct, the same crime as the plaintiff in *St. John*; he did not present a risk of flight; he posed no threat to others; and there were no exigent circumstances necessitating his immediate transport or confinement in the van. Additionally, the defendants here were aware that they were causing Jones unnecessary pain. First, it was readily apparent that he was wheelchair-bound, like the plaintiff in *St John*. . . Second, Jones cried out, 'ow,' to the officers as they pushed his head down. . . The fact that Jones did not apprise the officers of the specifics of his disability is not fatal to his case. In *St. John*, the plaintiff explained to the officers that his legs could not bend due to muscular dystrophy. . . But the issue was whether the officers were aware that they were causing the plaintiff, 'an obviously disabled and wheelchair-bound man,' pain—not that he gave a particular verbal warning. . . To that end, we considered the plaintiff's verbal warning *and* the fact that he used a wheelchair. . . The majority opinion interprets 'knowingly' from *St. John* to require a particular verbal warning, even if the arrestee has an obvious disability that a reasonable officer would appreciate and has otherwise communicated his pain to the officers. This makes little sense. Moreover, *St. John* also gave the defendants here fair notice that they could not leave a person with an apparent disability in an unsafe position.")

Sevy v. Barach, No. 19-2038, 2020 WL 3564660, at *5–7 (6th Cir. July 1, 2020) (not reported) ("First Amendment retaliation claims often involve retaliatory arrests. But to establish a retaliatory arrest, plaintiffs generally must prove that the arresting officer lacked probable cause. [citing *Nieves*] On appeal in this case, Sevy does not argue that Barach lacked probable cause to arrest him. That means his retaliation claim is not based on the arrest itself. Rather, Sevy's claim is based on the allegedly excessive force Barach used in carrying out the arrest. This certainly seems like a case where it would be 'particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.'. . Regardless, we need not untie this Gordian knot, because Sevy's asserted First Amendment right was not clearly established. . . Recall that to overcome qualified immunity, Sevy must show that (1) Barach violated his constitutional rights, and (2) his right was clearly established at the time of the alleged violation. . . A right is 'clearly established' when the alleged conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . In other words, the right is clearly established if someone in Barach's position should reasonably have known—based on existing law—that the conduct violated Sevy's First Amendment rights. . .But it's not clear whether Sevy even had a viable First Amendment claim on his excessive-force retaliation theory, let alone whether his First Amendment rights were clearly established under existing law. . . . Judge Moore concludes otherwise, reasoning that Sevy's right to protest was clearly established, and a reasonable officer would have known not to use physical force in retaliation. But this is not a case about physical force in isolation. Rather, the issue is whether the use of excessive force in executing an arrest supported by probable cause can amount to a First

Amendment, rather than a Fourth Amendment, violation. This is at least an open question, . . . and existing precedents do not answer that question 'beyond debate' in Sevy's favor[.] . . Thus, Sevy's First Amendment right to recover under this hybrid theory is not clearly established.")

Sevy v. Barach, No. 19-2038, 2020 WL 3564660, at *7-8 (6th Cir. July 1, 2020) (not reported) (Moore, J., concurring in part and dissenting in part) ("In short, it should not take a previous case holding that officers may not choke individuals in retaliation for their exercise of free speech, such as protest and public criticism of officers, to conclude that Sevy's rights were clearly established. This case is a prime example of 'the easiest cases don't even arise.'. . For these reasons, I concur in the majority opinion's resolution of Barach's appeal of the district court's denial of qualified immunity for Sevy's Fourth Amendment claim, and I dissent from the resolution of Barach's appeal of the district court's denial of qualified immunity for the First Amendment retaliation claim.")

Wright v. City of Euclid, Ohio, 962 F.3d 852, 866-72 (6th Cir. 2020) ("[B]ased only on Wright's brief stop at the residence, the officers decided to conduct a traffic stop with weapons drawn. These circumstances are very different from those in *Heath* where the officers had a justifiable fear for their safety given that the defendant, whom they had identified and surveilled for a month, was a large-scale drug dealer and likely to be carrying a weapon. Flagg and Williams at most had a suspicion that Wright had briefly visited with a suspected drug dealer, but given that the officers had not identified Wright himself as a drug dealer or sought any corroboration of their suspicions of criminal activity, there is a genuine dispute as to whether the officers were justified in brandishing their firearms upon approach. Thus, a jury must determine whether their decision to do so was unconstitutionally excessive. . . . When Wright was unable to comply with Flagg's commands because of his stomach staples and colostomy bag, the encounter turned violent. Wright was not armed. According to Flagg, he thought Wright was reaching for a weapon in the center console and considered that movement to be an act of resisting arrest. Wright, however, disputes that his hand movement was threatening to the extent that he moved his hand at all. Although these two versions of events are not inconsistent with each other—that is, Flagg could have reasonably believed Wright was reaching for a gun when in reality he was trying to comply with orders—a reasonable jury could find, based on the totality of the circumstances, that a reasonable officer would not believe that Wright posed an immediate threat to their safety. . . . Even if Flagg is correct that Wright's act of pushing down on the center console constituted some resistance, if the resistance was merely "passive," then the use of a taser was unreasonable. *See Goodwin*, 781 F.3d at 323. The tasering of Wright was justified only if he engaged in resistance that was 'active,' which 'can take the form of "verbal hostility" or a "deliberate act of defiance."'. . . [A]n officer may not tase a citizen not under arrest merely for failure to follow the officer's orders when the officer has no reasonable fear for his or her safety. Whether the tasering in this instance was constitutionally permissible must be decided by the jury, given the genuine factual disputes described above concerning the circumstances of Wright's encounter with the officers. . . .The district court held that it was 'unaware of any controlling cases that have established a constitutional violation occurred when non-lethal force was used to obtain control over the suspect

who reasonably appeared to pose a safety risk to officers.'. . In so holding, the district court examined the issue of whether the law was clearly established using too specific of a level of generality. . . The district court also incorrectly framed the issue based upon Flagg's version of the facts by assuming that Wright did in fact 'reasonably appear[ ] to pose a safety risk' to the officer. Given that this was a summary judgment ruling, the district court instead should have considered whether the law was clearly established using Wright's version of the facts. Wright contends that he had done nothing prior to his encounter with police to justify the officers' brandishing of their firearms. He also maintains that he had a right not to be tased when, during the course of an investigatory detention, he inadvertently broke away from the officer's grip, but presented no threat to others, and did not actively resist arrest. For the reasons discussed below, we hold that, viewing the facts in Wright's favor, Flagg's drawing of his firearm and use of his taser violated Wright's constitutional rights that were clearly established as of the date of the encounter, November 4, 2016. . . . We have also recognized that pointing a gun at an individual can constitute excessive force under the Fourth Amendment. [noting cases] Based on this authority, it was clearly established as of the time of Wright's encounter with the officers that brandishing a firearm without a justifiable fear that Wright was fleeing or dangerous was unreasonable and constituted excessive force. . . .To summarize, a reasonable jury could find that Flagg's actions constituted unreasonable and constituted excessive force. It was clearly established as of November 4, 2016 that drawing a weapon on a suspect who was not fleeing or posing a safety risk and tasering a suspect who was not actively resisting arrest constituted excessive force. Therefore, we **REVERSE** the district court's grant of summary judgment on qualified immunity grounds to Flagg as to the excessive-force claims. . . . Wright's excessive-force claim against Williams, based on his brandishing of a firearm and use of the pepper spray, largely mirrors the claim against Flagg based on his similar use of a firearm and tasing, and therefore the analysis is largely the same. . . . For reasons similar to those discussed above as they relate to Flagg's use of his taser, we hold that the right to be free from being pepper sprayed when a suspect is not actively resisting arrest was also clearly established at the time of the encounter in question. . . . Wright has produced evidence that would allow a reasonable juror to conclude that he had not committed a serious crime, or any crime at all; that he was not a danger to the officers or the public; and that he was not resisting arrest. Although the officers tell a different story, it should be up to the jury to determine whose story is more credible. Therefore, we **REVERSE** as to the excessive-force claim against Williams for deploying his pepper spray, as well as for brandishing his firearm.")

Jones v. Clark County, Kentucky, 959 F.3d 748, 756, 760, 766-67 (6th Cir. 2020) ("Under federal law, a plaintiff must prove four elements to establish a malicious prosecution claim: (1) that a criminal prosecution was initiated against the plaintiff and that the defendant 'made, influenced, or participated in the decision to prosecute;' (2) that the state lacked probable cause for the prosecution; (3) that the plaintiff suffered a deprivation of liberty because of the legal proceeding; and (4) that the criminal proceeding was 'resolved in the plaintiff's favor.'. . .[E]ven though there was probable cause for Jones' arrest and the grand jury indictment creates a presumption of probable cause for his prosecution, the forensics test results vitiated probable cause for Jones' ongoing detention. The record is clear that Murray knew by January 11, 2014, that there was no

evidence of child pornography on Jones' devices. But because there is a factual dispute as to whether Murray informed the prosecutors of these results, a genuine issue exists as to whether Murray 'knowingly or recklessly' withheld this exculpatory evidence. . . Ultimately, at the summary judgment stage, it is not for this Court or the district court to 'weigh the evidence and determine the truth of the matter.'. . There is a genuine dispute as to whether Murray falsely maintained probable cause for Jones' continued detention by not informing the prosecutors that there was no forensic evidence connecting Jones to the illegal video. Thus, a fact-finder should decide whether, 'had this information been made known, probable cause for Plaintiff's continued detention would have dissolved.'. . . If there was no probable cause for Jones' continued detention and Murray withheld the forensics test results from the prosecutors, then Murray did violate Jones' constitutional rights. The greater challenge is the second inquiry: whether the right was 'clearly established' at the time of the alleged violation. The right must be 'so clearly established in a particularized sense that a reasonable officer confronted with the same situation would have known that his conduct violated that right.'. . A court is to 'zoom in close enough to ensure the right is appropriately defined to reach a 'concrete, particularized description of the right.'. . . This Court has repeatedly held that 'individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff.'. . The right includes malicious prosecutions in which an officer participates by 'knowingly or recklessly making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.'. . This Court has also held that '[f]reedom from malicious prosecution is a clearly established Fourth Amendment right.'. . .
In the present case, Defendants argue that:
The law was not clear in 2013 (and still is not clear) that probable cause to prosecute a suspect on a child pornography charge requires forensic evidence of child pornography or that the identification of the subscriber for an IP address used to download child pornography coupled with other undisputed facts Deputy Murray learned is insufficient to establish probable cause for prosecution.
Br. of Appellees at 29.
Defendants do not demonstrate why their formulation of the requisite 'clearly established law' is appropriate. There is an undoubted right 'to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff.'. . This right applies in cases where the officer has falsified statements or withheld evidence and facilitated the continued detention of a plaintiff without probable cause. That is the right Jones argues was violated. And this has been the law since at least 1999, when *Spurlock* was decided.")

Jones v. Clark County, Kentucky, 959 F.3d 748, 768-76 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part) ("I must respectfully part ways with the majority's view that Jones may proceed with his claim that Murray lacked probable cause for Jones's 'continued detention' after January 2014 when Murray received the results of a forensic examination of Jones's cellphone and tablet computer. I would affirm the denial of Jones's continued-detention claim on qualified-immunity grounds. My reason is simple: The majority notes that Jones has a clearly established right to be free from a malicious prosecution. But the Supreme 'Court has repeatedly

told courts ... not to define clearly established law at a high level of generality.'. . . The Supreme Court has imposed doubly demanding standards on plaintiffs who seek to hold police officers liable under 42 U.S.C. § 1983 for 'seizing' them without 'probable cause' in violation of the Fourth Amendment. Plaintiffs must show not just that the officers failed to meet the minimal threshold required for probable cause, but also that the officers were plainly incompetent in concluding that they had met it. . . .To overcome the defense, a plaintiff must show that 'the violative nature of *particular conduct* [was] *clearly established*' when a police officer engaged in that conduct. . . These two phrases—'clearly established' and 'particular conduct'—give this test its teeth. . . . That caselaw affirmatively shows the *presence* of probable cause when Murray arrested Jones in October 2013, and it does not clearly establish the *absence* of probable cause when Murray received the forensic-examination results in January 2014. Under the Supreme Court's precedent, then, Jones cannot overcome Murray's qualified-immunity defense. . . . Under our caselaw governing a 'continued detention without probable cause,' Jones must prove that the forensic-examination results 'dissolved' the probable cause that initially supported Murray's arrest (and the indictment in December 2013). . . I do not think the results did so when assessed through the lens of the demanding qualified-immunity framework. And I do not see a need to say anything more about this closer constitutional question on the merits, both because the constitutional question is 'factbound' and because courts regularly provide probable-cause guidance in criminal cases with no qualified-immunity defense. . . . When considering all the facts collectively and objectively, an officer would not have been 'plainly incompetent' in believing that probable cause still existed. . . 'Tellingly,' Jones does not cite 'a single precedent—much less a controlling case or robust consensus of cases—finding [the absence of probable cause] "under similar circumstances"': when police connect child pornography to a residence's IP address but fail to uncover child pornography on electronic devices at the residence. . . Yet in this probable-cause context the Supreme Court has stressed 'the need to "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment."'. . And what is the 'clearly established' legal rule that would have given Murray unambiguous notice that probable cause no longer existed after January 2014? . . I do not think it can be the general 'right under the Fourth Amendment to be free from continued detention without probable cause.'. . That right is far 'too general' because the 'unlawfulness of [Murray's] conduct "does not follow immediately from the conclusion that"' it is clearly established. . . In sum, Jones's continued-detention claim must fail because he has not proved that Murray's conduct 'violate[d] clearly established ... constitutional rights of which a reasonable person would have known.'. . . Neither Jones nor the majority opinion identifies a clearly established legal rule that would have put Murray on notice that he lacked probable cause after receiving the forensic-examination results. Jones does not even attempt to meet this 'demanding standard.'. . His 47-page brief devotes a single sentence to qualified immunity, asserting that because Murray 'failed to show that [Murray] did not violate Jones' constitutional rights, [Murray] is not entitled to qualified immunity.'. . This will not do. To rebut qualified immunity, Jones must prove that Murray violated a constitutional right *and* that this right was clearly established. . . Jones both flips the burden of proof and collapses the two inquiries, leaving no separate work for qualified immunity apart from the underlying constitutional question. With respect, the majority largely does the same by defining the 'clearly established' law at a high

level of generality. It correctly notes that our cases establish 'an undoubted right '"to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff"' and that '[t]his right applies in cases where the officer has falsified statements or withheld evidence and facilitated the continued detention of a plaintiff without probable cause.'. . But the qualified-immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . . I do not believe the majority identifies its legal rule with the 'high "degree of specificity"' that the Supreme Court's cases demand. . . Its proposed legal rule is analogous to suggesting that there is a clearly established right to be free from 'excessive force'—a level of generality that the Supreme Court has repeatedly rejected. . . I concede that the Supreme Court does not require a case directly on point and that courts may face difficulty identifying the 'correct' level of generality at which to articulate a legal rule. . . But the Court has recognized these concerns too. It has given us a benchmark to decide whether a rule is too general: Does 'the unlawfulness of the officer's conduct' 'follow *immediately* from the conclusion' that the proposed rule is clearly established? . . If not, the rule 'is too general.'. . Apply this question to the majority's proposed rule: Does the lack of probable cause to detain Jones after the forensic-examination results 'follow immediately from' the rule that plaintiffs have a right to be free from a continued detention without probable cause? . . Not at all. . . . In this probable-cause context, I would think Jones should have identified a 'body of relevant case law' setting forth more specific rules over when evidence tying a defendant's IP address to child pornography does not create probable cause. . . But Jones identifies no such caselaw. The reason is obvious: the caselaw supports the conclusion that probable cause existed here. . . . The majority also suggests that the probable-cause issue is not suited for a summary-judgment resolution because a jury should decide the ultimate question whether probable cause continued to exist after the forensic-examination results. . . Our § 1983 cases have not spoken with one voice on this issue. We have said '[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made by a court.'. . But we have also treated the question as factual. [collecting cases] In any event, I would follow the Supreme Court's most recent teachings in *Wesby*. There, the district court had granted summary judgment to § 1983 plaintiffs on the ground that police officers lacked probable cause to arrest them. . . The Supreme Court reversed, concluding that the officers were entitled to summary judgment both because they had probable cause and because they were entitled to qualified immunity. . . *Wesby* tells us that officers are entitled to qualified immunity on this probable-cause issue at the summary-judgment stage when, 'looking at the entire legal landscape,' a reasonable officer could have concluded that probable cause existed. . . That is the case here.")

Howse v. Hodous, 953 F.3d 402, 406-07 & n.1 (6th Cir. 2020), *rehearing en banc denied*, 960 F.3d 905 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1515 (2021) ("We begin our analysis with the second prong—by asking whether the unlawfulness of the officers' conduct was clearly established at the time they approached and arrested Howse. . . 'Clearly established' means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct. . . That's a deferential rule. And for good reason: officers often find themselves in positions where they must make split-second decisions in dangerous situations. In

those crucial seconds, officers don't have the time to pull out law books and analyze the fine points of judicial precedent. To avoid 'paralysis by analysis,' qualified immunity protects all but plainly incompetent officers or those who knowingly violate the law. . . With all this in mind, we consider Howse's claim. Howse argues that the officers violated his clearly established right to be free from 'unreasonable government intrusions.'. . But that frames the 'clearly established' test at too high a level of generality. The law must be specific enough to put a reasonable officer on clear notice that his conduct is unlawful. . . The right to be free from 'unreasonable government intrusions' is much too vague to do that. Instead, we must examine the *particular* situation that Hodous and Middaugh confronted and ask whether the law clearly established that their conduct was unlawful. To answer this question, we must ask whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed. Importantly, this question asks about the lawfulness of conduct under the Fourth Amendment. And in that context, the Supreme Court has stressed 'the need to identify a case where an officer acting under similar circumstances' was found 'to have violated the Fourth Amendment.'. . Without such a case, the plaintiff will almost always lose. . . .Because the alleged unlawfulness of the officers' conduct wasn't clearly established, the officers are entitled to qualified immunity.[1] **[fn. 1:** The dissent concludes otherwise after it frames the question as follows: 'whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest that person without probable cause.'. . Of course, it's true that an officer cannot *arrest* someone without probable cause. But it's also true that an officer doesn't need probable cause to *stop* someone—reasonable suspicion is enough. . . Thus, the level of justification depends on whether the officer is carrying out a stop or an arrest. . . The mere act of handcuffing someone doesn't transform a stop into an arrest. That's because an officer *may* temporarily handcuff someone during a *Terry* stop 'so long as the circumstances warrant that precaution.'. . So it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse. Acknowledging this point, the dissent cites *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 591 (6th Cir. 1994) to show that the officers arrested Howse when they initially threw him to the ground. But *Centanni* cuts *against* the dissent's conclusion. That's because *Centanni* says that an arrest generally doesn't occur until the officers physically remove the suspect from the scene. . . Of course, the officers hadn't removed Howse from the scene when they initially threw him down. So that would mean the officers *didn't* need probable cause until they removed him from his home and took him to the station. Even if we assume the officers carried out an arrest unsupported by probable cause, that doesn't change the outcome here. Howse still needs a case putting the officers on clear notice that their use of force was excessive. And we still aren't aware of one.**]**")

Howse v. Hodous, 953 F.3d 406, 414 (6th Cir. 2020) (Cole, C.J., dissenting in part), *rehearing en banc denied,* 960 F.3d 905 (6th Cir. 2020), *cert. denied,* 141 S. Ct. 1515 (2021) ("The majority asks, 'whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed.'. . We should instead be asking whether it violates a clearly established constitutional right for an officer to throw

a person to the ground in order to arrest. . . that person without probable cause**.** I conclude that the answer to that question is yes[.] . .Accordingly, I would deny Middaugh qualified immunity")

Nelson v. City of Battle Creek, 802 F. App'x 983, ___ (6th Cir. 2020) ("We must . . . inquire whether, as of November 16, 2013, it was clearly established that it was unconstitutional for an officer to shoot when, over the span of two seconds, someone pulls what appears to be a gun, drops it, and raises his hands after being given a warning. We hold it was not. Rivera reasonably perceived a threat of serious physical harm when he saw N.K. reach for and grab what looked like a real gun. It was not objectively unreasonable for Rivera to decide to shoot N.K. as he saw N.K. grip and raise his gun, even if the bullet ultimately struck N.K. after he had dropped the gun. Neither the district court nor Nelson identified any case law where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment. The district court instead relied on what it perceived as 'sufficient factual disputes' as to the reasonableness of Rivera's conduct. . . The dissent similarly says the evidence is 'equivocal' as to whether Rivera shot N.K. while N.K threw away his gun or after doing so. . . To the extent any facts are disputed, however, these disputes do not deprive Rivera of qualified immunity. The dissent highlights testimony from N.K. and his friend suggesting that Rivera shot N.K. after he had already thrown away his gun. But these observations about when N.K. was struck—which Rivera concedes was after N.K. threw his gun away—do not create a dispute of fact as to when Rivera *decided* to shoot. Rivera claims he decided to shoot when he saw N.K. grab and raise the gun. Nelson fails to dispute this fact because N.K. and other witnesses cannot speak to Rivera's decision-making or his perception of harm in the two-second span the events unfolded. Even assuming that N.K. dropped the gun—and was raising his hands—before Rivera shot him, this does not alter our analysis. 'What matters is the reasonableness of the officers' belief,' and '[t]he fact that [N.K.] was actually unarmed when he was shot is irrelevant to the reasonableness inquiry in this case.'. . Although 'hindsight reveals that [N.K.] was no longer a threat when he was shot, we do not think it is prudent to deny police officers qualified immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions.'. . Indeed, the Supreme Court and Sixth Circuit have repeatedly said that an officer's employment of deadly force in split-second decisions when faced with a threat of serious injury or death should not be questioned. . . . Thus, Nelson has not met her burden to demonstrate that the contours of N.K.'s right were sufficiently defined such that 'every reasonable official' in Rivera's shoes would understand that using deadly force would violate N.K.'s constitutional rights. . . . The case before us is not an 'obvious case' such that, under the general principles of *Garner*, *Graham*, and *Robinson*, a reasonable officer would be aware that shooting N.K. violated his clearly established constitutional rights.")

Nelson v. City of Battle Creek, 802 F. App'x 983, ___ (6th Cir. 2020) (Moore, J., dissenting) ("It should go without saying that reasonable police officers do not shoot disarmed young boys with upraised hands. But because the majority misconstrues both the factual record and our circuit precedent to condone that result here, I must respectfully dissent. I would affirm the district court and allow this case to proceed to trial. . . . Fairly read, the parties' deposition testimony is equivocal as to whether Rivera shot N.K. *while* N.K. was throwing down his gun and raising his hands

or *after* N.K. had taken those two actions. . . . All told, although a reasonable jury *could* accept Rivera's narrative (that he shot N.K. while N.K. was pulling a realistic-looking toy gun out of his pants), it could *alternatively* accept N.K.'s narrative (that Rivera shot him *after* he had thrown his gun to the ground and begun raising his hands). And so, for purposes of this appeal, we must accept N.K.'s narrative as true and assume that Rivera shot N.K. under the latter circumstances. Given these facts, the relevant legal question is whether, as of November 16, 2013, our case law put Rivera on fair notice that it is unconstitutional for a police officer to shoot an armed individual after that individual has thrown their weapon to the ground and begun raising their hands, in compliance with officer commands. It did. . . . [T]he majority attempts to sidestep *Bletz*'s general holding by adjusting the 'clearly established law' lens to a microscopic level. . . But this mode of analysis runs afoul of our precedent cautioning panels against being too particular in defining 'clearly established' law. . . To survive qualified immunity a plaintiff need only point to a 'reasonably particularized' constitutional right that the government allegedly violated. . . The Fourth Amendment rule laid out in *Bletz* meets that 'middle ground' standard. . . . [I]f the jury agrees with N.K.'s version of events, Rivera shot 14-year-old N.K. *after* he put down his weapon *and* raised his hands, which would suggest that Rivera did not face a life-or-death decision at the moment he pulled the trigger. . . For these reasons, I respectfully dissent. This case belongs in front of a jury.")

SEVENTH CIRCUIT

Taylor v. Ways, 999 F.3d 478, 487-88, 490-92 (7th Cir. 2021) ("The district court found that Taylor presented sufficient evidence that a reasonable jury could find that Ernst, motivated by racial animus, caused Taylor's firing. Ernst argues he is entitled to qualified immunity because the law was not clearly established that an official with his investigatory responsibilities, but without decision-making authority, could be held liable on a 'cat's paw' theory for race-motivated firing. Ernst also argues that the district court erred by refusing to consider the non-discriminatory rationale that he provided in defense of his termination recommendation: that the probable cause he had to arrest Taylor immunized him for anything that happened later. We consider these arguments in turn. For his claim against Ernst as an individual, Taylor relies on the cat's paw theory of liability used so often in employment discrimination cases. . . Taylor's theory is that Ernst's racial animus poisoned the investigation against him and that Ways, Whittler, and the Merit Board failed to take sufficient steps of their own to remove the taint of Ernst's racial animus. In response, Ernst argues, in effect, that as the monkey who used Ways, Whittler, and the Merit Board as his cat's paw, he is shielded from individual liability under § 1983. We disagree. In 2012 we observed that a cat's paw theory would support imposing individual liability under § 1983 on subordinate government employees who act with unlawful motives to cause the actual decision-makers to take action against another employee. . . We noted that at least five other circuits had held or said as much. . . So despite Ernst's non-supervisory role, he is not insulated from individual liability under § 1983 so long as Taylor can prove that Ernst's discriminatory motive was a factor in bringing about his termination. . .Taylor has presented just such evidence: evidence of Ernst's racial animus toward Taylor and evidence of Ernst's significant role in the investigative and

disciplinary proceedings that brought about Taylor's termination. . . . Taylor is not challenging his arrest. He is challenging his termination. Ernst took the lead in an investigation that continued for weeks after Taylor's arrest, and Ernst's involvement in the case continued for years, at least through the Merit Board hearing in 2013. If his racial animus toward Taylor led him to conceal or turn a blind eye to exculpatory evidence during that longer investigation, and if his actions caused Taylor's termination, the Equal Protection Clause reaches such actions. . . . Under the facts asserted by Taylor and relied upon by the district court, Ernst violated clearly established law. . . .In 2011 and 2013, when the events took place, it was clearly established that a government official violates the Equal Protection Clause of the Fourteenth Amendment by using his official powers to cause a colleague to be fired on the basis of race. . . Any reasonable official in Ernst's position would have known that intentional racial discrimination toward another employee was unconstitutional. And what Taylor alleges against Ernst is textbook racial discrimination. The word "n****r," used by Ernst, a white man, aimed at Taylor on several separate occasions, reflects a uniquely virulent strain of racism, long recognized by the federal courts as capable of having a 'highly disturbing impact on the listener.'. .The illegality of Ernst's alleged conduct was obvious long before these events in 2011 and 2013. . . . Ernst, however, argues that the second prong of the qualified immunity inquiry requires precedent tied to more particularized facts. He argues that the district court incorrectly denied qualified immunity based on the 'broad principle that terminating an employee on the basis of his race violates equal protection.' According to Ernst, in 2011 and 2013, it was not clearly established that a *subordinate employee could be held liable* for unlawful efforts to cause the termination of another employee. Ernst's argument asks the wrong question about qualified immunity. The question is not whether *rules of individual liability* for the conduct were clearly established at the time. The question is whether *the wrongfulness of the defendant's conduct* was clearly established. . . The Supreme Court has repeatedly described the defense of qualified immunity in terms of whether the defendant official's 'actions' or 'conduct' violated clearly established law, not in terms of whether a defendant should have realized he would be held civilly liable for his actions or conduct. . . By 2011, a veritable river of precedents established that public employees may not discriminate against other employees on the basis of race. . . . Based on the district court's analysis of the summary judgment evidence, we must assume here that Ernst acted out of racial animus and that his actions caused Taylor's termination. Any reasonable public employee, and certainly any public employee responsible for investigating other employees for disciplinary purposes, would have known he could not act on the basis of racial animus. Ernst simply has not offered a plausible argument to the effect that a reasonable police officer in 2011 could have thought he could engineer a colleague's termination because of his race without violating the Constitution. In addition, while precedent tied to particularized facts can indicate that a point of law is clearly established, the Supreme Court does not demand a case directly on point. *Thompson v. Cope*, 900 F.3d 414, 422 (7th Cir. 2018); see also *Taylor v. Riojas*, —— U.S. ——, 141 S. Ct. 52, 53–54, 208 L.Ed.2d 164 (2020) (reiterating that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"), quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). . . . If the cited cases on race discrimination in public employment decisions were not enough, the facts we must assume would qualify this case as that rare, obvious case.

Based on the wealth of case law on the unlawfulness of race discrimination in the employment context, Ernst had 'fair and clear warning' in 2011 and 2013 that he was violating the Constitution. . . We therefore affirm denial of summary judgment for Ernst.")

Lopez v. Sheriff of Cook County, 993 F.3d 981, 987-92 (7th Cir. 2021) ("Like the district court, we begin and end with the second step of the analysis: determining whether Officer Raines violated Fernando Lopez's clearly established Fourth Amendment right to be free from an unreasonable seizure. For the law to be clearly established, the 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . . While an officer may be authorized to use deadly force at one moment, it is not a blank check. When an individual has become 'subdued and [is] complying with the officer's orders,' the officer may no longer use deadly force. . . Yet we must be careful not to allow the benefit of hindsight to cause us to discount the reality that officers must make quick decisions as to how much force, if any, to employ. . . While cases like *Garner* and *Graham* are instructive in the excessive force context, they 'do not by themselves create clearly established law outside an obvious case.'. . Determining whether an officer violates clearly established law requires a look at past cases with specificity. . . The Supreme Court has time and again instructed lower courts 'not to define clearly established law at a high level of generality.'. . Specificity is critical to making qualified immunity a workable doctrine in the Fourth Amendment context, where it 'is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts.'. .But this requirement is not unbending. The prong-two clearly-established-law assessment does not require a case with identical factual circumstances, lest qualified immunity become absolute immunity. . . Still, the right must be so clearly established such that it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . That sounds like a high bar because it is—qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. .The district court approached this inquiry the exact right way, looking first to past precedent to ask whether any cases squarely govern the facts at issue. In following suit, we too think it best to consider Officer Raines's use of force that early morning in two distinct phases: the shooting of Lopez and the use of Lopez as a human shield during the sidewalk standoff. . . . Neither the Supreme Court's precedent nor our own clearly establishes that Officer Raines's split-second decision to open fire was unlawful. There were many people on the city street when Lopez, just moments before, opened fire. All Raines knew at the time he fired was that Lopez had just popped off two rounds and that Lopez was now walking in his general direction with gun in hand. A reasonable officer could have concluded that Lopez was an imminent threat both to the officer and the bystanders on the street and outside the Lounge. Lopez insists that Officer Raines should have given him a warning. Whether Raines did so is disputed. At summary judgment and without any clear evidence to the contrary, we must credit Lopez's contention that Raines did not announce himself as a police officer. A warning is decidedly preferred—but it is not required in every circumstance. . . Given the lack of clearly established law, Officer Raines is entitled to qualified immunity as to the first shot. From here the case gets much harder. Lopez contends that even if the first shot did not transgress established law, Raines's subsequent shots clearly violated Lopez's constitutional right not to have lethal force used against him once he was subdued

by the initial shot. But that contention too discounts the speed and unpredictability with which events unfolded on the street that morning. As the district court explained, the video shows that Raines first shot Lopez at 3:56:27 a.m. Lopez dropped his gun one second later, but as he turned and started to run, Officer Raines fired for two more seconds, until 3:56:30 a.m. Raines fired all of his shots in the span of three seconds. In retrospect, and with the benefit of the security footage, it is inviting to parse the multiple shots fired into separate individual events. But we must consider them together in light of how quickly—and in precisely what circumstances—everything transpired. Indeed, in this very context of qualified immunity, the Supreme Court has emphasized that a proper analysis must 'allo[w] 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.'. . Lopez cannot point to a case that clearly establishes a reasonable officer cannot use lethal force over the span of three seconds on an individual he had just seen fire his weapon, who has not surrendered, and is still moving to evade capture. Lopez points to precedent that we find either easily distinguishable or standing for principles that do not show that Officer Raines's conduct violated clearly established law. [discussing and distinguishing cases relied on by Lopez] Our assessment does not change when we consider Officer Raines's conduct on the sidewalk. Recall that after Raines shot Lopez, Lopez quickly moved around the rear of his car and scampered toward the sidewalk. Security footage shows Lopez dropped his gun but was still fleeing. Raines followed after him, quickly reaching Lopez on the sidewalk near the entrance to the Lounge just a few seconds later (at 3:56:34 a.m.). As Officer Raines followed after Lopez, Mario Orta picked up Lopez's gun and immediately opened fire on Raines—shooting directly at him but missing. Raines was then forced to deal with two assailants—restraining an injured Lopez and keeping a mobile, gun-toting Orta at bay. Notice what Officer Raines did not do: he never again fired his weapon. He instead used Lopez's body as a buffer between himself and Orta, rotating his position (and the injured Lopez) to react to Orta's constant movement. . . . To be sure, Raines aggressively restrained Lopez, at times holding a gun to his head. You certainly (and rightly) will not find this maneuver in a police training manual. But the qualified immunity inquiry is not whether Officer Raines's action is immune from criticism. The question the Supreme Court instructs courts to consider instead is whether Officer Raines violated clearly established law. In our view, he did not. . . .The combination of these unusual facts compels our conclusion. We cannot say that Officer Raines's actions on the sidewalk violated law clearly established in 2014—especially when considering the Supreme Court's admonition to define the violation with specificity. Try as Lopez might, there is no analogous case to put Raines on notice that his conduct was unlawful given the circumstances he faced in those early morning hours. Nor is this a situation where a violation is so egregious that any reasonable officer would know they are violating the Constitution notwithstanding the lack of an analogous decision. . . The situation was too fast-moving, too unpredictable, and too volatile to reach that conclusion. Raines could have reasonably concluded he was acting lawfully in protecting himself and the public when he subdued Lopez and tried to defuse the situation by using him as a shield to ward off Mario Orta until police arrived at the scene. . .What makes this case difficult is the distinct impression the video leaves us with after watching it multiples times. By the looks of it, there is a reasonable chance that Fernando Lopez was about to get in his car and leave the scene right when Officer

Raines opened fire. That observation invites the conclusion that Raines may not have needed to use lethal force at all. This whole situation may have been avoided had cooler heads prevailed that morning. Hindsight—aided by watching this scene unfold frame by frame on video footage from four distinct angles in the comfort of the courthouse—allows us to ponder how Officer Raines could have best handled the situation. But that is not our inquiry here. We are left to evaluate whether Raines's conduct violated clearly established law, given the dangerous, delicate, and dynamic circumstances he faced that morning and the state of the law at the time. The benefit of hindsight does not lower the clear and high bar that is the law of qualified immunity. In this case that bar compels us to AFFIRM the grant of qualified immunity.")

Cibulka v. City of Madison, 992 F.3d 633, 639-41 (7th Cir. 2021) ("The Cibulkas admit that they 'are unable to cite ... a case that clearly applies to the level of force exercised by the defendant officers ... because none exist.' Admissions of this sort are often fatal to plaintiffs' attempts to overcome qualified immunity. . . But the Cibulkas argue that the analysis should not end there for two main reasons. First, they contend that 'a reasonable officer should not be able to assume his conduct is reasonable ... unless there is case law affirmatively so stating.' They cite no support for this argument, which is unsurprising because that's plainly not the law. 'In this circuit, once a defendant claims qualified immunity, the burden is on the plaintiff to show that the right claimed to have been violated was clearly established.'. .We will not flip this well-established burden on its head. Second, the Cibulkas employ the expected last-ditch argument against qualified immunity and claim that the officers' constitutional violations were so obvious that the Cibulkas don't need to cite a closely analogous case. But they misplay this argument, too, because they still need to identify 'some settled authority that would have shown a reasonable officer in [these officers'] position that [their] alleged actions violated the Constitution.'. . In other words, they must show that 'a general constitutional rule already identified in the decisional law ... appl[ies] with obvious clarity to the specific conduct in question,'. . . so that 'a reasonable person necessarily would have recognized it as a violation of the law[.]'. . If anything is obvious about this case, however, it's that the officers' conduct did not obviously violate the Constitution. Let's take a look at the instant replay. First, the officers grabbed Todd when he stood up from the retaining wall and moved toward Johnson Street. Todd disputes that he was going to fall into the street, but a reasonable officer could certainly have *thought* that Todd was in danger of toppling headlong into traffic and potentially harming himself (or disappointed Purdue fans driving back to Indiana). Erwin testified that he *did* think Todd was about to fall and grabbed him for that reason. The Cibulkas cite no 'settled authority that would have shown a reasonable officer' that grabbing an inebriated individual for his own safety is a constitutional foul. . . And it is not the least bit surprising that such cases do not exist. . .Next, the officers took down and handcuffed Todd after he admittedly began resisting and refused to sit down (and after, we repeat, arguable probable cause to arrest was formed). Again, we fail to see how this routine police activity is an obvious constitutional violation. Indeed, cases involving arguably more forceful conduct indicate otherwise. . . Finally, the officers huddled with Todd and tried to persuade him to get into a squad car to de-escalate the situation. When those efforts failed, they used incremental levels of force to get him into the car. And when those efforts failed too, they called a timeout and let Todd get out.

Once again, the Cibulkas fail to convince us that this is one of those 'rare cases ... where the state official's alleged conduct is so egregious that it is an obvious violation of a constitutional right.'. .In the end, 'it should go without saying that this is not an "obvious case" where "a body of relevant case law" is not needed.'. . Maybe the Cibulkas' case would be more persuasive if, say, the officers started gratuitously smashing Todd's ribs. . . But they stopped well short of such unnecessary roughness. . . That's enough to decide the Cibulkas' excessive-force claim. We need not take up the parties' offer to consider the 'community caretaker doctrine.'. . We note only that the pertinent cases from the Supreme Court and this court shed virtually no light on how that doctrine might apply to this case, and Wisconsin cases (which we may consider, . . . have applied it to justify the warrantless seizure of an individual in public[.]. . If anything, these cases make it even more reasonable for an officer to believe that the conduct here was fair game and violated no clearly established rights. But ultimately, the community caretaker doctrine is beside the point. The only thing that matters is that the Cibulkas cite neither ' "controlling authority" [n]or "a robust consensus of cases of persuasive authority"' that establish the right to be free from the conduct in this case, . . . and the officers' conduct was not 'so egregious that it is an obvious violation of a constitutional right[.]'. .Qualified immunity is therefore proper with respect to the Cibulkas' excessive-force claim.")

Balsewicz v. Pawlyk, 963 F.3d 650, 657-58 (7th Cir. 2020) ("If any reasonable officer in Sergeant Pawlyk's shoes—after discovering that Balsewicz faced a substantial danger of being beaten up by Rivers—would have understood that taking no action to address that danger violated Balsewicz's right, then the right was clearly established. . . Put another way, if applying the law at that time to the facts 'would have left objectively reasonable officials in a state of uncertainty,' then immunity is appropriate. . . It is true that, here, *factual* uncertainty remains about whether Sergeant Pawlyk knew Balsewicz faced an imminent, rather than a lapsed, danger of serious harm. But that is not the kind of uncertainty that matters. The reason is that we approach the qualified-immunity inquiry by treating as true the evidence-supported facts and inferences favoring Balsewicz. . . The appropriate question, then, is this: Assuming Sergeant Pawlyk was informed that Balsewicz faced an ongoing threat from Rivers, did Sergeant Pawlyk's inaction violate one of Balsewicz's clearly established rights? The answer is yes. *Farmer v. Brennan* made clear that being violently assaulted by a fellow inmate in prison is a serious harm. . . And *Farmer* also made clear what a prison official must do when he learns that an inmate faces an excessive danger of such a harm: take reasonable measures to abate the danger. . .Cases since *Farmer* have confirmed that inmates have a right to have officers take reasonable measures to abate a known risk of violent assault by a fellow inmate. . . . Accordingly, at the time Sergeant Pawlyk was informed that Rivers presented an ongoing excessive danger to Balsewicz, a competent officer in Sergeant Pawlyk's shoes would have known that taking no protective action in response—no additional investigation, no reporting to a supervisor, no measures to keep Rivers away from Balsewicz, etc.—violated Balsewicz's right to be reasonably protected from a violent beating by another inmate. Given the clear governing rules set out by *Farmer*, and given their application in cases confirming that inaction in like circumstances violates an inmate's constitutional right, Sergeant Pawlyk is not entitled to qualified immunity.")

Day v. Wooten, 947 F.3d 453, 461, 463 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1449 (2021) ("The district court defined the rights at issue as Day's right to be free from excessively tight handcuffs and his right to have the officers consider his injury or condition in determining the appropriateness of the handcuff positioning. The court concluded that the officers' conduct violated those rights. However, there is no Seventh Circuit precedent clearly establishing that the conduct the officers engaged in violated either of those rights. The plaintiffs point to *Payne v. Pauley* . . . and identify it as the best case to clearly establish the right to be free from excessively tight handcuffs. . . .*Payne* does not help the plaintiffs because it involves circumstances and conduct drastically different than this case. Day was suspected of shoplifting while armed with a gun, a much more serious offense than the plaintiff in *Payne* (who had allegedly done nothing wrong). It is also undisputed that Day was not cooperative: he repeatedly changed position despite the officer's instructions to remain seated upright, and he argued with the officers to let him go. More importantly, Officer Denny and Sergeant Wooten did not violently yank or jerk Day's arms and shoulders, or any of Day's person for that matter. Furthermore, the handcuffs in *Payne* were much tighter than they needed to be to accomplish the purpose of detaining the arrestee, to the point of causing visible physical injury. There is no suggestion that the handcuffs used on Day were any tighter than would have been typically used to restrain an arrestee in similar circumstances. In fact, the coroner noted no visible signs of trauma, and the autopsy report indicated no lacerations or contusions on Day's wrists. The rule announced in *Payne* is inapposite. . . .Given the facts as assumed by the district court and the information known to the officers at the time of the arrest, the only right plaintiffs can assert would be the right of an out-of-breath arrestee to not have his hands cuffed behind his back after he complains of difficulty breathing. We find no Seventh Circuit precedent clearly establishing such a right. The cases relied upon by the district court and the plaintiffs present circumstances far different, and therefore cannot clearly establish that the officers' conduct violated Day's rights. One further point must be addressed. The Supreme Court has stated that even in the absence of existing precedent addressing similar circumstances, 'there can be the rare "obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear.'. . This case is certainly not one of those rare obvious cases. As already discussed, the handcuffs were used in a manner that would not have harmed an average arrestee, and there is no evidence the officers were aware the handcuffs were causing Day's breathing trouble. The officers' conduct under the circumstances was not obviously unlawful.")

EIGHTH CIRCUIT

Graham v. Barnette, No. 19-2512, 2021 WL 3012338, at *3-5 (8th Cir. July 16, 2021) ("We previously affirmed the district court's judgment. . . Graham then petitioned for a writ of certiorari, arguing (as relevant here) that the doctrine we relied on to find that the officers' warrantless entry was reasonable under the Fourth Amendment—the so-called community-caretaking or community-caretaker exception—did not apply to the home. . . While Graham's petition was pending, the Supreme Court decided *Caniglia*, where it explained that this 'exception' is not actually a 'standalone doctrine that justifies warrantless searches and seizures in the home.'. .

Subsequently, it granted Graham's certiorari petition, vacated our prior judgment in Graham's appeal, and remanded the matter to us for further consideration in light of *Caniglia*. . . We have reconsidered this appeal in light of *Caniglia*, and we once again affirm the district court's judgment. . . . Graham first argues that the officers violated her clearly established Fourth Amendment right to be free from an unreasonable search by entering her home. Pre-*Caniglia*, the officers responded that their warrantless entry into her home was reasonable under the community-caretaking exception but that, even if it was not, they were entitled to qualified immunity as to this claim because it was not clearly established that their actions were unreasonable in the circumstances. . . .Due to the 'dearth of community caretaking cases,' the district court bypassed the first prong of the analysis, . . . concluding instead that the law was not clearly established that the officers violated Graham's Fourth Amendment rights by entering her home without a warrant pursuant to the community-caretaking exception. Previously, we opted to affirm under the first prong, . . . concluding that the officers' warrantless entry was sufficiently justified and thus reasonable under the community-caretaking exception[.] . . But *Caniglia* rendered our prior rationale untenable insofar as it explained that 'community caretaking' was not a 'standalone doctrine' that could justify warrantless entry into the home. . . Accordingly, we now affirm the district court's grant of summary judgment under the second prong of the qualified-immunity analysis. . . . On May 25, 2017, it was well established in this circuit that the community-caretaking exception was a standalone doctrine that alone could justify warrantless entry into a home. . . And, in the circumstances present here, the officers' warrantless entry did not violate Graham's Fourth Amendment rights under our then-extant community-caretaking jurisprudence. . . .We need not and do not unpack today *Caniglia*'s full ramifications for our community-caretaking jurisprudence. . . Rather, we decide only that the officers' warrantless entry was reasonable under 'the legal rules that were clearly established' in this circuit on May 25, 2017. . . While *Caniglia* made clear that 'community caretaking' was not its own Fourth Amendment exception that alone could justify warrantless entry into the home, '*Caniglia* did not address' what 'rights were clearly established' under 'pre-existing circuit law.' *Luer v. Cnty. of St. Louis*, --- F.4th ---, 2021 WL 2285499, at *1 (8th Cir. June 3, 2021). Accordingly, we affirm the district court's grant of summary judgment on the basis of qualified immunity to the officers with respect to Graham's Fourth Amendment warrantless-entry claim.")

Intervarsity Christian Fellowship/USA v. Univ. of Iowa, No. 19-3389, 2021 WL 3008743, at *7–8 (8th Cir. July 16, 2021) ("The University and individual defendants say that the law is not clearly established when there is a direct conflict between civil rights laws and First Amendment protections in the University setting. InterVarsity, on the other hand, argues that its right to be free from viewpoint discrimination when speaking in a university's limited public forum was clearly established at the time of the violation. In denying the individual defendants qualified immunity below, the district court treated its preliminary injunction in the BLinC case as precedent. The court explained that the order applied the appropriate First Amendment cases and put the individual defendants on notice that their actions were unconstitutional. . . .While we share the district court's frustration with the University's conduct, we do not consider the BLinC preliminary injunction as precedent that clearly established the

individual defendants' conduct was unconstitutional. 'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.' *Camreta v. Greene*, 563 U.S. 692, 730 n.7 (2011) (citation omitted). 'Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity.' *Id.* While the Eighth Circuit 'subscribes to a broad view of what constitutes clearly established law,' and we often look to 'state courts, other circuits and district courts,' for what is clearly established, *K.W.P. v. Kan. City Pub. Schs.*, 931 F.3d 813, 828 (8th Cir. 2019) (citation omitted), we will not rely on a district court's preliminary injunction as clearly established law in this case. But when the district court denied the individual defendants qualified immunity, it did not have the benefit of our decision in *BLinC II*. We found that the law was clearly established that universities may not engage in viewpoint discrimination against RSOs based on a nondiscrimination policy. . . In reaching that conclusion, we relied on Supreme Court precedent, our own case law, and other circuit decisions. The Supreme Court has clearly stated that universities may not single out groups because of their viewpoint. . . Our own precedent clearly establishes that this is a violation of the First Amendment. . . Out-of-circuit decisions also define the selective application of a nondiscrimination policy against religious groups as a violation of the First Amendment. . .Relying on those precedents, we held that the University's choice to deregister BLinC while permitting other student organizations to base membership and leadership on specific traits or affirmations of beliefs was viewpoint discrimination and a violation of the First Amendment that was clearly established. . . The University and individual defendants in that case took action against BLinC well before InterVarsity was ever on their radar. If the law was clearly established when the University discriminated against BLinC, it was clearly established when they did the same thing to InterVarsity. We acknowledge that the intersection of the First Amendment and anti-discrimination principles can present challenging questions. . . . But as Justice Thomas asked in *Hoggard v. Rhodes*, 'why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?' —— S.Ct. ——, *1 (2021) (Thomas, J., statement regarding denial of certiorari). What the University did here was clearly unconstitutional. It targeted religious groups for differential treatment under the Human Rights Policy—while carving out exemptions and ignoring other violative groups with missions they presumably supported. The University and individual defendants turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven.")

McReynolds v. Schmidli, No. 19-3772, 2021 WL 2932508, at *4 (8th Cir. July 13, 2021) ("Applying the requisite amount of specificity, we conclude that a reasonable officer would have had fair warning that, in June 2012, he could not violently takedown a person who was not threatening anyone, not actively resisting arrest, and not attempting to flee. The district court erred in granting qualified immunity to Schmidli.")

Gerling v. City of Hermann, Missouri, No. 20-1528, 2021 WL 2557896, at *3-4 (8th Cir. June 23, 2021) ("The existence of probable cause. . . guarantees Waite qualified immunity only for an arrest in a public place. There is a genuine dispute of material fact about whether Waite entered Gerling's home without a warrant to effect the arrest. Gerling says that he might have taken a step onto the porch during his initial conversation with Waite to gesture at the street, but immediately moved back into the house before Waite arrested him. The video recording of the incident does not contradict Gerling's account: we agree with the district court that it is 'dark and difficult to make out' where the parties are standing. If Gerling's testimony is accepted, then any reasonable officer should have known that he could not enter Gerling's home to make an arrest without a warrant or an exception to the warrant requirement that is not present here. . . On these assumed facts, it was clearly established at the time of the incident that Waite could not reach into Gerling's home to arrest him. . . We therefore affirm the district court's denial of summary judgment on Gerling's unlawful arrest claim. . . . [W]here a suspect ignores instructions and walks away, officers may be justified in using force to effect an arrest. . . Because the inquiry is fact-intensive, officers are entitled to qualified immunity 'unless existing precedent "squarely governs" the specific facts at issue.'. .Gerling relies on a line of cases involving non-resisting suspected misdemeanants, but he admits that he pulled away from Waite, did not comply with directions to raise his hands, and walked into an area of the home that was unfamiliar to Waite. . . . An officer reasonably could have believed Gerling was resisting arrest. Under those circumstances, Waite's use of force did not violate a clearly established right. It was not clearly established in November 2012 that officers were forbidden to use force, including a taser, to arrest a suspect who resisted, ignored instructions, and walked away from the officer. . . We note, however, that any damages that Gerling suffered because of his arrest are subsumed within his unlawful arrest claim. Although we analyze unlawful arrest and excessive force claims separately, 'the damages recoverable on an unlawful arrest claim "include damages suffered because of the use of force in effecting the arrest."'. . Therefore, even without a freestanding claim for use of excessive force, Gerling may recover any damages that he suffered from Waite's use of a taser if Gerling succeeds on his claim alleging unlawful arrest based on an unjustified entry into the home.")

Luer v. County of St. Louis, Missouri, No. 18-3512, 2021 WL 2285499 (8th Cir. June 3, 2021) ("Appellees move to recall and stay the mandate in light of *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), which held that there is no 'freestanding community-caretaking exception' to the warrant requirement of the Fourth Amendment. In this case, we held that the appellant police officers were entitled to qualified immunity in certain respects because the officers did not violate rights of the appellees that were clearly established as of July 2016—long before *Caniglia* was decided. Appellees' motion recognizes that this court had issued 'prior opinions extending the community-caretaking exception to the home,' and argues that this court's precedent aligns with the decision of the First Circuit that was disapproved in *Caniglia*. The police officers were acting in light of pre-existing circuit law, and this appeal required us to determine what rights were clearly established as of July 2016. Because *Caniglia* did not address that issue, the motion is denied.")

Banks v. Hawkins, 999 F.3d 521, 529-31 (8th Cir. 2021) ("Applying the appropriate level of specificity here, we conclude that a reasonable officer had fair warning in February 2017 that he may not use deadly force against a suspect who did not present an imminent threat of death or serious injury, even if the officer felt attacked earlier and even if he believed the suspect had previously posed a threat. This proposition finds support in at least two cases involving similar, albeit not identical, circumstances. . . . We must presume that, at the moment Hawkins shot Banks, there was no longer a threat to Vanessa Banks's safety—assuming there ever was—and Johnny Banks was not charging Hawkins or otherwise moving towards him. As in *Ellison*, '[i]f [Hawkins] shot [Banks] while he was simply standing in his [home] and holding no [weapon], then there were not reasonable grounds to believe that [Banks] posed a serious threat of death or serious physical injury to the officers or others.'. . . Similarly, the officers in *Nance* were also responding to a 'dangerous situation' when one of them shot the suspect. . . We nevertheless affirmed the denial of qualified immunity because, even though the suspect had a gun in his pants and may have raised his hands while trying to get to the ground, he was not holding the gun or acting in a threatening manner and the officers failed to provide a warning before shooting. . . In other words, the officers had no 'reason to fear for their safety at the time of the shooting.'. . This means that Hawkins had fair warning in February 2017 that fear of imminent harm cannot justify shooting a suspect absent a reasonable basis to believe the suspect would act violently in that moment. As in *Nance*, the fact that Hawkins 'knew [he] might encounter a dangerous situation' did 'not permit the use of deadly force,' even if Banks raised his hand when he opened the front door. . . '[O]n the facts we are bound to assume,'. . . *Ellison* and *Nance* 'clearly prohibit[ed]' Hawkins's conduct[.] . . This is further supported by a 'body of relevant case law.' [collecting cases] At bottom, while the fact that Hawkins suffered a blow to the head from a source he knew was not Banks may amount to a 'novel factual circumstance[ ],'. . . it does not blur the contours of the constitutional right at issue. Even assuming he thought he was 'under attack,' the record indicates that Hawkins nevertheless understood he was not under attack *by Banks*. . . Because a reasonable officer in the same circumstances as Hawkins would have known that it was unlawful to shoot an unarmed and nonaggressive man who posed no imminent threat to the officer or to anyone else, we conclude—at this stage of the proceedings—that Hawkins's use of deadly force violated clearly established law.

Banks v. Hawkins, 999 F.3d 521, 531-34 (8th Cir. 2021) (Stras, J., dissenting) ("The question for us is whether Officer Hawkins is entitled to qualified immunity. Whether his actions that night were objectively reasonable is a close call, and I tend to agree with the court that it is likely one for a jury to decide. . . But qualified immunity applies precisely when an officer is forced to make a hard choice. . . . The court says that Officer Hawkins should have known that he could 'not use deadly force against a suspect who did not present an imminent threat of death or serious injury, even if [he] felt attacked earlier and even if he believed the suspect had previously posed a threat.'. . Not only is this formulation so broad that it lacks clarity, it also risks sweeping too broadly. The proof is in the pudding: there are cases that both fall within the court's supposed clearly established rule *and* do not involve the violation of a constitutional right. If you are wondering how both can be true, they cannot be. [discussing cases] Today's decision does more than just expose Officer

Hawkins to liability. It stands as a warning to other officers who may need to make split-second decisions to protect their own safety. The message could not be clearer: even in the absence of a clearly controlling legal rule, think twice before acting, regardless of whether your own life is at stake, because a court may step in later and second-guess your decision. . . We can reasonably disagree about whether qualified immunity should exist, *see Baxter v. Bracey*, —– U.S. ——–, 140 S. Ct. 1862, 1864–65, 207 L.Ed.2d 1069 (2020) (Thomas, J., dissenting from the denial of certiorari), but there is no question that circumstances like these are why it does, *see Winzer v. Kaufman County*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting in part). I respectfully dissent.")

Masters v. City of Independence, Missouri, 998 F.3d 827, 836-38 (8th Cir. 2021) ("In sum, Masters 'was an unarmed suspected misdemeanant, who [was] not resist[ing] arrest, did not threaten [Runnels], did not attempt to run from him, and did not behave aggressively towards him.'. . A reasonable officer would not have continued to tase Masters under these circumstances. . . . Runnels nevertheless argues that this was a 'tense and rapidly evolving' encounter. In his view, it was reasonable to continue discharging the Taser, even while Masters was compliant, until Masters was fully subdued. It is true that the reasonableness of an officer's use of force must take into account 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.'. . 'Even so, a reasonable officer is not permitted to ignore changing circumstances.'. . The undisputed evidence shows that Masters stopped resisting arrest soon after Runnels initially discharged his Taser. A reasonable officer would have taken into account those changed circumstances to determine whether continued or additional use of the Taser was warranted. Runnels did not do so, and the record supports Masters's claim that Runnels used excessive force when prolonging the use of the Taser. Second, we consider whether the right to be free from an excessive, prolonged use of a Taser was clearly established as of September 14, 2014, when the traffic stop occurred. . . . In September 2014, it was clearly established that prolonging the use of a Taser against a suspect who was complying with a police officer's commands constituted an excessive use of force. . . .Runnels also asserts there is 'no bright line' on how long an officer may tase a suspect. But there is: An officer may not continue to tase a person who is no longer resisting, threatening, or fleeing. That is so whether the tasing comes in the form of multiple, separate deployments or, as in this case, a single, continuous deployment that lasts for an extended period of time. By September 2014, 'when the tasing[ ] of [Masters] occurred, there was sufficient case law to establish that a misdemeanor suspect in [Masters's] position at the time of the [prolonged] tasing—non-threatening, non-fleeing, non-resisting—had a clearly established right to be free from excessive force,'. . . and that prolonged tasing of such a suspect was excessive.The district court did not err in denying Runnels's motion for judgment as a matter of law on Masters's prolonged Taser claim.")

Masters v. City of Independence, Missouri, 998 F.3d 827, 842 (8th Cir. 2021) (Colloton, J., concurring) ("In my view, *Jackson v. Stair*, 944 F.3d 704 (8th Cir. 2019), was wrongly decided and should not be extended. . . Unlike *Jackson*, where a reasonable officer could have believed

that the offender's 'momentary post-tasered position on the ground' did not 'justify considering it as a clearly punctuated interim of compliance' that made further use of a taser unreasonable, . . . Masters was compliant for the last fifteen seconds of the disputed tasing and lying face-down on the pavement for most of that time. No reasonable officer could have believed that Masters was resisting during that period, or that continued application of a taser was reasonable under the circumstances, so the district court properly denied qualified immunity.")

T.S.H. v. Green, 996 F.3d 915, 919-21 (8th Cir. 2021) ("A school official need not have probable cause to search a student in a school; '[r]ather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.'. . A student search is reasonable if it is 'justified at its inception, and 'reasonably related in scope to the circumstances which justified the interference in the first place.'. . The law is not settled on whether the same reasonableness inquiry applies to student seizures, . . . but there is no clearly established law to the contrary. At least one circuit has concluded that the reasonableness standard from *T.L.O.* applies to student seizures. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304 (11th Cir. 2006). This court and the Ninth Circuit have reserved judgment on whether to apply *T.L.O.* or the objective reasonableness standard from *Graham v. Connor*[.] . . Given the state of the law, a reasonable officer could have proceeded on the understanding that a student seizure is permissible if it is reasonable under the standard of *T.L.O.* Although the alleged seizure in this case did not occur at the high school and was initiated by law enforcement, reasonable officers could have believed that probable cause was not required. We have applied the reasonableness standard to searches of high school students outside of 'traditional school grounds,' because the 'nature of administrators' ... responsibilities for the students entrusted to their care, not school boundary lines, renders the Fourth Amendment standard in the public-school context less onerous.'. .*T.L.O.* left open whether the reasonableness test should apply to actions 'conducted by school officials in conjunction with or at the behest of law enforcement agencies,'. . . but our decision in *Shade* applied the reasonableness standard where both school officials and law enforcement officers were involved. . . . Given that Green and Williams were employed by the University Police, it is also noteworthy that searches conducted by school police or school liaison officers have been evaluated under a reasonableness standard. . . We recently rejected an argument that clearly established law required 'probable cause' before a school resource officer could summon a high school student to the school office for interrogation about an alleged sexual assault. . . In light of these decisions, the students had no clearly established right to be free from a seizure instigated by Green and Williams if it passed muster under a standard of reasonableness. Under the facts alleged here, we further conclude that a reasonable officer could have believed that the seizure was reasonable. When the principles of *T.L.O.* are applied to this context, a seizure is 'justified at its inception' if there are reasonable grounds to believe that 'the student has violated or is violating either the law or the rules of the school.'. . A seizure is reasonable in scope if it is 'reasonably related to the objectives' of the investigation and not excessive in light of the student's characteristics and the nature of the alleged infraction. . . There were sufficient grounds on these facts to place the officers' action at least within the gray area for which qualified immunity is available. On justification for the seizure, the students allege that the officers described the cheerleading coach's allegation as a

'possible Title IX incident.' Title IX is a federal statute that prohibits discrimination on the basis of sex in 'any education program or activity receiving Federal financial assistance.'. . But the students contend that because the cheerleading coach was neither a student nor an employee of the University, there was thus no reasonable justification under Title IX for the seizure. They argue that the officers were attempting instead to 'prove the commission of a crime,' such as invasion of privacy under Missouri law. *See* Mo. Rev. Stat. § 565.252.1(1). We think a reasonable officer could have believed that either basis justified an investigatory seizure. Under then-applicable Title IX guidance, a school with knowledge of 'student-on-student harassment that creates a hostile environment' was required 'to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.'. . The same guidance said that 'Title IX also protects third parties from sexual harassment ... in a school's education programs and activities,' and included the example of 'a visitor in a school's on-campus residence hall.'. . Based on the report of the cheerleading coach who was housed in the University's dormitory, the officers reasonably could have believed that they were authorized to investigate the incident to comply with the prevailing Title IX guidance. So too with a possible violation of Missouri law. A person commits the offense of invasion of privacy if he photographs another person, without her consent, while she is in a state of full or partial nudity and is in a place where one would have a reasonable expectation of privacy. Mo. Rev. Stat. § 565.252.1(1). Reasonable officers could have believed that the cheerleading coach's report gave reasonable grounds to suspect that questioning the students would turn up evidence about invading the privacy of the cheerleading coach. Finally, the seizure must have been reasonable in scope. The students claim that they were 'not free to leave for a period of hours.' Other courts, however, have found student seizures of similar durations to be reasonable. [giving examples] In light of this authority, we conclude that the students had no clearly established right to be free from a seizure that extended for a period of hours. In sum, it was reasonable for Officers Green and Williams to believe that a seizure of high school students by a high school coach acting at the behest of the officers was permissible if reasonable. It was also reasonable for the officers to believe that the seizure was justified under that standard. The officers thus did not violate the students' clearly established rights under the Fourth Amendment, so they are entitled to qualified immunity on this claim.")

T.S.H. v. Green, 996 F.3d 915, 922-25 (8th Cir. 2021) (Kelly, J., concurring in part and dissenting in part) ("Because I believe T.S.H. and H.R.J. have stated a plausible claim for violation of their Fourth Amendment rights, I respectfully dissent. . . Assuming the standard articulated in *New Jersey v. T.L.O.* . . . applies to a seizure of high school students carried out by their football coach at the behest of law enforcement and away from traditional school grounds, . . . I disagree with the court's conclusion that the seizure at issue here was reasonable. Under the *T.L.O.* standard, we must evaluate both whether the seizure was 'justified at its inception' and whether it 'was reasonably related in scope to the circumstances which justified [it] in the first place.'. . . Here, the students adequately allege that they never consented to the seizure. And because the Amended Complaint suggests the officers made no effort to coordinate with the university's Title IX officer or to comply with Title IX regulations, there is no basis to conclude that they reasonably believed they had authority under Title IX to independently initiate an investigation and to seize and

interrogate high school students. . . . [E]ven if the seizure was justified at its inception, it was not 'reasonably related in scope to the circumstances which justified the interference in the first place.'. . . Considering the absence of a security threat and the lack of any apparent disruption to the camps or to the students' learning environment, it was unreasonable for the officers to believe that the hours-long detention and interrogation of T.S.H. and H.R.J. were warranted.")

Perry v. Adams, 993 F.3d 584, 587-88 (8th Cir. 2021) ("The question of qualified immunity as against the current § 1983 claim, therefore, does not ask simply whether Adams's alleged actions or failures to act might have violated an internal policy at the St. Louis City Justice Center or whether as a matter of state law such actions might have constituted negligence. . . Similarly, it does not ask whether Adams possessed knowledge that Brison was at 'some risk' yet failed to act. Rather it asks whether *on the facts presented*, Adams knew of a substantial risk of serious harm yet failed to act. Framed at the level of specificity that the Supreme Court mandates for our analysis, we understand the specific question we must answer to be as follows: 'Does a transferring officer violate a pretrial detainee's Fourteenth Amendment rights by failing to inform a receiving entity that the detainee is on a close-observation status if a mental health professional has determined that the detainee is not suicidal and if the applicable close-observation status is, in and of itself, indicative of the absence of a suicide risk?' Framed in this way, and even assuming that Adams had knowledge that Brison was on Close Observation, we find no clearly established right. Brison was analyzed by a mental health professional and was on a watch status indicating he was not suicidal. Therefore, this is not a case like *Boswell v. Sherburne County*, 849 F.2d 1117, 1122 (8th Cir. 1988), where a jailer with knowledge of a detainee's serious medical condition failed to contact medical professionals or advise incoming jailers as to the detainee's risk. Here, short of a suicide risk which a mental health professional found to be absent, the plaintiffs do not identify what risk of 'serious harm' Brison faced and what actual knowledge Adams possessed regarding any such risk. Of course, detention officers have a general duty to guard reasonably against known risks of suicide. . . As such, transferring officers generally should strive to convey important information likely to aid in the protection of inmates' health and welfare. But, clearly established and specific constitutional requirements defined under this general rule do not support the proposition that an officer is required to second-guess a mental health professional's judgment as to the substantiality of a suicide risk.")

Business Leaders In Christ v. Univ. of Iowa, 991 F.3d 969, 980, 985-88 (8th Cir. 2021) ("To prove that the law was clearly established at the time that the individual defendants violated BLinC's constitutional rights of free speech, expressive association, and free exercise, BLinC must 'point to existing circuit precedent that involves sufficiently similar facts to squarely govern [the individual defendants'] conduct in the specific circumstances at issue, or, in the absence of binding precedent, to present a robust consensus of persuasive authority constituting settled law.'. .We first address whether BLinC's free-speech and expressive-association claims are undergirded by clearly established law. . . . An important task in determining whether the law was clearly established at the time the individual defendants acted is to avoid defining the law at a 'high level of generality.'. . . In the present case, the appropriate inquiry is 'whether [BLinC's] right not to be subject to

viewpoint discrimination when speaking in a university's limited public forum was clearly established.'. . This inquiry takes into account the undisputed facts of the present case: the University's creation of a limited public forum for student speech and subsequent viewpoint discrimination against BLinC, a student organization, within that forum. First, 'it was clearly established at the time of these events' that the University's recognition of RSOs constituted a limited public forum. . . . Second, 'it was clearly established that a university may not discriminate on the basis of viewpoint in a limited public forum.' . . *Martinez*, *Rosenberger*, *Widmar*, *Healy*, and *Gerlich* all place 'beyond debate,'. . . that BLinC had a 'right not to be subjected to viewpoint discrimination while speaking in [the] [U]niversity's limited public forum.'. . . Nonetheless, the individual defendants argue that there is no clearly established law 'definitively decid[ing] the issue of the *uneven enforcement of a nondiscrimination policy* against registered student organizations on a university campus.'. . But *Walker* and *Reed* both recognized the legal principle that a nondiscrimination policy neutral on its face violates a student group's rights to free speech and expressive association if not applied in a viewpoint-neutral manner. . . . In summary, we are satisfied that Supreme Court precedent, existing Eighth Circuit precedent, and 'a robust consensus of cases of persuasive authority,' 'squarely govern[ed] [the individual defendants'] conduct in the specific circumstances at issue.'. . As a result, we hold that the district court erroneously granted the individual defendants' motion for summary judgment based on qualified immunity on BLinC's free-speech and expressive-association claims. . . . BLinC also maintains that its free-exercise rights were clearly established. Three Supreme Court cases concerning student speech in a university's limited public forum are instructive in determining whether it was clearly established that the individual defendants' selective enforcement of its nondiscrimination policy against BLinC violated BLinC's free-exercise rights. *See Martinez*, 561 U.S. at 697 n.27, 130 S.Ct. 2971; *Rosenberger*, 515 U.S. at 841–42, 115 S.Ct. 2510; *Widmar*, 454 U.S. at 273 n.13, 102 S.Ct. 269. . . . None of these cases make clear that BLinC would have a free-exercise claim—as opposed to a free-speech claim—against the University defendants for selectively enforcing its nondiscrimination policy against BLinC in a limited public forum. In fact, *Widmar* expressly declined to 'inquire into the extent, if any, to which free exercise interests are infringed by the challenged University regulation.'. .BLinC cites several other cases in support of its argument that the law clearly established that the individual defendants' conduct violated BLinC's free-exercise rights, but none of them involve student speech in a limited public forum. . . We may not 'define clearly established law at a high level of generality,'. . . and to apply the general principles derived from those cases to the present case would contravene the Supreme Court's directive. Because the law was not clearly established at the time that the individual defendants' conduct violated BLinC's free-exercise rights, we hold that the district court did not err in granting qualified immunity to them on BLinC's free-exercise claim.")

Business Leaders In Christ v. Univ. of Iowa, 991 F.3d 969, 988-90 (8th Cir. 2021) (Kobes, J., concurring in part and dissenting in part) ("Administrators at the University of Iowa discriminated against religious student groups. The University and individual defendants do not appeal that finding. I join the well-written majority opinion in denying qualified immunity on BLinC's free speech and association claims, but I write separately because I think the law is clearly established

on its free exercise claim, too. . . .The purpose of qualified immunity is to shield good-faith actors who make mistaken judgments about unresolved issues of law, and it protects 'all but the plainly incompetent or those who knowingly violate the law.'. . But we do not need the benefit of hindsight to know that the individual defendants' choices were prohibited by the Constitution. They had more than 'fair warning' that their conduct was unconstitutional. . . In fact, they *knew* it was. . . The law is clear: state organizations may not target religious groups for differential treatment or withhold an otherwise available benefit solely because they are religious. That is what happened here. The individual defendants may pick their poison: they are either plainly incompetent or they knowingly violated the Constitution. Either way, they should not get qualified immunity.")

Luer v. Clinton, 987 F.3d 1160, 1168-70 (8th Cir. 2021) ("The officers found no one in the attached garage but observed that the door from the garage into the kitchen of the home was ajar. They knocked, announced police, entered the kitchen with guns drawn, and made 'loud verbal commands' that anyone in the house 'make themselves known.' Up to this point, we conclude that the officers are entitled to qualified immunity under the community caretaker exception because an open door into a home late at night, when no one had responded to their repeated knocking at the outside doors, arguably warranted a limited protective entry. However, even if their intrusions to this point were justified, we must assess whether they sufficiently tailored their subsequent activity to this limited purpose. . . No one responded to the officers' repeated announcing at the kitchen door threshold. From there, they saw a light emanating from an open door to the basement. They descended to the basement, found no signs of disturbance, returned to the main level, and continued searching the entire home until encountering Luer outside his bedroom. We conclude the community caretaker exception cannot justify this severe, warrantless intrusion into a home. In searching two yards, underneath a deck, behind an air conditioning vent, and in the Luer-Steinebach attached garage, Officer Clinton observed no sign of the intoxicated fare-skipper. The officers had no information the suspect was armed or otherwise dangerous. They got no response from inside the Luer-Steinebach home and saw no signs of criminal activity. The cab driver reported that a petty thief had run, not that a burglar was on the prowl in a residential neighborhood. Reasonable police officers acting as community caretakers should have left the home. Whether the community caretaker exception extends to entries into the home is not a resolved Fourth Amendment question, as the recent grant of certiorari in the First Circuit's *Caniglia* decision demonstrates. The First Circuit recognized that the need to limit the extent of this exception 'is especially pronounced in cases involving warrantless entries into the home.... [P]olice officers must have "solid, noninvestigatory reasons" for engaging in community caretaking activities.' . . The other 'exigent circumstance' exceptions to the Fourth Amendment warrant requirement do not apply in these circumstances. The officers were not in 'hot pursuit' of the intoxicated fare-skipper, and they had no information suggesting that he was armed and dangerous. The officers argue that, because of the open doors, they had a 'reasonable belief that the occupants of the [home] may be under a threat to their safety.' Of course, there *may* be a threat to safety in almost any situation. However, it is clearly established that '[s]omething more than a speculative hunch is needed for police to conduct a protective sweep.'. . Nor did the officers have information suggesting that anyone in the home was in need of emergency assistance. Had they confronted a

person dressed as the cab driver described the fare-skipper *in a place where the officers were entitled to be*, they may well have had reasonable suspicion to stop and question the person and perhaps take him a short distance to see if the cab driver would identify him as the fare-skipper. But they were not entitled to enter and conduct an extensive search of the Luer-Steinebach home for this purpose without a warrant or consent. . . .Here, as in *Selberg*, Officers Clinton and Selz encountered no signs of disturbance outside the Luer-Steinebach home or in their attached garage. Nothing suggesting imminent danger to persons or property was visible from the kitchen door threshold. Although *Selberg* did not use the phrase 'community caretaking,' the opinion in substance addressed whether an interest in community caretaking -- that is, protection of persons or property -- justified the entry, . . . and the case is nearly on point factually. Considering *Selberg* together with the Supreme Court's frequent cautions that exigent circumstances rarely justify a warrantless home intrusion, we conclude that it was clearly established by controlling Fourth Amendment precedents that the officers' full blown search of the entire Luer-Steinebach domicile without a warrant was objectively unreasonable.")

Luer v. Clinton, 987 F.3d 1160, 1170 (8th Cir. 2021) (Kobes, J., concurring in part and dissenting in part) ("The majority wrestles with the outer limits of community caretaking. Those are hard questions—but they are questions we need not answer. Community caretaking was not raised in the district court and was only discussed here in a reply brief. It was waived. . . Even if the exception was properly raised, no facts support a reasonable belief that the officers needed to enter Luer and Steinebach's property to protect community safety. The cab driver told Officers Clinton and Selz that the fare skipper walked away from Luer and Steinebach's home, and the officers 'had no information the suspect was armed or otherwise dangerous.'. . The cab driver reported only 'that a petty thief had run, not that a burglar was on the prowl in a residential neighborhood.'. . On these undisputed facts, I do not think this is one of the 'certain limited situations' where community caretaking justifies 'a noninvestigatory search[ ].'. . Officers Clinton and Selz raised only two exigent circumstances—hot pursuit and emergency aid. The majority correctly rejects both arguments, and I would affirm on those grounds. To the extent the majority's opinion grants immunity to the officers, I respectfully dissent.")

MacKintrush v. Pulaski County Sheriff's Dep't, 987 F.3d 767, 770-71 (8th Cir. 2021) ("The right of a passive arrestee to be free from excessive use of body slams (or similar techniques) was clearly established when Hodge took MacKintrush to the floor. Force may be appropriate if a suspect presents a possible threat to police. . . 'There is no requirement that the plaintiff must find a case where the very action in question has previously been held unlawful so long as existing precedent has placed the statutory or constitutional question beyond debate.'. . It is 'unreasonable for an officer to body-slam a nonviolent, nonthreatening misdemeanant who pulled her arm away from the officer to extinguish a cigarette, where no reasonable officer would have viewed the act as noncompliance.'. . Ambiguous gestures that officers claim are noncompliant (such as reaching to extinguish a cigarette) do not justify body slamming an otherwise compliant, nonviolent, nonthreatening misdemeanant. . . . Crediting MacKintrush's account and the video of the incident, he was not actively resisting Hodge. Hodge tried to physically steer MacKintrush while he was

walking through booking. MacKintrush shrugged off his touch. Hodge immediately body-slammed MacKintrush to the floor, knocking him out. Assuming that MacKintrust was a nonviolent, nonthreatening misdemeanant who pulled his arm away from the officer, *Karels* put Hodge on notice that his body slam was excessive force.")

Kuessner v. Wooten, 987 F.3d 752, 756-58 (8th Cir. 2021) ("[D]isparate cases did not give Wooten fair warning that arresting Kuessner based on bloodshot eyes, a drinking admission, and her refusal to take a breath test was unconstitutional. . . .These cases provided no fair warning to Wooten that his conduct was unconstitutional. They did not clearly establish that he lacked arguable probable cause to believe Kuessner had been driving based on the available facts—arriving alone, at the remote station, early in the morning, keys in hand, to pick up Wood. The district court properly granted summary judgment to Wooten.")

Quraishi v. St. Charles County, Missouri, 986 F.3d 831, 838-39 (8th Cir. 2021) ("Anderson insists that the law was not clearly established at the time of his alleged misconduct. 'A citizen's right to exercise First Amendment freedoms without facing retaliation from government officials is clearly established.'. . .True, the Eighth Circuit has not considered a case 'directly on point' with the present facts—where reporters are arrested while peacefully filming a protest. . . An exact match, however, is not required if the constitutional issue is 'beyond debate.'. .Reporting is a First Amendment activity. . . . Based on this robust consensus of cases of persuasive authority, it is clearly established that using an arrest (that lacks arguable probable cause) to interfere with First Amendment activity is a constitutional violation. . . A reasonable officer would have understood that deploying a tear-gas canister at law-abiding reporters is impermissible. . . This court affirms the denial of qualified immunity on the First Amendment claim.")

Quraishi v. St. Charles County, Missouri, 986 F.3d 831, 840 (8th Cir. 2021) ("Neither the district court nor the reporters cite authority that gave 'fair warning' to Anderson that deploying one canister of tear-gas was a seizure. . . The district court relied on inapposite law. True, use of pepper spray to arrest an unarmed, compliant suspect can be excessive force. . . *Peterson* is distinguishable, because it focused on the officer's behavior after the individual was already seized. This court did not consider whether the use of chemical agents *alone* is a seizure. . . Here, the issue is whether deploying tear gas is a seizure.The reporters cite Supreme Court cases to argue they were restrained because they could not stay in their chosen location. . . But these cases did not give fair warning. *Brendlin* held that, during traffic stops, passengers are seized. . . *Brower* held that setting up a roadblock that stops a fleeing suspect is a seizure. . . *Brendlin* and *Brower* are inapposite because both involve police action that terminated or restricted freedom of movement. . . Here, the reporters' freedom to move was not terminated or restricted. *See Johnson*, 926 F.3d at 506 (no seizure where plaintiff was not "ordered to stop and remain in place" and "was able to leave the scene"). They were dispersed. The reporters cite no 'precedent,' 'controlling authority' or 'robust consensus of cases of persuasive authority' to show it was clearly established that tear-gassing was a seizure. . . When Anderson deployed the tear-gas, it was not clearly established that

his acts were a seizure. The district court should have granted qualified immunity to Anderson on the Fourth Amendment claim.")

Robbins v. City of Des Moines, 984 F.3d 673, 678-79 (8th Cir. 2021) ("Robbins asserts the defendant officers reasonably should have known that the First Amendment protected his recording activity, verbal challenge of the police, and refusal to leave a public place. Assuming Robbins had a constitutionally protected right to record as he was doing in this case, that right is not absolute. . . Here, law enforcement officers observed Robbins recording both vehicles near the police station and officers and civilian employees entering and leaving the police station. The officers also possessed other significant information: they were aware of recent criminal activity involving cars parked in the area, and they were aware of a previous filming and stalking incident that escalated into the murder of two officers. Armed with this knowledge, Officer Youngblut approached Robbins and asked him what he was doing. Robbins was non-responsive, evasive, and confrontational. Officer Youngblut reasonably found Robbins's behavior suspicious. Robbins' behavior that went beyond any constitutionally protected recording activity when combined with the officers' knowledge about vehicles being stolen and vandalized in the area and the previous filming that led to officers being murdered could cause an objectively reasonable person in the officers' position to suspect Robbins was up to more than simply recording the police. Under these circumstances, we can neither say that the officers' conduct was objectively unreasonable under clearly established law, nor in violation of the First Amendment. Robbins's remaining arguments are too generalized to show a violation of a clearly established right. . . While the First Amendment 'protects a significant amount of verbal criticism and challenge directed at police officers,'. . . Robbins cannot rely on broad general allegations to show a deprivation of a clearly established right[.] . . The defendant officers are entitled to qualified immunity on the Count I claims.")

Garcia v. City of New Hope, 984 F.3d 655, 672-73 (8th Cir. 2021) (Shepherd, J., concurring in part and dissenting in part) ("I join the majority's opinion in all respects except its conclusion that Officer Baker is not entitled to qualified immunity on Garcia's First Amendment retaliation claim. Because I conclude that Garcia has not shown a violation of a clearly established constitutional right, I would affirm the district court's grant of qualified immunity on this claim. . . . [E]ven if Garcia has shown the violation of a constitutional right, it was not clearly established on February 1, 2016, that driving through a school zone during school hours and in the presence of a crossing guard, leaning his entire head and arm out the window of his vehicle to raise his middle finger, all following a confrontation about Garcia's rate of speed in the same location earlier that day, was protected by the First Amendment. The majority relies on cases are factually distinct[.] . . Although we held in *Thurairajah* that shouting 'f**k you!' at an officer was protected speech, the Court's recognition of the clearly established right to be free from First Amendment retaliation was stated at a high level of generality and did not involve the same kind of conduct here, where Garcia demonstrated escalating aggressive and offensive behavior. . . *Cohen* similarly lacked any evidence of escalating behavior; the individual in that case engaged only in the passive action of wearing a jacket bearing the words 'F**k the Draft.'. . And although the Sixth Circuit held in *Cruise-Gulyas* that a reasonable officer would know raising a middle finger is protected speech,

this case is of no precedential value to our Court, post-dates the incident here, and involves a single interaction between the individual and the officer, not two in one day, like Garcia. . . Finally, none of the cases include a scenario where the offensive speech or conduct was offered in a school zone during the school day. These cases simply do not describe the facts confronting Officer Baker. The Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . The dispositive inquiry for this court 'is "whether the violative nature of *particular* conduct is clearly established,"' taking into account 'the specific context of the case, not [considering the determination] as a broad general proposition.'. . When viewed with the proper level of specificity, accounting for the specific circumstances of this incident, I cannot conclude that it was clearly established that Garcia's conduct was protected by the First Amendment. . . . Given the facts of this case, I believe Garcia has failed to show a violation of a clearly established constitutional right. Accordingly, I conclude Officer Baker is entitled to qualified immunity on Garcia's First Amendment claim.")

Bell v. Neukirch, 979 F.3d 594, 608-09 (8th Cir. 2020) ("Taking the evidence in the light most favorable to Bell, it was clearly established at the time of Bell's warrantless arrest that no reasonable officer in the position of Officers Munyan and Neukirch could have believed that probable cause existed to arrest Bell based on the plainly exculpatory evidence available to them. Bell wore different shorts and socks than the suspect wore at the scene. His height varied by five inches from Munyan's real-time description of the suspect. Bell did not exhibit signs of exertion that would be expected of a suspect who ran a mile in seven minutes on a warm afternoon. Given the glaring differences, there was not arguable probable cause to believe that Bell was the fleeing suspect. Bell's right to be free from an arrest and detention under the circumstances was clearly established. It is an obvious case of insufficient probable cause. The officers assert that they acted reasonably because they reviewed the video recording of the suspect multiple times before confirming that Bell should be arrested. There is a factual dispute over how thoroughly they reviewed the video. Given Officer Munyan's averment that he could not tell whether the suspect's shorts included a broad white stripe on the side, a reasonable jury could conclude that Officer Munyan did not reasonably consider the video. But even assuming that the officers collectively watched the video eight times as they claim, it should have been obvious to any reasonable officer that Bell's shorts and socks were different from the suspect's shorts and socks at the scene. Qualified immunity requires more than subjective good faith; it requires objectively reasonable official conduct. . . Simply scanning a video does not make conduct objectively reasonable if an officer ignores or overlooks plainly exculpatory evidence. . . Qualified immunity does not protect the 'plainly incompetent[.]'. . An officer who repeatedly watched the video and failed to take note of the substantial discrepancies between Bell and the suspect demonstrates less diligence that what is expected of competent police officers about to limit someone's liberty by arrest.The officers fall back on their claim that it was reasonable to think that Bell shed an outer layer of shorts and socks, so they reasonably could have believed that there was probable cause on that assumption. The record includes only a general undisputed fact allegation that the officers had prior experience with suspects shedding an outer layer of clothing in undefined circumstances. As we have said, unless there is evidence that the officers had training

or experience about suspects discarding layered clothing in a situation reasonably comparable to this one, the inference that Bell dispensed with a second pair of shorts and socks is implausible. Without more, it was not objectively reasonable to believe that Bell may have attempted to change his appearance by discarding solid dark-colored shorts in favor of underlying black-and-white shorts, and by removing long gray socks to reveal short black socks, while retaining his single white t-shirt and walking along the side of a road towards a parked patrol car during the supposed getaway. Even the initial detaining officer found little suspicious about Bell's appearance or demeanor. . . .The breadth of the officers' position illustrates the obviousness of its shortcoming. They contend that it was reasonable to believe that Munyan's height estimate of 5'10" could be off by five inches. They argue that it was reasonable to believe that a fleeing suspect found a mile away after only seven minutes would breath normally and sweat little on an 86-degree sunny afternoon. They maintain that it was reasonable to mistake one pair of shoes for another. And they assert that it was reasonable to believe that the suspect could be found wearing any combination of t-shirt, shorts, and socks, because suspects are known to change their appearance by discarding layered clothing during foot pursuits. On that view, a reasonable officer could have believed that there was probable cause to arrest any black male aged approximately 17–18, with a dreadlock hair style. . . and slender build, who was found within a one-mile radius of the original scene, if the young man's height ranged from 5'5" to 6'3" and he was wearing a white t-shirt, shorts, and socks of any color or design. We cannot accept that such an implication represented an objectively reasonable interpretation of the law at the time of Bell's arrest.")

Bell v. Neukirch, 979 F.3d 594, 610-11 & n.3 (8th Cir. 2020) (Colloton, J., concurring) ("The dissent. . . would affirm the judgment without addressing whether a reasonable officer could have believed that there was probable cause to arrest. (And by declining to address the first order question whether the officers had probable cause to arrest, the dissent's approach would allow officers qualified immunity to do the same thing again in the future.) On this view, because there is no decision of the Supreme Court or this court holding that an officer 'acting under similar circumstances' violated the Fourth Amendment, the officers have qualified immunity, without an inquiry into whether their actions were objectively legally reasonable. The dissent declines to address whether the existing constitutional rules were sufficient to give fair and clear warning on these facts, because Bell's appellate briefs did not invoke the language of *Wesby* that this is 'an obvious case where a body of relevant case law is not needed.'. .That is not how qualified immunity analysis should work. When an arrestee argues on a given set of facts that no reasonable officer could have believed that there was probable cause to arrest, the argument brings up for our consideration whether the officer's seizure was objectively legally reasonable. That question includes whether the existing constitutional rules apply with obvious clarity to the specific conduct in question. Sometimes a plaintiff can prevail by arguing from general constitutional standards that a right is clearly established on a given set of facts. . . Bell argued that 'fourteen obvious evidentiary reasons should have negated probable cause,' asserted that the right in question was clearly established, maintained that it was not objectively reasonable on these facts for officers to conclude that there was probable cause, and employed a rhetorical question—'If all this was objectively reasonable, what would be unreasonable?'—to say, in effect, 'it's obvious.'

We should not parse Supreme Court opinions as though they were statutes, . . . nor should we read them as though they implemented a code-pleading regime for qualified immunity cases. We cannot avoid the issue of objective legal reasonableness in this case by requiring the arrestee to use certain magic words in his appellate briefs. I join the opinion of the court and concur in the conclusion that 'this is an obvious case of insufficient probable cause.'. . Given the obvious distinctions between the video-recorded suspect and the arrestee, and the implausibility of Officer Munyan's post-hoc assertion that the fleeing juvenile may have sought to disguise himself by disposing of layered shorts and socks while retaining his white t-shirt, any reasonable officer should have known that he lacked probable cause to arrest and detain Bell.[3] [fn. 3: In recent decisions, the Supreme Court has added the modifier 'rare' when discussing the 'obvious case' in which the unlawfulness of an officer's conduct is sufficiently clear to deny qualified immunity without existing precedent that addresses similar circumstances. One hopes that obvious constitutional violations are rare, but it is not evident why rarity would be part of the legal standard; frequency seems to be an empirical question that depends on the conduct of police officers. But accepting that it should be a rare Fourth Amendment case in which qualified immunity is denied without a prior decision involving similar circumstances, this one fits the bill: for me, it is likely the first case in seventeen years to meet the standard.]")

Bell v. Neukirch, 979 F.3d 594, 611-14 (8th Cir. 2020) (Stras, J., concurring in part and dissenting in part) ("Tyree Bell spent three weeks in custody due to a case of mistaken identity. The district court held that the arresting officers were entitled to qualified immunity. Because there is no clearly established law to support Bell's claims against them, I would affirm across the board. . . .This case is hardly the model of good police work, but the question for us is whether Munyan and his partner were on 'notice' that their conduct violated 'clearly established law.'. . .The bottom line is that neither Bell nor the court 'have identified a single precedent ... finding a Fourth Amendment violation under similar circumstances.' [citing *Wesby*] For this reason, I agree with the district court that Officer Munyan and his partner are entitled to qualified immunity.")

Goffin v. Ashcraft, 977 F.3d 687, 689-92 (8th Cir. 2020) ("An officer may constitutionally use deadly force when she reasonably believes a fleeing suspect poses a threat of serious harm to herself or others. But Goffin claims (and Officer Ashcraft disputes) that he was patted down by another officer just before he fled. The pat down removed nothing from Goffin and was later shown to have been unusually ineffective; the officer failed to discover that Goffin was carrying a loaded magazine and extra bullets. We conclude that Officer Ashcraft is entitled to qualified immunity on these facts because it was not clearly established at the time of the shooting that a pat down that removes nothing from a suspect eliminates an officer's probable cause that the suspect poses a threat of serious physical harm. . . . The case turns on whether the pat down changes our analysis. . . Goffin argues that the pat down creates an issue of material fact because, if it occurred, then Officer Ashcraft must have *known* he was unarmed, or at least that there is an issue of material fact as to whether she knew he was unarmed. But whether probable cause exists is a *legal* question, not a factual one. . . He must therefore provide a case clearly establishing that a pat down that recovered nothing. . . eliminated Officer Ashcraft's objectively reasonable belief that he was

armed and dangerous. Goffin fails to point to such a case. He relies on *Tennessee v. Garner*, but that case stands for a general proposition and cannot clearly establish the rule in most cases. . . . We . . . conclude that Officer Ashcraft is entitled to summary judgment because it is not clearly established that after observing a pat down that removes nothing from a suspect who an officer reasonably believed to be armed and dangerous, an officer cannot use lethal force against that suspect when he flees and moves as though he is reaching for a weapon. Nor do we think this is the 'rare obvious case' in which 'the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . The district court is affirmed.")

Goffin v. Ashcraft, 977 F.3d 687, 692-94 (8th Cir. 2020) (Smith, C.J., concurring) ("I concur in the court's determination that the unlawfulness of Officer Ashcraft's conduct was not *clearly established*. I write separately to express my view that Officer Ashcraft did, however, violate Goffiin's constitutional right to be free from excessive force. . . . In my view, probable cause to believe that Goffin was armed dissipated upon completion of this full body pat-down search that revealed no weapons. Some cases analyzing probable cause in the context of investigatory stops have so held. . . The dissipation of probable cause to believe Goffin possessed a firearm should have reduced the officers' reasonable concern that Goffin posed an imminent threat to them or to bystanders. Thus, construing the facts in the light most favorable to Goffin, Officer Ashcraft violated Goffin's constitutional right to be free from excessive force by shooting him after witnessing a full body pat-down search that revealed no weapons. Nonetheless, I agree with the court's determination that Officer Ashcraft is entitled to qualified immunity because Goffin has not identified 'a *case clearly establishing* that a pat down that recovered nothing eliminated Officer Ashcraft's objectively reasonable belief that he was armed and dangerous.'. . . In this case, the officer who shot Goffin was not the officer who conducted the pat-down search. A pat down is not an invasive search and oversights can occur. The possibility of an oversight by the pat-down officer means an observing officer may still need to exercise independent judgment as to a potential threat. Here, circumstances abruptly changed and a compliant arrestee bolted from custody with unknown motives and capabilities. Pat-down searches are conducted precisely to diminish the officers' concern that an arrestee is armed, but those searches are not foolproof. The absence of authority clearly establishing that Officer Ashcraft's actions, on these facts, was constitutionally prohibited supports the district court's grant of qualified immunity under existing precedent.")

Goffin v. Ashcraft, 977 F.3d 687, 694-97 (8th Cir. 2020) (Kelly, J., dissenting) ("Officer Ashcraft never saw Goffin with a weapon, and she watched a fellow officer conduct a pat down that revealed no weapons. Yet Ashcraft shot Goffin in the back, in 'a split-second,' after he took 'no more than two steps.' Because I believe that the relevant law is clearly established—a question for the court to decide—and that a reasonable jury could find that Ashcraft's use of deadly force was objectively unreasonable, I respectfully dissent. . . . [T]he law is clearly established even if no prior case contained the exact factual circumstance here: a pat down before the suspect fled. The Supreme 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.'. . Officials can be on notice that

their conduct violates established law 'even in novel factual circumstances.'. . . The court relies on the precise scenario of a suspect fleeing after a pat down that revealed no weapons to conclude that Ashcraft violated no clearly established law. But the pat down is a novel fact that does not render inapplicable the clearly established law that officers 'may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . And here, although the novel factual circumstance of a pat down may impact whether a reasonable jury finds Ashcraft's actions objectively reasonable, it does not render inapplicable the clearly established law that she cannot use deadly force unless a suspect poses a significant threat of death or serious physical injury to her or others. I would reverse the grant of qualified immunity.")

Thurmond v. Andrews, 972 F.3d 1007, 1012-13 (8th Cir. 2020) ("While prisoners certainly have an Eighth Amendment right to sanitary prison conditions including 'reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time,' the articulation of this broad right does not answer whether the presence of non-toxic environmental allergens are necessarily violative of this right. . . A more specific and particularized inquiry is necessary in order to assess clearly established law in the context of an assertion of qualified immunity. . . The only thing clearly established in this case is that the definition of the asserted constitutional right embraced by the district court — a right to sanitary prison conditions — was impermissibly broad. . . And the finding that such a right was clearly established based on this general definition was therefore in error. Because the right at issue has not been properly defined and there are genuine disputes of material fact at play, it is not possible for us to determine whether the individual officers committed a constitutional violation in the Faulkner County Detention Center due to the presence of Cladosporium. To do so would require us to delve into genuinely disputed facts beyond our jurisdiction. This is not to say that there can never be a case in which the presence of mold or another environmental allergen may give rise to unsanitary prison conditions that violate inmates' Eighth Amendment rights. Nor does it mean that truly dangerous environmental conditions could not reach such a high level where the violation was obvious. . . But that is not the case here. Despite our limited ability to address whether a constiutitonal violation has occurred, we can still reach the second prong of the qualified immunity analysis. A grant of qualified immunity is inappropriate, absent an obvious violation, if the right was not clearly established. Here there is no controlling case and no robust consensus of persuasive authority able to place the question beyond debate. Neither our research nor the parties' briefing uncovered any controlling Eighth Circuit cases addressing prison conditions and issues related to mold or other allergens more broadly. Instead, tangential and sparse references to mold or allergens in our precedent arise specifically in the adequate medical care context, and not the conditions of confinement context. . . As such, a reasonable officer could glean little to no guidance from Eighth Circuit precedent about how to address the presence of a common mold in the jail, especially at the levels alleged. Likewise, there is a dearth of persuasive authority from outside the Eighth Circuit. . . . In short, we have not identified either 'controlling authority' or a 'robust consensus of persuasive authority' clearly establishing a right to be free from Cladosporium, mold, or other allergens in the prison context at the levels alleged here. The right in question, even if properly

defined, was not clearly established.")

Kohorst v. Smith, 968 F.3d 871, 878-79 (8th Cir. 2020) ("While Officer Smith's takedowns and repeated tasings of Kohorst 'likely reside[ ] on the hazy border between excessive and acceptable force, we cannot conclude that only a plainly incompetent officer would have believed the force used ...was constitutionally reasonable.'. . Officer Smith's actions, while a close call, did not violate a clearly established right and the district court did not err in granting qualified immunity. . . . Unlike *Blazek*, Kohorst was uncooperative, arguably resisting, and posed a potential threat as he had already attempted to escape his handcuffs. While we view the evidence in the light most favorable to Kohorst, no reasonable jury could review the video and conclude that Sergeant Stoler's action was gratuitous or unnecessarily violent–especially where Kohorst has no recollection of the event to testify to. Kohorst has also offered no evidence to refute Sergeant Stoler's explanation that he intended to place Kohorst in a way that reduced injury risk. . . . Sergeant Stoler's movement of Kohorst, an at least passively resisting suspect, was not gratuitous or unnecessarily violent. Even if we were to find that Sergeant Stoler's actions violated a constitutional right, it was not clearly established at the time that such force could not be used against a resisting, non-compliant suspect. The district court did not err in granting qualified immunity.")

Kohorst v. Smith, 968 F.3d 871, 879-83 (8th Cir. 2020) (Kelly, J., concurring in part and dissenting in part) ("I do not agree that Officer Smith is entitled to qualified immunity on Kohorst's excessive-force claim stemming from his initial takedown. First, there is a genuine dispute over whether Smith knew Kohorst was a suspect in a fight when he threw Kohorst to the ground face-first. . . . On summary judgment, we must view the evidence in the light most favorable to Kohorst, and it is not appropriate for this court to remove the task of assessing witness credibility from the hands of the jury. . . Therefore, Kohorst must be treated as a nonviolent misdemeanant, at most, when evaluating whether Smith used excessive force. . . . Second, viewing the evidence in the light most favorable to Kohorst, he did not fail to comply with commands to sit on the front of the squad car and take his hands out of his pockets. . . . Here, as in *Rohrbough*, the police officer initiated the physical confrontation. While Kohorst held his wallet behind his back, Smith forcefully grabbed Kohorst's right arm. Smith yelled 'Don't fight with me,' as he pushed Kohorst against the squad car and then used an arm-bar maneuver to force Kohorst face-first to the ground. All of this happened within a span of 17 seconds. A reasonable jury could conclude that Kohorst's putting his arm behind his back was no more than '*de minimis* or inconsequential' resistance. . . Indeed, if Rohrbough's pushing an officer did not justify Officer Hall's use of force, then Kohorst's moving his arm away did not justify Smith's taking Kohorst to the ground. Because a jury could reasonably conclude that Smith violated Kohorst's clearly established right to be free from excessive force during the initial takedown, Smith is not entitled to qualified immunity on this claim. . . I also do not agree that Sergeant Stoler is entitled to qualified immunity on Kohorst's separate excessive-force claim against him. . . . Viewing the facts in the light most favorable to Kohorst, Stoler's use of force was gratuitous and excessive under the circumstances. It is clearly established 'that when a person is subdued and restrained with handcuffs, a "gratuitous and completely unnecessary act

of violence" is unreasonable and violates the Fourth Amendment.'. . A reasonable jury could conclude that Stoler violated this clearly established right. Before Stoler pulled Kohorst out of the car and threw him onto the hard pavement, Kohorst was subdued, handcuffed, and seated. He was talking somewhat incoherently but calmly to the multiple officers who surrounded him. No reasonable officer would perceive Kohorst as a threat to officer safety. Indeed, one officer can be heard chuckling at Kohorst's awkward position. And although Kohorst twisted his hands while Stoler attempted to remove the handcuffs, this resistance was '*de minimis* or inconsequential.'. . The officers reasonably may have used *some* degree of force to reapply Kohorst's handcuffs, and we have said that 'officers are not required to treat detainees as gently as possible.'. . But Kohorst has offered evidence to show that Stoler's actions were 'gratuitous and completely unnecessary' under the circumstances. . . With multiple officers surrounding a subdued Kohorst, '[t]here were other means, short of the force employed,' to reapply Kohorst's handcuffs. . . As a result, Stoler is not entitled to qualified immunity on this claim. . .I respectfully dissent as to these two claims. I otherwise concur.")

Ivey v. Audrain County, Missouri, 968 F.3d 845, 849 (8th Cir. 2020) ("We have the discretion to decide either question first. . . and we think this case can be resolved on the second question, namely, whether the officers violated clearly established law. To prevail, Ivey's father has the burden to show that legal authorities establish beyond debate that a constitutional violation has occurred, so that, in responding to Ivey, the officers were plainly incompetent or knowingly violated the law. . .The Supreme Court has cautioned courts not to define clearly established law at too high a level of generality. . . We have recognized this principle in cases involving deliberate indifference to a pretrial detainee's objectively serious medical needs. . . The district court here defined the right at issue quite broadly when it said that 'it is unlawful to delay medical treatment for a detainee exhibiting obvious signs of medical distress.' Assuming the court's statement is true as a general matter, its application to the situation that the officers faced here is unclear because they encountered a detainee who declined medical assistance, and Ivey's father has not shown that the law clearly establishes what officers must do in that situation.")

Ivey v. Audrain County, Missouri, 968 F.3d 845, 851-53 (8th Cir. 2020) (Grasz, J., concurring in part and dissenting in part) ("The court today concludes the defendant jail employees are entitled to qualified immunity because it believes Ivey's father failed to establish a violation of clearly established law related to his son's death while in custody. But even applying our rigorous 'clearly-established' jurisprudence, I believe Ivey's claims should survive summary judgment. Here's why. 'Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."'. . 'In making that determination, a court must view the evidence "in the light most favorable to the opposing party."'. . Such an approach is required 'even when ... a court decides only the clearly-established prong of the [qualified immunity] standard.'. . The Supreme Court has highlighted 'the importance of drawing inferences in favor of the nonmovant' when deciding whether the law was clearly established. . . Under such an approach, my view of this case differs from the court in a few key ways — ways that impact whether the inaction of the jail officials violated clearly established law.

. . .Viewed in a light most favorable to Ivey, the facts demonstrate jail employees ignored medical instructions regarding Ivey's needed asthma medication, failed to report Ivey's first observed seizure to health officials, and either defied medical instruction and jail policy requiring Ivey's observation or observed a second seizure and then failed to respond for nearly an hour. I believe a reasonable jail employee in July of 2016 would know such conduct was constitutionally deficient.")

Dillard v. O'Kelley, 961 F.3d 1048, 1053-55 (8th Cir. 2020) (en banc) ("Often, controlling precedent establishes that an alleged constitutional right exists, but its parameters are 'inapplicable or too remote,' or their application to the facts is unclear. . . In other cases, the right's parameters are unclear because there is no controlling case, and courts in other jurisdictions may be 'sharply divided' on the issue. . . Here, by contrast, a Supreme Court decision raises the threshold question whether the right Defendants are alleged to have violated even exists. In *Whalen v. Roe*, the Supreme Court stated that its prior cases 'sometimes characterized as protecting "privacy" have in fact involved ... the individual interest in avoiding disclosure of personal matters.'. . The Court then upheld a New York statute requiring the State Department of Health to collect records identifying persons who acquired certain prescription drugs, concluding that 'this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.'. . . Despite the Court's inconclusive acknowledgment of a constitutional right it held not violated, a majority of the courts of appeals interpreted *Whalen* and *Nixon* as recognizing a constitutional right to the privacy of medical, sexual, financial, and other categories of highly personal information, grounded in the Fourteenth Amendment right to substantive due process. . . . More than thirty years after *Whalen* and *Nixon*, the Supreme Court returned to the issue in *NASA v. Nelson*, 562 U.S. 134, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011). It again rejected a constitutional privacy challenge, this time to mandatory background checks for contractors at NASA's Jet Propulsion Laboratory. . . The Court declined to provide a 'definitive answer' to whether there is a constitutional right to informational privacy, because the government as petitioner had not presented the issue for decision and it was not briefed and argued. . . . Although *Nelson* left the issue unresolved, it confirmed that our court and other circuits erred in reading inconclusive statements in *Whalen* and *Nixon* as Supreme Court recognition of a substantive due process right to informational privacy. In this case, at oral argument before our *en banc* court, Defendants urged us to hold that the alleged right does not exist. But they did not raise this issue in the district court, before the panel, or in their petition for rehearing *en banc*. Nor did Plaintiffs address the issue prior to responding at oral argument. In similar circumstances, seven Supreme Court Justices declined to decide this constitutional issue in *Nelson*, observing that, 'Particularly in cases like this one, where we have only the scarce and open-ended guideposts of substantive due process to show us the way, the Court has repeatedly recognized the benefits of proceeding with caution.'. . The Court in *Nelson* opted to 'assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.'. . However, even if the right is assumed to exist, in reviewing the denial of qualified immunity, Nelson raises an essential question: whether a right the Supreme Court has only assumed may exist, and this court has never held to be violated, can be a clearly established constitutional right. . . . The disclosures in this case occurred years after

the decision in *Nelson*, and we have not revisited the issue. The resulting legal uncertainty surely means the alleged constitutional right to informational privacy is not 'beyond debate' in the Eighth Circuit. . . . Under Reichle, therefore, the uncertain status of the right to informational privacy means that Defendants are entitled to qualified immunity. If a right does not clearly exist, it cannot be clearly established.")

Dillard v. O'Kelley, 961 F.3d 1048, 1055-56 (8th Cir. 2020) (en banc) (Colloton, J., concurring) ("I join the opinion of the court and submit these observations in response to the separate opinions that follow. Both opinions take the view that court decisions *rejecting* a plaintiff's claim of constitutional right can clearly establish a constitutional right for the benefit of a future plaintiff. The court properly declines to adopt that reasoning. . . . If there is no decision that a constitutional right exists, then the right is not clearly established, and officials do not have fair notice about it. In the context of qualified immunity, therefore, 'clearly established law comes from holdings, not dicta,'. . with the likely exception of decisions that declare a constitutional violation in a concrete case before granting qualified immunity. . . . [I]n discerning a clearly established substantive due process right to informational privacy, the panel decision in this case mistakenly attributed the force of binding law to dicta in *Peffer*, *Eagle*, and *Cooksey*. . . Whether some other disclosure of information that amounted to a 'shocking degradation' or 'egregious humiliation' would have implicated the concept of substantive due process was unnecessary to the decision or result in those cases. It was sufficient for this court in *Peffer, Eagle*, and *Cooksey* to assume without deciding that a disclosure of matters more personal would violate the Constitution, just as it was sufficient for the Supreme Court to do so in *Whalen* . . . and. . . *Nelson*[.]. . Such an assumption does not clearly establish a constitutional right. . .Decisions of four other circuits denying qualified immunity in this context relied on precedent of that circuit deciding in an actual case that a constitutional right to informational privacy existed and was sufficiently pleaded or proved.")

Dillard v. O'Kelley, 961 F.3d 1048, 1057-59 (8th Cir. 2020) (en banc) (Grasz, J., with whom Smith, C.J., joins, concurring in part and concurring in the result) ("The constitutional right to informational privacy in the Eighth Circuit is dead. . . Some believe it never lived. In any event, in this age of digital information, where the government may possess massive amounts of personal data, the protection of twenty-two million people from wrongful disclosure of intimately private information by government officials now lies squarely in the hands of the state legislatures in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. . . Perhaps that is where it belonged from the start, given that the federal constitution is silent on the matter and the United States Supreme Court has yet to conclude that a constitutional right to informational privacy exits. . . . While the demise of informational privacy as a constitutional right in this circuit may be appropriate, we should at least recognize this was not an academic exercise to the plaintiffs. The court has concluded that the Arkansas public officials here, who are alleged to have callously revealed intimate and humiliating personal information of young sexual assault victims to a tabloid under highly suspicious circumstances, are exempt from liability because of qualified immunity. . . The court does so, in part, based on the proposition that a constitutional right not definitively recognized by the Supreme Court cannot be 'clearly established' for purposes

of qualified immunity analysis. . . While this reasoning may have facial appeal, it is simply not true that a right established in circuit precedent cannot be 'clearly established' for purposes of qualified immunity even in the absence of definitive Supreme Court precedent. Indeed, many other circuit courts would likely be quite surprised by this holding. . . Regardless, today's decision means future litigants have no recourse in this circuit under 42 U.S.C. § 1983 for informational privacy violations. I remain of the view that the panel below was bound to follow this court's opinions in *Cooksey v. Boyer*, 289 F.3d 513, 515–16 (8th Cir. 2002), *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996), and *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993), in which we recognized and narrowly defined the right to informational privacy. . . However, I agree with the en banc court that the foundation of those cases is gone. And today's decision has effectively negated them. . . With no right to informational privacy recognized in this circuit, the appellants cannot, as a matter of law, prevail against the assertion of qualified immunity. They must instead look to state law for relief.")

Dillard v. O'Kelley, 961 F.3d 1048, 1059-62 (8th Cir. 2020) (Kelly, J., concurring in part and dissenting in part) ("In 2006, Plaintiffs provided private and intimate details regarding their childhood sexual abuse to government officials under a promise of confidentiality. More than eight years later, government officials broke that promise and disclosed this sensitive information to a tabloid without Plaintiffs' consent. Because I believe this violated Plaintiffs' clearly established right to privacy, I respectfully dissent. The issue in this appeal is whether a reasonable government official in the Eighth Circuit would have understood that disclosing to a tabloid private information regarding childhood sexual abuse would violate the constitutional right to privacy. . . . Following other circuits, we have held that to violate an individual's constitutional right of privacy 'the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information.'. .Until this case, we had not been presented with a factual scenario that satisfied this exacting standard. . . But in my view, we had provided fair notice to government officials in the Eighth Circuit that the public disclosure of 'highly personal matters representing the most intimate aspects of human affairs,' that is 'either a shocking degradation or an egregious humiliation ..., or a flagrant breach of a pledge of confidentiality,' violates the constitutional right to privacy. . . . The question then becomes whether our precedent was undermined, such that the rule in this circuit would not have been clear to a reasonable official, by the Supreme Court's decision in *Nelson*. In that case, the Court 'assume[d], without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.'. . And it explained that, contrary to the interpretation adopted by most circuits, this was 'the same approach ... the Court took more than three decades ago in *Whalen* and *Nixon*.'. . In the court's view, 'Nelson raises an essential question: whether a right the Supreme Court has only assumed may exist, and this court has never held to be violated, can be a clearly established constitutional right.'. . Relying on *Reichle v. Howards*, the court answers this question in the negative, reasoning that 'the uncertain status of the right to informational privacy means that Defendants are entitled to qualified immunity.'. . I disagree. In *Reichle*, the Supreme Court decided that it was not clearly established in the Tenth Circuit that a retaliatory arrest could violate the First Amendment even if

the arrest was supported by probable case. . . The Court reasoned that, although there was Tenth Circuit caselaw to this effect, a reasonable officer could have believed that caselaw had been abrogated by the Court's subsequent decision in *Hartman v. Moore*, . . . which reached the opposite conclusion regarding retaliatory prosecutions. . . The Court explained that most circuits had treated retaliatory arrest and prosecution claims similarly before *Hartman*, that it had granted certiorari in *Hartman* to resolve a circuit split pertaining to both retaliatory arrests and prosecutions, that much of the rationale in *Hartman* applied to both retaliatory arrests and prosecutions, and that several circuits had decided that *Hartman*'s no-probable-cause requirement extended to retaliatory arrests. . . I do not agree that *Nelson*'s effect on our right-to-privacy caselaw is similar to *Hartman*'s effect on the Tenth Circuit's retaliatory-arrest caselaw. Unlike *Hartman*, which was intended to resolve a circuit split and abrogate contrary circuit authority, *Nelson* purported to leave the state of the law intact. . . The Court expressly acknowledged that, after *Whalen* and *Nixon*, different circuits had adopted different interpretations of when the disclosure of private information by government officials would violate the right to privacy, and the Court declined to decide which circuit's caselaw was correct. . . . *Nelson* did clarify that our prior caselaw was not required by *Whalen* and *Nixon.* A reasonable government official could have wondered whether, in light of that clarification, we would revisit our past decisions and change our right-to-privacy jurisprudence. But because we had not done so when the government officials made the disclosures at issue here, they could not have reasonably concluded that the law in the Eighth Circuit had been changed. And we have not been presented with an opportunity to revisit our pre-*Nelson* caselaw in this appeal. . . For these reasons, I believe the panel's opinion was correct, and I would reinstate it. To the extent the court does otherwise, I respectfully dissent.")

Chestnut v. Wallace, 947 F.3d 1085, 1090-92 (8th Cir. 2020) ("Taking the facts in Chestnut's favor, we think *Walker* establishes that Wallace violated Chestnut's clearly established right to watch police-citizen interactions at a distance and without interfering. The dissent says our definition of the right is defined too abstractly, at too high a level of generality. We respectfully disagree. We think we have correctly characterized the principle acted on in *Walker*, and thus the right in question, and we conclude that Chestnut has carried his burden to show that *Walker* clearly establishes such a right. Wallace tries to distinguish *Walker* on several grounds, but we find none of them persuasive. He maintains that *Walker* involved an arrest, whereas Chestnut was only detained. But the same facts that led us to conclude that it was clearly unlawful to arrest Walker lead us to conclude it was likewise clearly unlawful for Wallace to detain Chestnut; in both cases, no reasonable officer could conclude that a citizen's passive observation of a police-citizen interaction from a distance was criminal. We think it is legally irrelevant that Chestnut did not undergo similar post-seizure experiences as Walker, such as being placed in a hot police car, taken to the police station, or charged with a crime: This case is about the facts that existed when Chestnut was seized. Nor do we place any weight on the fact that Walker provided identification when Chestnut did not, for the reasons already stated. In short, we think *Walker* puts this constitutional question beyond debate, . . . and we can't see how applying *Walker* means that we are requiring police officers 'to parse fine distinctions between statutory and constitutional law in split-second decisions,' as the dissent maintains. Respectfully, it is the distinctions that Wallace

invites us to draw between our case and *Walker* that are too fine and irrelevant. . . . Other legal authorities fully support our holding that the right here was clearly established. Every circuit court to have considered the question has held that a person has the right to record police activity in public. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017). Four circuits had so decided by the time of the events in question here. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). This robust consensus of cases of persuasive authority suggests that, if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary prerequisite to recording. Our circuit in particular has been quite forthright in upholding the right of citizens to engage with officers while they perform their duties. . . .The dissent explicitly agrees with our characterization of these cases, but it argues 'that factual distinctions matter greatly in delimiting the right.' We agree. But it supports its argument with a case, *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), that is distinguishable. In that case, a man recorded the exterior of a police station. The facts do not indicate that he recorded any police-citizen interactions or any other public police activity. The case therefore presents a much different question from ours, though we point out that that court, like every other circuit court that has considered the question, held that there was a constitutional right to record police activity. . . . We observe in closing that the fact-finder at trial may determine that Chestnut was indeed lurking in the woods, or at least otherwise disagree with Chestnut's telling of the night's events, in which case Wallace's detaining, handcuffing, and frisking Chestnut may have been justified. But at this stage, we must view the facts in Chestnut's favor. And though we agree with the dissent that 'qualified immunity is important to society as a whole,' so is the people's ability to monitor police activities to ensure that their duties are carried out responsibly.")

Chestnut v. Wallace, 947 F.3d 1085, 1095-96, 1099 (8th Cir. 2020) (Gruender, J., dissenting) ("The court does not explain why the distinctions between this case and *Walker* fail to sufficiently distinguish it. Instead, it says it is unconvinced by Wallace's attempt to do so. . . Yet Wallace does not bear the burden to show that these cases are too distinct to provide obvious guidance; Chestnut has the burden to prove they are sufficiently similar. . . We cannot—and should not—shift that burden. In light of the dissimilarities in these cases, I do not believe that *Walker* put 'beyond debate' what the law required in the circumstances Wallace faced. . . In an effort to support its finding that Wallace violated clearly established law, the court turns away from *Walker* to an argument Chestnut does not advance: that a consensus of cases from other circuits establishing that the Constitution protects those who video record police activity as long as they do not interfere with police duties also includes the right to merely observe police conduct. . . I agree with the court's characterization of those cases. But—again—the fact that a certain right exists does not mean it is without limits, nor does it necessarily indicate that it is obvious how the right applies to a certain set of facts. *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), a recent Fifth Circuit case considering the right to record the police, illustrates that factual distinctions matter greatly in delimiting the right. There, officers observed an individual videotaping the Fort Worth Police Station from a sidewalk across the street from the station. . . Officers approached,

questioned, and detained the on-looker, eventually handcuffing him and placing him in the back of a patrol car. . . The court found that, because of the unusual nature of where and what he was recording, '[a]n objectively reasonable person in [the officers'] position could have suspected that Turner was casing the station for an attack, *stalking an officer*, or otherwise preparing for criminal activity, and thus could have found Turner's filming of the "routine activities" of the station sufficiently suspicious to warrant questioning and a brief detention.'. . .Likewise, under the circumstances presented here, a reasonable officer could believe it would not violate clearly established law to conduct an investigative stop. . . . In recent years, the Supreme Court has issued several decisions reversing denials of qualified immunity by the courts of appeals. The Court found those reversals 'necessary 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.'. . We should hew closely to the wisdom of this instruction and to the counsel of our own precedent which emphasizes that officers in the line of duty are not 'participating in a law school seminar.'. . It is thus worth emphasizing again that police officers are not—and should not be—expected to parse fine distinctions between statutory and constitutional law in split-second decisions. . . Because there is no authority that would have given Officer Wallace notice that it was a Fourth Amendment violation to conduct an investigative stop in the manner he did under the circumstances presented in this case, I respectfully dissent.")

NINTH CIRCUIT

Larios v. Lunardi, No. 20-15764, 2021 WL 1997941, at *1 (9th Cir. May 19, 2021) (not published) ("The district court properly concluded that the law was not clearly established at the time of the events in question that a search or seizure of a personal cell phone pursuant to the workplace exception and workplace policy was unconstitutional. In short, applicable 'existing precedent' had not 'placed the statutory or constitutional question beyond debate,'. . . and that any possible unlawfulness in defendant officials' actions was not 'apparent.'. . Accordingly, we affirm the district court's grant of qualified immunity to the defendants. We need not, and do not, address whether the search and seizure in this case was constitutional.")

Larios v. Lunardi, No. 20-15764, 2021 WL 1997941, at *2 (9th Cir. May 19, 2021) (Hunsaker, J., concurring) (not published) ("I question whether the workplace exception to the Fourth Amendment's warrant requirement applies to the search of an employee's personal cellphone where the employee has not relinquished his privacy interests in the cellphone by agreeing to give the employer access or by some other means. . . . Here, the relevant workplace policy did not give Larios's employer the right to access or search his cellphone. The policy provided only that work product is the employer's property even if located on a personal electronic device and must be turned over to the employer which can be done without subjecting an employee's personal electronic device, including a cellphone, to search by the employer. I agree, however, that the application of the workplace exception to an employee's personal cellphone is not clearly established. . . . I also agree that even if the workplace exception applies—the sole legal justification Defendants assert for their warrantless downloading of all the data on Larios's

cellphone—and the scope of Defendants' download violated this exception, such violation was not clearly established for purposes of the qualified immunity analysis. But the outcome of this case would be different for me if this were a *scope of search* issue because the law is clear that an employer cannot rely on the workplace exception to conduct a search that does not correlate to the legitimate workplace objective of the employer's search. . . That is, if an employer has a justifiable basis to search an employee's personal cellphone for communications with one specific person, that does not give the employer the right to search everything else on the employee's cellphone while it is at it. But downloading all the data on Larios's cellphone is not a *search* issue in this case—it is a *seizure* issue. Larios's argument is that Defendants violated his Fourth Amendment rights by downloading the full contents of his cellphone, which the record shows Defendants then used to conduct limited searches tailored to the specific objective of their investigation—whether Larios was having improper communications with a confidential informant. Existing precedent does not clearly establish that a download, or *seizure*, of this breadth of data is unconstitutional in this context.")

Tobias v. Arteaga, 996 F.3d 571, 580-83, 585-86 (9th Cir. 2021) ("The district court correctly denied qualified immunity on Tobias's claim that the LAPD Detectives violated his Fifth Amendment right to counsel by continuing his custodial interrogation after he requested an attorney and then using the resulting confession against him in his criminal case. . . .Because it was clearly established at the time of Tobias's interrogation that the statement "Could I have an attorney? Because that's not me," was an unambiguous request for an attorney, . . . we affirm the district court's denial of qualified immunity on this claim. . . . [I]n *Harrison* we set down a bright-line rule: 'there are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor.'. . Under this clearly established law, Detective Arteaga violated Tobias's Fifth Amendment rights with his repeated assertions that the court would consider Tobias a 'cold blooded killer' and 'might throw the book at [him]' if he did not confess. . . . Unlike Arteaga, who made the threats against Tobias, Detectives Cortina and Pere did not directly violate *Harrison* during Tobias's interrogation because they did not make threats of harsher punishment based on lack of cooperation. However, to the extent they were aware of the violation as it happened, they may have had a duty to intercede to stop the constitutional violation and would not be entitled to qualified immunity. By 2013, we had clearly established that 'police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.'. . .This extended, overbearing interrogation of a minor, who was isolated from family and his requested attorney, comes close to the level of 'psychological torture' that we have held is not tolerated by the Fourteenth Amendment. . . However, Tobias's interrogation falls short of the behavior in *Cooper* and *Crowe* in one main respect: unlike those cases, Tobias's mistreatment lasted under two hours. . .We do not hold that 'hours and hours,'. . . of coercive questioning are *required* for an interrogation to 'shock[ ] the conscience[.]' . . But because the prior cases in which we found 'psychological torture' did involve hours of questioning, and because the officers' behavior towards Tobias was otherwise similar to—but not obviously worse than—the behavior in those cases, it was not clearly established that the offending tactics 'shocked

the conscience' when used over a shorter period of time. Because controlling precedent does not establish 'beyond debate' that the officers' conduct violated the Fourteenth Amendment, they are entitled to qualified immunity on this claim.")

Tobias v. Arteaga, 996 F.3d 571, 590-91, 593-96 (9th Cir. 2021) (Collins, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Although Tobias was only 13 years old and his unequivocal request for counsel was improperly brushed aside, his early-evening interrogation lasted only approximately 90 minutes, involved no physical threats or abuse, and otherwise relied on interrogation techniques that cannot be said, either singly or in the combination presented here, to have violated then-clearly-established law (*e.g.*, bluffing about the strength of the evidence the officers had, arguing that the courts would go easier on the suspect if he did not lie and instead told the truth about what he had done, and shaming the suspect for the effect a prosecution would have on his family). . . Despite the violation of Tobias's right to counsel, in my view Tobias has failed to show that, even considered as a whole, the detectives' conduct in the interrogation constituted impermissible coercion under clearly established law as it stood in 2012. . . . [T]he majority's argument today for *extending* the principles of *Harrison* to the different context presented here . . . is of no value in determining what was clearly established law in 2012. Because it would not have been clear to every reasonable officer in 2012 that a suspect could not be warned that continuing to lie during an interrogation could lead to harsher consequences, Detective Arteaga did not violate clearly established law and is entitled to qualified immunity. . . Second, in addition to extending the *Harrison* rule to a context in which it had not been applied pre-2012, the majority radically transforms that rule in a further respect that is unsupported by precedent. According to the majority, a violation of its broader *Harrison* rule is now *per se* 'unconstitutionally coercive.'. . This principle was *not* clearly established law in 2012; indeed, it was not the law at all until the majority announced this novel rule in its decision today. *Harrison* itself nowhere adopts the majority's per se rule requiring an automatic finding of involuntariness. On the contrary, it reiterated that the voluntariness inquiry turns on 'the totality of the circumstances' and requires a court to consider whether '"the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne."'. . The majority points to *Harrison*'s statement that ' "there are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor."'. . But the majority ignores the very next sentence of *Harrison*, which confirms that the court there was not creating a per se rule about *voluntariness*: '"The admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."'. . *Harrison* thus may have established a per se *prophylactic* rule about how officers should behave in an interrogation, . . . but *Harrison* made clear that voluntariness still had to be considered in light of all of the circumstances, and we proceeded to do just that in evaluating the voluntariness of Harrison's confession. . . The majority's clear misreading of *Harrison* as establishing an automatic rule of *involuntariness* was not the law in this circuit until the majority announced it today, and it

certainly was not clearly established law in 2012. . . I agree with the majority's decision to reverse the district court's denial of qualified immunity with respect to Tobias's substantive due process claim under the Fourteenth Amendment, but I reach that conclusion for somewhat different reasons than the majority. . . .Because controlling precedent does not establish 'beyond debate' that the detectives' conduct here shocks the conscience, . . . the detectives are entitled to qualified immunity on this claim. I therefore concur in the majority's judgment reversing the denial of summary judgment as to this claim.")

Benavidez v. County of San Diego, 993 F.3d 1134, 1151-53 (9th Cir. 2021) ("Because the district court examined whether there was a clearly established constitutional right at the time of Lisk and Jemison's actions through the lens of unconstitutional medical examinations on children in protective custody, it incorrectly concluded that Lisk and Jemison are entitled to qualified immunity. Lisk and Jemison are not entitled to qualified immunity for unconstitutional judicial deception. . . . Our precedent establishes the right to be free from judicial deception in child custody proceedings. [collecting cases] Prior cases establishing this right in the context of protective custody were decided well before the date of the alleged conduct in March 2016. Therefore, Lisk and Jemison had fair warning that material omissions and misrepresentations with a deliberate disregard for the truth to a juvenile court would violate the Constitution. . . . It was reasonably foreseeable that unconstitutional misrepresentations to the juvenile court would result in medical examinations on the Minors without their parents' knowledge or consent. Thus, a reasonable social worker would understand that providing false information concerning notification to parents when requesting a juvenile court order for a medical examination on minors in protective custody would violate or at least disregard a substantial risk of a violation of the Parents' rights. . . Lisk's and Jemison's misrepresentations to the juvenile court set in motion a path by which the Minors would be subjected to unconstitutional medical examinations. This scenario is comparable to an individual who provides false information to obtain a search warrant. . . Regardless of whether they were responsible for issuing or executing a warrant that resulted in an unconstitutional search, their judicial deception alone is sufficient to overcome their qualified immunity. . . Thus, Lisk and Jemison, through their alleged judicial deception, can be held liable for the unconstitutional medical examinations. We reverse the dismissal by the district court as to the claims against Lisk and Jemison and hold that Lisk and Jemison are not entitled to qualified immunity.")

Rice v. Morehouse, 989 F.3d 1112, 1124-27 (9th Cir. 2021) ("There are several clear parallels in this case to the balance we struck in *Bryan*. First, Morehouse's and Shaffer's use of the take-down maneuver involved 'substantial' force that resulted in forcibly throwing Rice face-first to the pavement, similar to the non-lethal force in *Bryan*. Second, similar to *Bryan*, Rice's behavior did not constitute an immediate threat to the officers; his traffic violation did not support the use of a significant level of force; Rice's refusal to get out of his car did not constitute active resistance; and officers failed to attempt a less intrusive alternative. Finally, on balance, a reasonable jury could find that the state's minimal interest in the use of force against Rice did not justify the 'substantial force' used against him. . . . In sum, although there are material facts in dispute, when

the facts are taken in the light most favorable to Rice, a jury could conclude that Morehouse and Shaffer used excessive force in violation of the Fourth Amendment. Thus, we turn to the second prong of the qualified-immunity analysis. . . .The district court held that even if Morehouse and Shaffer used excessive force, they were entitled to qualified immunity. Accordingly, we consider whether Rice's right to be free from Morehouse's and Shaffer's substantial force in implementing the take-down 'was clearly established ... in light of the specific context of the case.'. . . Long before Rice's arrest, we clearly established one's 'right to be free from the application of non-trivial force for engaging in mere passive resistance.'. . . Cases like *Deorle*, *Headwaters*, *Young*, and *Bryan*—as summarized in *Gravelet-Blondin* and *Nelson*—sufficiently established the law before Rice's arrest in 2011. These cases form a 'body of relevant case law' that together place Morehouse's and Shaffer's use of substantial force against a passively resisting person 'beyond debate.'. . Accordingly, qualified immunity must be denied. Morehouse's and Shaffer's reliance on the Supreme Court's recent decision in *Emmons* is misplaced. In *Emmons*, the Supreme Court vacated our decision denying summary judgment and qualified immunity to an officer who, responding to a domestic abuse call, tackled Marty Emmons as he exited an apartment. . . In denying the officer qualified immunity, we said that the 'right to be free of excessive force was clearly established' at the time of Emmons's arrest in 2013. . . The Supreme Court rejected that formulation as 'far too general.'. . The Court acknowledged the right described in *Gravelet-Blondin* to be 'free from the application of non-trivial force for engaging in mere passive resistance,' but rejected that case law as inapposite because it involved uses of force 'against individuals engaged in *passive* resistance.'. . Accordingly, the Court remanded for us to consider whether the officer was entitled to qualified immunity. . . On remand, we continued to cite favorably our holding in *Gravelet-Blondin*. . . But to reconcile the Supreme Court's decision with *Gravelet-Blondin*—a case with which the Court did not take issue—we concluded that the Court 'must have concluded implicitly that [Emmons]'s actions involved more than passive resistance.'. . In particular, we noted the Supreme Court's emphasis that Emmons was a potential suspect (for domestic abuse) and was attempting to flee. . . That distinction was critical and led us to hold that *Gravelet-Blondin* (and the line of cases leading up to it) was not sufficiently on point regarding Emmons's take-down. . . We were otherwise unable to find a case sufficiently on point, and we held that the officer was thus entitled to qualified immunity. . . In contrast, here, taking Rice's version of the events as true, Rice was engaged in mere passive resistance. To be sure, Rice repeatedly declined to provide his license and other documents to Murakami and to exit his car. But Rice gave Murakami his name, rolled down the window, and attempted to gather his license before he was pulled out of his car. Rice also unlocked the car and did not physically resist arrest before he was taken to the ground. Although Rice was upset and insistent in wanting to speak with Murakami's supervisor, Rice did not swear or threaten any of the officers. Thus, like the plaintiff in *Gravelet-Blondin*—and unlike the plaintiff in *Emmons*—Rice was 'perfectly passive, engaged in no resistance, and did nothing that could be deemed particularly bellicose.'. . Accordingly, the line of cases discussed in *Gravelet-Blondin* clearly established the law long before Morehouse's and Shaffer's take-down of Rice. . . .Viewing the facts, as we must, in the light most favorable to Rice, we conclude that a reasonable jury could find that Rice engaged in passive resistance and that Morehouse's and Shaffer's take-down of Rice involved unconstitutionally excessive force.

Furthermore, because the right to be free from 'the application of non-trivial force for engaging in mere passive resistance' was clearly established before December 2011, Morehouse and Shaffer are not immune from suit.")

Sandoval v. County of San Diego, 985 F.3d 657, 671-78 (9th Cir. 2021) ("We begin with whether the shift in the legal framework governing Plaintiff's claims—from subjective deliberate indifference to objective unreasonableness—has any bearing on the qualified immunity analysis. The nurses argue, and the dissent agrees, that in determining whether the nurses are entitled to qualified immunity, we must apply all elements of an inadequate medical care claim exactly as they stood at the time of the incident at issue here, including the subjective deliberate indifference requirement. But we have already rejected this approach in *Horton by Horton v. City of Santa Maria*. 915 F.3d at 599–603. Under *Horton*, when we assess qualified immunity for a claim of inadequate medical care of a pre-trial detainee arising out of an incident that took place prior to *Gordon*, we apply the current objective deliberate indifference standard to analyze whether there was a constitutional violation. . . and 'concentrate on the objective aspects of the [pre-*Gordon*] constitutional standard' to evaluate whether the law was clearly established[.] . . .To fully understand *Horton*, we must first address *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002). [court discusses *Estate of Ford* and *Horton*] The rule of *Horton*, aside from the fact that it is controlling precedent, makes sense. The purpose of determining whether there has been a constitutional violation has always been to 'further the development of constitutional precedent.'. . It would run counter to that goal to apply the pre-*Gordon* standard now, because 'no purpose would be served for future cases from delineating the application of that standard to the constitutional merits of this case.'. .Horton's recognition that the objective deliberate indifference standard applies even when the incident occurred pre-*Gordon* comports with the purpose underlying the clearly established law requirement. As the Supreme Court has explained, this requirement is designed to 'give[ ] government officials breathing room to make reasonable but mistaken judgments about open legal questions.'. .Because the premise of qualified immunity is that state officials should not be held liable for money damages absent fair warning that their actions were unconstitutional, the clearly established law standard 'requires that the legal principle clearly prohibit the [defendant's] conduct in the particular circumstances before him.'. . This inquiry is an objective one that compares the factual circumstances faced by the defendant to the factual circumstances of prior cases to determine whether the decisions in the earlier cases would have made clear to the defendant that his conduct violated the law. . . The focus is on the standards governing the defendant's conduct, not legal arcana. . . Consistent with this purpose, the qualified immunity analysis remains objective even when the constitutional claim at issue involves subjective elements. . . Thus, in the Eighth Amendment deliberate indifference context, we have recognized that 'a reasonable prison official understanding that he cannot recklessly disregard a substantial risk of serious harm, could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high. In these circumstances, he would be entitled to qualified immunity.'. . We are not aware of a single case in which we have examined the defendant's mental state in assessing the clearly established law prong of qualified immunity. Several other circuits have concluded, as we did in *Horton*, that

because the clearly established law prong focuses objectively on whether it would be clear that the defendant's conduct violated the Constitution, lack of notice regarding the mental state required to establish liability has no bearing on the analysis. Take, for example, the Seventh Circuit's decision on remand from the Supreme Court in *Kingsley* itself. *See Kingsley v. Hendrickson*, 801 F.3d 828 (7th Cir. 2015) (per curiam) ("*Kingsley II*"). . . On remand, the *Kingsley* defendants advanced a view of qualified immunity similar to the one the nurses offer here. They argued that because the Supreme Court's decision had 'altered the substantive law of liability,' their liability should not be assessed under the new objective unreasonableness standard, which had not been clearly established at the time of the incident in the case. . .In addressing this argument, the Seventh Circuit first concluded that prior cases had clearly established that the force used by the officers was excessive—i.e., that their *conduct* was unlawful. . It then turned to the defendants' argument that they were nevertheless entitled to qualified immunity because the standard had changed from subjective awareness to objective unreasonableness during the course of the litigation. . . Rejecting this position, the Seventh Circuit explained that it 'would untether the qualified immunity defense from its moorings of protecting those acting in reliance on a standard that is later determined to be infirm.'. . Reliance interests were not implicated there, it said, because before and after the Supreme Court's decision, 'the standards for the amount of force that c[ould] be permissibly employed remain[ed] the same.'. . The Seventh Circuit concluded that to decide otherwise would require it 'to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose.'. . It declined to do so. . .Like the Seventh Circuit, the Sixth Circuit has rejected the argument that defendants facing claims of excessive force based on pre-*Kingsley* conduct are entitled to qualified immunity simply because it would not have been clear at the time of their unconstitutional conduct that any claims against them would be governed by an objective standard. *Hopper v. Plummer*, 887 F.3d 744, 755–56 (6th Cir. 2018). . . The First and Fifth Circuits have reached similar conclusions. [citing cases] Rather than sticking to our settled approach, the dissent would, for the first time, drag a subjective element into the question of whether a defendant violated clearly established law. For example, the dissent concludes Nurse de Guzman is entitled to qualified immunity—regardless of whether it would have been clear to every reasonable nurse that his conduct was unlawful—because there is, supposedly, insufficient evidence that de Guzman subjectively understood that Sandoval faced a serious medical need. . . This radical reimagination of qualified immunity would produce results directly contrary to the purposes served by the doctrine—giving 'government officials breathing room to make reasonable but mistaken judgments about open legal questions,'. . . while at the same time ensuring that a plaintiff can recover damages from a defendant who acts so unreasonably in light of established case law that he is appropriately described as 'plainly incompetent[.]'. . Consider how the dissent's approach would play out in practice. Here, there is no dispute that the objective unreasonableness standard from *Gordon* governs the merits of Plaintiff's claims. Thus, had the nurses not raised a qualified immunity defense, presumably even the dissent would agree that objective unreasonableness alone would be sufficient to establish their liability. . . Yet the dissent would use qualified immunity, a defense designed 'to shield officials ... when they perform their duties *reasonably*,'. . . to require Plaintiff to satisfy a standard under which the nurses would

be protected from liability—no matter how *un*reasonable their conduct—as long as they did not *subjectively appreciate* that their actions put Sandoval at a substantial risk of suffering serious harm. We cannot accept this extraordinary proposition, which would transform a defense that protects 'all but the plainly incompetent,' into one that provides immunity to defendants *precisely because* they were so incompetent that they did not understand the patent unreasonableness of their conduct as already established by law. . . The dissent's position might be justified if we could somehow conclude that the nurses relied on the subjective deliberate indifference standard in determining how to treat Sandoval. But to speak the thought is to recognize that it makes little sense. As the clearly established law prong of qualified immunity is typically applied, we impute to the defendant knowledge of the relevant case law governing his conduct. Thus, if there is binding precedent holding that a police officer may not use deadly force against an unarmed fleeing suspect, . . . future officers are expected to tailor their conduct accordingly. Those who fail to do so are not entitled to qualified immunity. . . They have received their 'fair notice' and squandered it. . . But how would an official who believes any claims against him would be tried under a subjective deliberate indifference standard act any differently than one who knows that an objective unreasonableness standard applies? It is not as if an individual can consciously control the extent to which he is subjectively aware of the wrongfulness of his conduct. It therefore seems likely that officials responsible for providing medical care to inmates will act in exactly the same manner after *Gordon* as they did before. They will provide the treatment they think necessary under the circumstances, mindful of what our cases dictate is appropriate conduct in different factual scenarios, and, in the event they subjectively believe the treatment they are providing is inadequate, they will, we would hope, adjust their conduct accordingly. It is true that after *Gordon*, state officials may now be held liable for providing inadequate medical care even when they were not subjectively aware of the unreasonableness of their conduct. But as the Seventh Circuit has explained, this change could affect an official's on-the-ground actions only if we were to assume that before *Gordon*, officials acted in reliance on the belief that as long as they were not subjectively aware that their conduct created a substantial risk of serious harm to an inmate, they could provide any level of medical care they so chose, no matter how obviously deficient. . . Like the Sixth and Seventh Circuits, we refuse to accept this 'dubious proposition.'. . In sum, as we previously concluded in *Horton*, when the governing law has changed since the time of the incident, we apply the current law to determine if a constitutional violation took place under the first prong of qualified immunity analysis, and the second prong remains what it has always been: an objective examination of whether established case law would make clear to every reasonable official that the defendant's *conduct* was unlawful in the situation he confronted. . . We will approach our analysis accordingly. We have already determined that there is a triable issue of fact whether the nurses committed constitutional violations under the *Gordon* standard, which governs the violation prong of our qualified immunity analysis. . . We turn now to whether the right was clearly established at the time. . . Applying *Horton*'s approach here, to defeat qualified immunity for the Officers, Plaintiff must show that, given the available case law at the time, a reasonable nurse, knowing what Llamado, Harris, and de Guzman knew, would have understood that failing to call paramedics (Llamdo and Harris), or failing to check on Sandoval for hours and failing to pass on information about his condition (de Guzman), 'presented such a

substantial risk of harm to [Sandoval] that the failure to act was unconstitutional.'. . The nurses' actual subjective appreciation of the risk is not an element of the established-law inquiry. We conclude that Sandoval has demonstrated that the available law was clearly established as to the unreasonableness of the nurses' conduct.")

Sandoval v. County of San Diego, 985 F.3d 657, 685-91 (9th Cir. 2021) (Collins, J., concurring in the judgment in part and dissenting in part) ("In reversing the judgment as to the Nurses, the majority applies the wrong legal standards to the qualified immunity inquiry and, as to Nurse de Guzman, reaches the wrong result. . . In opposing the Nurses' claim of qualified immunity, Plaintiff had to show that the Nurses violated clearly established law as it stood in 2014, when they acted. Because the then-controlling deliberate-indifference liability standards included a *subjective* element, Plaintiff therefore had to make a showing of subjective deliberate indifference to defeat qualified immunity, and she had to do so even though that subjective element of the test for liability has since been overruled. The majority errs—and expressly creates a circuit split—in reaching the oxymoronic conclusion that a county employee who did not even violate the law at the time he or she acted can nonetheless be said to have violated *clearly established* law at that time. . . . Because the qualified immunity issue turns on whether '"any reasonable official in the defendant's shoes would have understood that he [or she] was violating"' *then-existing* law, . . . and because then-existing law required subjective awareness of a serious medical need, . . . it follows that a nurse who, at the time, did not *subjectively* apprehend Sandoval's serious medical needs is entitled to qualified immunity. Put simply, a nurse who did not violate then-existing law cannot possibly be said to have violated clearly established law, and such a nurse is therefore entitled to qualified immunity. Consequently, unless Plaintiff presented sufficient evidence to raise a triable issue with respect to (*inter alia*) a given nurse's subjective awareness of Sandoval's serious medical needs, that nurse would be entitled to qualified immunity. . . The majority nonetheless contends that the qualified immunity inquiry in this case is governed by a purely *objective* standard, *viz*., whether 'a reasonable nurse, knowing what Llamado, Harris, and de Guzman knew, would have understood that [his or her actions] "presented such a substantial risk of harm to [Sandoval] that the failure to act was unconstitutional."'. . According to the majority, the qualified immunity inquiry requires an *exclusively* objective focus that effectively shears off any subjective element of the previously existing liability standard. As explained above, this position cannot be correct, because it rests on the self-contradictory premise that one can violate the clearly established law at the time without even violating the law at the time. . . Although the majority argues that its position is required by Ninth Circuit precedent, its ruling here is both contrary to our caselaw and creates a split with at least three other circuits. . . . In addition to being inconsistent with our precedent, the majority's ruling creates a clear split with the decisions of at least three other circuits. Indeed, the majority opinion candidly acknowledges that the Third, Eighth, and Tenth Circuits have held that courts addressing comparable claims must 'apply a *subjective* framework for purposes of qualified immunity, even though it ha[s] since been replaced by an objective standard.'. . . Although the majority's position is directly contrary to that of the Third, Eighth, and Tenth Circuits, the majority claims that its approach is supported by the decisions of several other circuits. . . That is doubtful. Only two of these cases involved a claim of

deliberate indifference to the serious medical needs of a pretrial detainee, and the court in both cases applied the subjective test in addressing qualified immunity. *Dyer v. Houston*, 964 F.3d 374, 383–84 (5th Cir. 2020) (holding that confusion over the exact nature of the subjective element did not absolve the district court of having to decide whether the defendants were liable under the then-clearly established standards); *Hopper v. Plummer*, 887 F.3d 744, 756–57 (6th Cir. 2018) (declining to disturb district court's denial of qualified immunity in light of its "finding of a genuine issue of material fact as to defendants' 'knowledge of a substantial risk of serious harm' "). The majority instead cites the portion of *Hopper* that involved an *excessive force* claim, as well as two other decisions involving such claims. *Hopper*, 887 F.3d at 755–56; *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016); *Kingsley v. Hendrickson*, 801 F.3d 828 (7th Cir. 2015) (decision on remand from the Supreme Court's *Kingsley* decision). The courts in all three of these cases dismissed the notion that any previously applicable subjective element of the excessive force test provided any basis for granting qualified immunity, and to that extent those cases bear some arguable similarity to the majority's conclusion here. . . But there is a critical difference between the role of the subjective element in an excessive force claim (in which the officer *affirmatively* applies force, . . . and a claim of deliberate indifference to serious medical needs (in which the official *fails to act*). In excessive force cases in which the objective component of the qualified immunity inquiry is met—meaning that the officer has applied an objective level of force that *any* reasonable officer would know is excessive—there are likely to be few, if any, cases in which the officer who is *knowingly and affirmatively applying that force* could plausibly assert that he did not simultaneously act with the requisite subjective intent of 'at least recklessness.'. . In other words, satisfying the objective standard for qualified immunity in such excessive force cases almost certainly means that the subjective element is met as well. By contrast, where the gravamen of the violation is a failure to act (as in the context of deliberate indifference to serious medical needs), the objective unreasonableness of a nurse's failure to detect a serious medical risk does not similarly lead to an inescapable conclusion that the nurse *must* have *actually* subjectively appreciated that risk. People can, and do, sometimes subjectively overlook what they should obviously detect. These three cases thus supply little support for the majority's sweeping rule that the qualified immunity inquiry is exclusively objective and requires courts to affirmatively and always disregard any subjective elements of the previously clearly established law. In all events, to the extent that these cases could be read to endorse the majority's flawed analysis, then they are wrong as well. . . Accordingly, each of the Nurses here is entitled to qualified immunity unless Plaintiff presented sufficient evidence to show (*inter alia*) that that Nurse was subjectively '"aware of facts from which the inference could be drawn that a substantial risk of serious harm [to Sandoval] exists,"' and that he or she actually '"dr[e]w the inference."'")

Richards v. Cox, 842 F. App'x 49, ___ (9th Cir. 2021) ("The Supervisor Defendants request qualified immunity here because, when Richards was shot in April 2015, no prior case law had specifically held that a birdshot policy combined with get-down orders violated the Eighth Amendment. But it has long been clearly established that prison officials may not act with deliberate indifference to inmate safety. . . And 'general statements of the law are not inherently

incapable of giving fair and clear warning[ ] and ... may apply with obvious clarity to the specific conduct in question[.]'. . No reasonable prison supervisor could believe that the Eighth Amendment permitted a policy in which bystander inmates are required to lie on the ground while correctional officers fire a 12-gauge shotgun loaded with birdshot directly at the ground in non-deadly situations—especially without considering the safety of the bystander inmates lying on the ground. . . The Supervisor Defendants' policy resulted in hundreds of metal pellets in each birdshot cartridge ricocheting and striking innocent bystanders lying on the ground. The Supervisor Defendants therefore had a 'fair warning' that their birdshot policy, combined with get-down orders, violated the Eighth Amendment. . . The district court did not err by denying the Supervisor Defendants summary judgment based on qualified immunity.")

Wright v. Beck, 981 F.3d 719, 736-37 (9th Cir. 2020) ("Although 'due process' has been castigated as 'cryptic' and 'abstract,'. . . its balustrades have been identified, time and again, as notice and an opportunity to be heard[.] . . As explained above, California courts have for decades observed this straightforward rule, which adds to our confidence that the law was clearly established. . .Further, unlike the mere general right to 'due process,'. . . or the abstract right to be free from 'excessive force,'. . . the right to notice is a specific, concrete guarantee that a person will be informed of the government's intent to deprive him or her of property before doing so. . . Any reasonable official would have thus known that deviating from this straightforward requirement—and indeed dispensing with it entirely—violates the right to due process. We are further convinced that the obligation to provide notice was clearly established given that Edwards was seeking ex parte permission to *destroy* the firearms—a permanent kind of deprivation. . . This makes Edwards's conduct even more egregious than the kind prohibited in *Fuentes*, in which the Court struck down state statutes authorizing the mere *temporary* deprivation of goods through an ex parte writ of replevin. . .Additionally, we conclude Edwards had fair notice that his conduct violated due process given that he acted in the complete absence of statutory authority. . . As we explained above, no statute authorized Edwards's decision to seek an ex parte application for permission to destroy Wright's property without notifying Wright of his intent to do so. If anything, the only express rule that applied made it clear that he needed to provide notice. . .Further, the obviousness of the constitutional violation is especially evident given the Ventura Court's September 2011 instruction to attempt to resolve the dispute informally and to return to court, if necessary. The record suggests that Edwards knew notice should have been provided; otherwise, he probably would not have told the court that Wright presented no proof of ownership or insinuated that Wright had abandoned his ownership claim. Thus, although we do not identify a case with the exact factual situation involved here, we conclude that in light of the precedent that did exist at the time Edwards filed an ex parte application for permission to destroy Wright's firearms, his actions fit within the 'obvious' situation. . . It appears obvious to us, even without a case addressing identical facts, that a state actor cannot unilaterally seek to destroy one's property without first providing the individual notice of the intent to do so. That is the only reasonable inference one can draw in light of *Mullane* and its progeny. Yet despite knowing that Wright had a pending claim of ownership, Edwards applied to the Los Angeles Court, without notice to Wright, for an order to

destroy his property. We thus conclude that the due process right to notice, as alleged by Wright, was clearly established and, as a result, Edwards is not entitled to qualified immunity.")

Rico v. Ducart, 980 F.3d 1292, 1298-1303 (9th Cir. 2020) ("Existing precedent does recognize *general* rights against excess noise and prison conditions that deprive inmates of 'identifiable human need[s],' such as sleep. . . But this is not the end of the analysis; we must consider the 'specific facts under review' here. . . . We go straight to the second prong of the qualified immunity analysis: whether existing precedent placed the question 'beyond debate' that every reasonable official would have understood that his specific actions violated a clearly established right. . . Rico alleges that creating excessive noise that deprives inmates of sleep for an extended period is a clearly established constitutional violation. However, the defendants in this case are entitled to qualified immunity because, on the specific facts presented here, every reasonable official would not have understood that how they performed the court-ordered Guard One checks violated the Constitution. . . Our mandate to examine the particular facts, including what caused Rico's alleged sleep deprivation, reveals that the challenged noise arose from activity that was inherently noisy in a facility the very construction of which made difficult quietly conducting round-the-clock welfare checks that defendants were ordered by the *Coleman* court to perform. . . Rico suggests that we need not focus on the factual specificity of precedent because the qualified immunity inquiry in Eighth Amendment cases differs from the inquiry in other types of cases, like those involving the Fourth Amendment. But we have clarified 'that the fact-specific, highly contextualized nature of the inquiry does not depend on which particular constitutional right a given plaintiff claims the officials have violated.'. . Existing caselaw did not provide insight into the lawfulness of creating noise while conducting court-ordered suicide-prevention welfare checks in a maximum security facility built of concrete, metal, and steel. Rico relies upon a single Ninth Circuit published opinion in *Keenan*. . . But even a cursory review of the facts in *Keenan* reveals how different that case is from this one: *Keenan* involved unrelenting noise caused by other inmates. . . . That case did not put 'beyond debate' the lawfulness of periodic noise resulting from court-ordered suicide-prevention checks and the immutable characteristics of a solitary confinement unit deliberately constructed in a maximum security prison not conducive to these kinds of activities. . . . Rico also relies on unpublished district court decisions. While 'unpublished decisions of district courts may inform our qualified immunity analysis ... it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only.'. . . Rico argues that dismissal at this stage is inappropriate because discovery is necessary to address factual questions including whether the checks were too loud for the inmates to sleep, whether officers caused noise through their 'sloppy implementation of the checks,' and whether the officers 'were doing the best they could under the circumstances.' We need not wait for the summary judgment stage; even taking every fact Rico pleads as true, under these circumstances, no reasonable officer would believe that creating additional noise while carrying out mandatory suicide checks for prisoner safety clearly violated Rico's constitutional rights. . . . Even if the Pelican Bay officials haphazardly implemented the Guard One system, no reasonable official in these circumstances would believe that creating additional noise while carrying out

mandatory suicide checks for prisoner safety clearly violated Rico's constitutional rights. In circumstances like these, where the defendants were following court-ordered procedures to enhance inmate safety that are inherently loud, all Pelican Bay officials are entitled to qualified immunity from this civil rights suit. That portion of the district court's order denying qualified immunity on Rico's Eighth Amendment claim is **REVERSED** and the case is **REMANDED** for entry of an order of dismissal granting qualified immunity as to all remaining defendants.")

Rico v. Ducart, 980 F.3d 1292, 1304-07 (9th Cir. 2020) (Silver, District Judge, concurring in part and dissenting in part) ("The first prong of qualified immunity analysis asks 'whether the official's conduct violated a constitutional right.'. . As the majority recognized, prisoners are entitled to 'identifiable human need[s], such as sleep.'. . Therefore, conditions of confinement depriving prisoners of sleep for an extended period violate the Constitution. According to the complaint, Rico was deprived of sleep for over a year, which establishes a viable claim for an Eighth Amendment violation. . . The second prong of the qualified immunity analysis requires determining whether every reasonable official would have known that depriving Rico of sleep for a year violated his rights. We have made clear both excessive noise and conditions causing sleep deprivation violate the Eighth Amendment. . . . The majority, however, has narrowed the 'clearly established' prong to determine whether '[e]xisting caselaw' addresses 'the lawfulness of creating noise while conducting court-ordered suicide-prevention welfare checks in a maximum security facility built of concrete, metal, and steel.'. . This approach is functionally equivalent to requiring 'a case directly on point,' something the Supreme Court has rejected. . . Thus, while identifying the appropriate 'level of generality' for existing precedent can be difficult, a greater level of generality is required here. . . I agree that this inquiry requires considering if existing precedent establishes the 'violative nature of ... *particular* conduct ... in light of the *specific context* of the case.'. . However, the clearly established prong of qualified immunity must be applied in a reasonable fashion, preventing liability where genuine uncertainty exists but allowing liability where no reasonable official could actually be confused. . . Basic and clearly necessary requirements, such as sleep, are not subject to debate. . . The majority does not dispute that sleep is one of life's necessities. . . . After defining the relevant right narrowly, the majority states that Guard One was 'inherently noisy' and 'the very construction' of the SHU 'made difficult quietly conducting round-the-clock welfare checks that defendants were ordered by the *Coleman* court to perform.'. . Ultimately, these facts may be established on summary judgment or at trial, but when reviewing a denial of a motion to dismiss, unless those facts are in the complaint or inferred in the plaintiff's favor, considering and relying on them on appeal is inappropriate. Rico's allegations thus describe an obvious deprivation of a constitutional right, which is sufficient to survive a motion to dismiss.")

Garcia by and through Walker v. McCann, No. 19-55022, 2020 WL 6268428, at *1 (9th Cir. Oct. 26, 2020) (not reported) ("Because the record is unclear on whether leaving the children in the home would have put them at risk of 'imminent danger of future harm,' the district court properly denied qualified immunity on this claim. . . Several facts, viewed in the light most favorable to

Plaintiffs, undermine the reasonableness of a belief of exigency. First, the only reported incident of abuse in the home concerned Cassandra, not her sisters. . . Second, Cassandra reported that the incident occurred more than one month before the sisters' removal from the home, and there is no evidence that the abuse was recurring. . . As Defendants note, other facts may support a finding of exigency, including that it would have taken 24 to 72 hours to procure a warrant and that Defendants acted promptly after conducting their initial inquiry. As in *Mabe*, these factual disputes prevent the conclusion that, as a matter of law, imminent serious injury justified the warrantless removal of the sisters from their home. It is up to a jury to determine whether Defendants had 'reasonable cause to believe exigent circumstances existed.'. . Defendants invoke on appeal only the Supreme Court's warning, given in the context of excessive force cases, that we not define the law at too high a level of generality. . . In this case however we deal with a specific line of cases that provides 'clear notice of the law to social workers responsible for protecting children from sexual abuse and families from unnecessary intrusion.'. . Further, '[w]hile the Supreme Court has repeatedly admonished this court not to define clearly established law at a high level of generality, we need not identify a prior identical action to conclude that the right is clearly established.'. . Although there is no case with this precise set of facts, it has been well established since at least 2000 that social workers 'may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.'. . Defendants McCann and Escamillao-Huidor are not entitled to qualified immunity on plaintiffs' claim that the sisters should not have been removed without a warrant on the basis of a single assault that had been reported several days earlier, and had occurred months before the removal.")

Garcia by and through Walker v. McCann, No. 19-55022, 2020 WL 6268428, at *3-4 (9th Cir. Oct. 26, 2020) (not reported) (Collins, J., concurring in part and dissenting in part) ("The majority suggests that the Supreme Court's admonition against defining clearly established law at a high level of generality is limited to excessive-force cases, . . . but that is wrong. In fact, that same admonition has been given by the Court in a variety of cases under 42 U.S.C. § 1983 (and even under 42 U.S.C. § 1985). [collecting cases] More importantly, this court has already applied this principle to the warrantless removal of children, the very issue before us. . . . Under *Kirkpatrick*, the inquiry must be framed as follows: Defendants are entitled to qualified immunity unless in 2013 (when Defendants acted) it was 'beyond debate that the confluence of factors' *in this case* 'would not support a finding of exigency.'. . The majority commits legal error in framing the qualified-immunity question at a higher level of generality than *Kirkpatrick* allows. Applying the correct qualified-immunity standards, I would reverse the denial of qualified immunity to McCann and Escamilla-Huidor. . . . Viewed in the light most favorable to Plaintiffs, the evidence established that Defendants were aware of the following circumstances at the time that they acted: that a 16-year-old girl had reported to an initial social worker that her father had inappropriately fondled her while drunk and that her parents would regularly drink until vomiting, leaving her to care for her two- and ten-year-old sisters; that the initial social worker reported that the 16-year-old was tearful and unable to say if the inappropriate touching had happened previously or to her

sisters; that the ten-year-old sister denied that sexual abuse had happened to her but confirmed that the parents would drink to the point of vomiting, although "not so much lately"; that, even though the 16-year-old later claimed that the incident with her father was an isolated accident, the initial social worker had found the 16-year-old's emotional earlier account (which professed uncertainty about other incidents) to be credible; and that a warrant would have taken at least 24 to 72 hours to obtain. I think that, under then-existing precedent in 2013, it 'was not beyond debate that the confluence of factors set forth above would not support a finding of exigency.'. . Put another way, it cannot be said that every reasonable social worker would have recognized in 2013 that these facts did not support a warrantless removal.")

Ventura v. Rutledge, 978 F.3d 1088, 1092 & n.1 (9th Cir. 2020) ("Omar was advancing with a knife toward a woman whom he had reportedly just assaulted. He ignored Officer Rutledge's repeated commands to stop and a warning that she would shoot. None of the cases Ventura cites involved an officer acting under similar circumstances as Officer Rutledge, and therefore, Ventura fails to show that it was clearly established that Officer Rutledge's actions amounted to constitutionally excessive force. . . .Ventura argues that there is a question of material fact as to whether Omar was 'walking normally,' whether he appeared to be brandishing his knife, and whether Andrade felt threatened. Resolution of these facts does not change our finding that Officer Rutledge did not violate clearly established law. It was not clearly established, in 2015, that fatally shooting a person, who was armed with a knife and advancing toward someone whom he had reportedly just assaulted, and who ignored multiple commands to stop and a warning that the officer would fire, constituted constitutionally excessive force, even if the decedent was 'walking normally,' did not appear to be 'brandishing' his knife, and the intended victim did not feel threatened.")

Tan Lam v. City of Los Banos, 976 F.3d 986, 1002-03 (9th Cir. 2020) ("In sum, the district court properly denied the Rule 50(b) motion on qualified immunity as to Lam's Fourth Amendment claim. The law was clearly established at the time of the shooting that an officer could not constitutionally kill a person who did not pose an immediate threat. The law was also clearly established at the time of the incident that firing a second shot at a person who had previously been aggressive, but posed no threat to the officer at the time of the second shot, would violate the victim's rights. The facts as found by the jury adequately supported the conclusion that a Fourth Amendment violation had occurred. The district court was correct in denying qualified immunity as a matter of law. . . . In short, the district court did not err in denying Acosta's Rule 50(b) motion challenging the jury's verdict on Lam's Fourth Amendment claim. The district court properly concluded that sufficient evidence supported the jury's conclusion that Acosta's use of deadly force was unreasonable, and the district court properly held that, given the jury findings, Acosta was not entitled to qualified immunity.")

Tan Lam v. City of Los Banos, 976 F.3d 986, 1011-13 (9th Cir. 2020) (Bennett, J., dissenting) ("Lam must 'identify a case where an officer acting under similar circumstances as Officer [Acosta] was held to have violated the Fourth Amendment.'. .Lam fails to meet this burden, as he

does not identify a single case in which an officer acting under similar circumstances as Officer Acosta was found to have violated the Fourth Amendment. And under the Supreme Court's teachings, similar circumstances means similar to what happened here—a one-on-one confrontation, in a confined space, in which a suspect used a deadly weapon to wound a police officer, was not disabled by a first shot, and the deadly shot was fired very shortly after the first. Lam first argues that Officer Acosta violated clearly established law because *Tennessee v. Garner*, 471 U.S. 1 (1985), established 'that the use of deadly force against a non-threatening unarmed suspect is unreasonable.' But the Supreme Court has already explained that *Garner* "lay[s] out excessive-force principles at only a general level" and therefore, *Garner* "do[es] not by [itself] create clearly established law outside 'an obvious case.'" . . . Because Lam does not argue that this is an obvious case, his reliance on *Garner* is misplaced. . . . The differences between *Hopkins* and *Deorle* and this case 'leap from the page.'. . Neither case involved a solo officer in a confined space who, after having just been stabbed with a deadly weapon, had to make a quick judgment call on whether he should risk his life by waiting and seeing what would happen next or use deadly force. . .In sum, Lam identifies no clearly established law showing that *every* reasonable officer in Officer Acosta's position would have known that it was a Fourth Amendment violation to fire the second shot. Officer Acosta is therefore entitled to qualified immunity on the Fourth Amendment claim.")

Sampson v. County of Los Angeles, 974 F.3d 1012, 1020-22 (9th Cir. 2020) ("The district court granted Defendants qualified immunity, finding no binding case law clearly establishing that public officials outside of the law enforcement, prison, employment, or school contexts can be liable for retaliation under the First Amendment. We disagree. It was clearly established at the time of Defendants' conduct that the First Amendment prohibits public officials from threatening to remove a child from an individual's custody to chill protected speech out of retaliatory animus for such speech. . . . *Capp* is indistinguishable from the instant case. Here, too, Defendants knew or should have known that taking the serious steps of falsely accusing Sampson of neglect and abuse and convincing the juvenile court to temporarily remove H.S. from her custody, when Defendants would not have taken these steps absent their retaliatory intent, violates the First Amendment. Although *Capp* was decided in 2019, it held that the right at issue was clearly established by August 2015. . . Therefore, under *Capp*, Sampson's First Amendment right was clearly established on November 2015—the relevant date here. . . Defendants argue that *Capp* is distinguishable because it involves a biological parent. The fact that Sampson is H.S.'s court-appointed legal guardian, rather than her biological parent, does not mean that Defendants could have reasonably understood that threatening to remove H.S. from her custody in retaliation for her protected activity did not violate the First Amendment. . . To the contrary, *Capp* simply articulated, in the context of social workers, what is a longstanding, clearly established right under the First Amendment to be free from retaliation in the form of threatened legal sanctions and other similar means of coercion, persuasion, and intimidation. . . . [B]ecause the same clearly established right at issue in *Capp* is also at issue here, the cases that supported denial of qualified immunity in *Capp* also compel us to deny qualified immunity in the instant case. . . . In sum, because the First Amendment right to criticize official conduct of public officials without being subject to the

threat of losing custody was 'clearly established' as of August 2015, when the events of *Capp* took place, we hold that the same right was clearly established when Defendants sought and obtained a warrant to remove H.S. from Sampson's custody in November 2015. Therefore, we vacate the district court's grant of qualified immunity to Defendants on Sampson's § 1983 claim for retaliation under the First Amendment, since Defendants were not so entitled.")

Sampson v. County of Los Angeles, 974 F.3d 1012, 1023-25 (9th Cir. 2020) ("Here, Sampson complains that Obakhume sexually harassed her by commenting on her appearance and marital status, urging her to end her marriage, inappropriately touching her, and attempting to coerce her into riding in his vehicle. The district court found the constitutional right not to be sexually harassed by public officials providing social services was not clearly established outside of the workplace or school contexts. . . Although we reluctantly agree that this right was not clearly established at the time of Obakhume's conduct, and therefore Defendants are entitled to qualified immunity in the instant case, we hold that the Equal Protection Clause protects the right to be free from sexual harassment at the hands of public officials providing social services. To ' "promote[ ] the development of constitutional precedent" in an area where [our] guidance is sorely needed,' we first address whether Sampson asserts a violation of a constitutional right. . . We have broadly held—on multiple occasions—that '[w]ell prior to 1988 the protection afforded under the Equal Protection Clause was held to proscribe any purposeful discrimination by state actors, be it in the workplace *or elsewhere*, directed at an individual solely because of the individual's [sex].'. . . Here, a male social worker subjected Sampson to sexualized comments and unwanted physical advances because she is a woman. The only difference with prior cases is that Sampson's harassment was at the hands of a social worker assigned to her case, rather than a coworker, supervisor, classmate, or teacher. That difference is inconsequential because the Equal Protection Clause prohibits public officials, including social workers like Obakhume, from 'deny[ing] to any person within its jurisdiction the equal protection of the laws.' . . Obakhume's conduct denied Sampson, because she is a woman, the right to seek legal guardianship of her niece and related services without being subjected to hostile sexual harassment. Simply put, if she were a man, Sampson would not have experienced this harassment in seeking services from Obakhume, and that discrepancy fundamentally offends the equality and fairness principles embodied in the Equal Protection Clause. . . . The right under the Equal Protection Clause to be free from sexual harassment by public officials in the workplace and school contexts is clearly established by our prior case law. . . However, as Sampson acknowledges, these cases are factually distinguishable, and we have never held that the Equal Protection Clause protects private individuals who suffer sexual harassment at the hands of public officials providing them with social services. Thus, we cannot say that the question raised by Sampson's claim was 'beyond debate' when the conduct as issue occurred here. . . Although we find that Sampson has plainly alleged a constitutional violation here, for purposes of analyzing qualified immunity, we must heed the Supreme Court's repeated admonitions 'not to define clearly established law at a high level of generality,'. . . because 'doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced[.]". . Therefore, because we cannot find a case with sufficiently similar facts, we cannot say that Sampson's right to be free from sexual harassment at the hands of a social

worker was clearly established under the Supreme Court's impossibly high bar. . . . Unfortunately, the Supreme Court's exceedingly narrow interpretation of what constitutes a 'clearly established' right precludes us from holding what is otherwise obvious to us—that the right of private individuals to be free from sexual harassment at the hands of public officials outside of the workplace and school contexts was clearly established under the Equal Protection Clause at the time of Defendants' conduct. Although we are prevented from denying qualified immunity in the instant case, we want to make it abundantly clear moving forward—if it was not already—that State public officials violate our Constitution's promise of equal protection when they sexually harass the people they serve.")

Sampson v. County of Los Angeles, 974 F.3d 1012, 1025-28 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) ("I agree with my colleagues that Natia Sampson has plausibly alleged violations of both her First and Fourteenth Amendment rights. In a world in which the plain language of the statute controlled, that would end our analysis. But, of course, it does not. We must also parse the judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983. *See Baxter v. Bracey*, —— U.S. ——, 140 S. Ct. 1862, 1862–63, —— L.Ed.2d —— (2020) (Thomas, J., dissenting from denial of certiorari). And that doctrine requires—in this case and many others—the dismissal of facially plausible claims of constitutional violations because the right at stake was not 'clearly established' at the time of the violation. Until the Supreme Court revisits its qualified immunity jurisprudence, as a constitutionally 'inferior' court, U.S. Const. art. III, § 1, we must continue to struggle to apply it. I agree with Judge Murguia that the doctrine, however ill-conceived, bars Sampson's otherwise plausible equal protection claim, and therefore concur in Section IV.B of the majority opinion. But I am unable to reach a different conclusion as to Sampson's First Amendment retaliation claim, and therefore cannot join Section IV.A. . . . .To be sure, the Court has reiterated that a prior 'case directly on point' is not required, . . and that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances[.]' . . But much like Lucy of 'Charlie Brown' fame, the Court repeatedly yanks away the football when lower courts attempt to apply this language. . . Lower courts have been repeatedly rebuked for defining 'clearly established law at a high level of generality,'. . . and 'fail[ing] to identify a case' involving 'similar circumstances,'. . . 'controlling authority' or 'a robust consensus of cases of persuasive authority[.]' . . . Thus, although stating that qualified immunity does not protect the 'plainly incompetent or those who knowingly violate the law,'. . . the Court has protected wrongdoers unless the violated constitutional right was 'particularized,'. . . and defined 'on the basis of the specific context of the case[.] . . Although the Court has found this level of specificity 'especially important in the Fourth Amendment context,'. . . it has not yet limited the requirement to those claims. . . In the First Amendment context, for example, the Court has admonished that 'the right in question is not the general right to be free from retaliation for one's speech,' but 'the more specific right to be free from a retaliatory' act under the facts of the case. . . As a practical matter, therefore, we must identify a case substantially similar, or nearly identical in some contexts, to the one at hand to find 'clearly established' what otherwise would seem to be clear constitutional rights. . . . The 'clearly established' inquiry focuses on the judicial opinions extant at the time of the conduct at issue, not

on how subsequent cases characterize pre-existing law. Decided years after the relevant conduct here, *Capp* is of no use. And, the other cases upon which the majority relies simply establish, in factual contexts quite different than the one at hand, the general principle that one has the right to be free from retaliation by public officials for her speech. . . Under the Supreme Court's jurisprudence, that is not enough.")

Sampson v. County of Los Angeles, 974 F.3d 1012, 1028-30 (9th Cir. 2020) (Zouhary, District Judge, concurring in part and dissenting in part) ("With respect to the First Amendment claim, I agree with Judge Murguia that the application of qualified immunity was improper. When the conduct at issue took place, it was clearly established that public officials may not threaten to remove a child from an individual's custody in retaliation for protected speech. I therefore join in Section IV.A of the opinion. As for the Equal Protection claim, I agree that Defendant Obakhume's alleged actions violated Sampson's constitutional right to be free of sexual harassment. However, I disagree that this right is not yet clearly established. . . . I understand my colleagues' reluctance to find this constitutional right clearly established in light of recent admonitions from the Supreme Court. True, we must 'not [ ] define clearly established law at a high level of generality.'. . But that is not this case. As an initial point, much of the Court's recent precedent cautioning against broadly defining constitutional rights dealt with excessive force. The Court has 'stressed that the specificity of the [right] is especially important in the Fourth Amendment context' because '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.'. . Such cases involve 'split-second judgments and implicate the hazy border between excessive and acceptable force.'. . Here, Obakhume had no quick decision to make—he allegedly undertook a persistent course of inappropriate conduct over several weeks. Context matters. The Supreme Court has noted that 'even though the very action in question has not previously been held unlawful ... officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . Thus, a factually identical scenario is unnecessary. Rather, we must determine whether the official had 'fair notice' that his actions were unconstitutional. . . This Circuit has repeatedly held that the right to be free of sexual harassment by public officials is clearly established in a variety of contexts, including prison, educational settings, and the workplace. [citing cases] These cases clearly define the law on sexual harassment in this Circuit: public officials cannot sexually harass others while on the job. This is true irrespective of whether the other person is a coworker, or a consumer of government services—who has no choice but to interact with the public official. Because existing cases place the unreasonableness of Obakhume's conduct 'beyond debate,'. . . he had 'fair notice' that his conduct was unlawful. Further, although the above case law clearly establishes Sampson's right, this is an 'obvious case'—meaning a case on all fours is unnecessary. . . Qualified immunity shields only those officials whose 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . Novelty of circumstance does not preclude liability. . . Taking Sampson's allegations as true, Obakhume's conduct is beyond the pale. . . Giving the Supreme Court's mandate a most narrow (and unrealistic) reading leads to a bizarre conclusion: Obakhume knew that he could not sexually harass others in his workplace if, and only

if, they were employed by the County; but he was unaware (or confused or unsure) whether he could subject a client of his office to the same treatment. Although we clearly establish this right 'going forward,' there is no need to wait. The time is now. For this reason, I respectfully dissent from Section IV.B of the opinion.")

Reynaga Hernandez v. Skinner, 969 F.3d 930, 943-44 (9th Cir. 2020) ("Existing precedent forecloses Skinner's and Hernandez's arguments that Reynaga's right to be free from a *Terry* stop absent reasonable suspicion was not clearly established in these circumstances. *Melendres* clearly establishes the law that governs the Fourth Amendment right implicated by Reynaga's unlawful *Terry* stop. Skinner stopped Reynaga solely on the basis of Hernandez's statement that a witness had testified that Reynaga was 'not a legal citizen.' *Melendres*—which was decided in 2012, almost five years before Skinner stopped Reynaga—held that 'detaining individuals based solely on reasonable suspicion or knowledge that a person was unlawfully present in the United States' is not sufficiently 'premised on criminality' to be justified under *Terry*. . . Skinner detained Reynaga based solely on knowledge that he was unlawfully present in the United States. Reynaga's right to be free from detention absent reasonable suspicion in this context was clearly established at the time of the stop. . . . Neither are Skinner and Hernandez entitled to qualified immunity for Skinner's unlawful arrest of Reynaga. For the reasons discussed, Skinner arrested Reynaga when he handcuffed Reynaga and detained him in the patrol car. . . The Supreme Court and our own court long ago established an immigrant's right to be free from arrest absent probable cause that he has entered the country unlawfully. Officers may, during a justified *Terry* stop, question individuals 'about their citizenship and immigration status, and ... may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.'. .In *Gonzales v. City of Peoria*, published in 1983, we held that an individual's 'lack of documentation or other admission of illegal presence' does not, 'without more, provide probable cause of the criminal violation of illegal entry.'. . Arresting officials must 'be able to distinguish between criminal and civil violations and the evidence pertinent to each.'. . We re-emphasized this in *Martinez-Medina*, explaining that an immigrant's 'admission of illegal presence ... does not, without more, provide probable cause of the criminal violation of illegal entry,' which 'remain[ed], the law of the circuit, binding on law enforcement officers.'. . . Reynaga's right to be free from arrest absent probable cause that he entered the country unlawfully has been established since at least 2012, by which time we had published both *Melendres* and *Martinez-Medina*, and arguably as early as *Gonzales*, in 1983. . . We affirm the district court's denial of qualified immunity for both Skinner and Hernandez. Skinner stopped and arrested Reynaga without reasonable suspicion or probable cause, respectively, and Hernandez integrally participated in his actions. Reynaga's right to be free from unlawful stops in this circumstance has been established since at least 2012, by which time both *Melendres* and *Martinez-Medina* were law of the circuit.")

Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1032-33, 1037-39 (9th Cir. 2020) (*on denial of reh'g and reh'g en banc*) ("[W]here the test for determining whether the right in question has been violated is framed as a standard, rather than a rule, officials are given more breathing room to make 'reasonable mistakes.'. . In those instances, we require a higher degree of factual

specificity before concluding that the right is 'clearly established.' But where the right at issue is clear and specific, officials may not claim qualified immunity based on slight changes in the surrounding circumstances. . . To properly approach this inquiry, we consider separately three categories of audio and video surveillance alleged in the complaint: (1) recordings made by Monteilh of conversations to which he was a party; (2) recordings made by Monteilh of conversations to which he was not a party (i.e., the recordings of conversations in the mosque prayer hall); and (3) recordings made by devices planted by FBI agents in Fazaga's office and Abdel Rahim's house, car, and phone. . .We conclude that the Agent Defendants are entitled to dismissal on qualified immunity grounds of Plaintiffs' § 1810 claim as to the first two categories of surveillance. As to the third category of surveillance, conducted via devices planted in Abdel Rahim's house and Fazaga's office, Allen and Armstrong are not entitled to qualified immunity. . . . As of 2006 and 2007, however, no federal or state court decision had held that individuals generally have a reasonable expectation of privacy from surveillance in places of worship. Our court had declined to read *Katz* as established authority 'for the proposition that a reasonable expectation of privacy attaches to church worship services open to the public.'. . Noting that there was a lack of clearly established law so concluding, *Presbyterian Church* held that Immigration and Naturalization Service ("INS") officials were entitled to qualified immunity from a Fourth Amendment challenge to undercover electronic surveillance of church services conducted without a warrant and without probable cause. . . No case decided between *Presbyterian Church* and the incidents giving rise to this case decided otherwise. And no case decided during that period addressed circumstances more like those here, in which there are some specific manifestations of an expectation of privacy in the particular place of worship. Arguably pertinent was *Mockaitis*, but that case concerned the confession booth, not the church premises generally. . . The circumstances here fall between *Presbyterian Church* and *Mockaitis*, so there was no clearly established law here applicable. The Agent Defendants are thus entitled to qualified immunity as to this category of surveillance. . . . In sum, Plaintiffs allege a FISA claim against Allen and Armstrong for recordings made by devices planted by FBI agents in Abdel Rahim's house and Fazaga's office. As to all other categories of surveillance, the Agent Defendants either did not violate FISA; are entitled to qualified immunity on the FISA claim because Plaintiffs' reasonable expectation of privacy was not clearly established; or were not plausibly alleged in the complaint to have committed any FISA violation that may have occurred.")

Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1059-60 (9th Cir. 2020) (*on denial of reh'g and reh'g en banc*) ("*Abbasi* makes clear that intracorporate liability was not clearly established at the time of the events in this case and that the Agent Defendants are therefore entitled to qualified immunity from liability under § 1985(3). . . In *Abbasi*, men of Arab and South Asian descent detained in the aftermath of September 11 sued two wardens of the federal detention center in Brooklyn in which they were held, along with several high-level Executive Branch officials who were alleged to have authorized their detention. . . They alleged, among other claims, a conspiracy among the defendants to deprive them of the equal protection of the laws under § 1985(3). . . *Abbasi* held that, even assuming these allegations to be 'true and well pleaded,' the defendants were entitled to qualified immunity on the § 1985(3) claim. . . It was not 'clearly

established' at the time, the Court held, that the intracorporate conspiracy doctrine did not bar § 1985(3) liability for employees of the same government department who conspired among themselves. . . . The Court declined, however, to resolve the issue on the merits. . . *Abbasi* controls. Although the underlying facts here differ from those in *Abbasi*, the dispositive issue here, as in *Abbasi*, is whether the Agent Defendants could reasonably have known that agreements entered into or agreed-upon policies devised with other employees of the FBI could subject them to conspiracy liability under § 1985(3). At the time the Plaintiffs allege they were surveilled, neither this court nor the Supreme Court had held that an intracorporate agreement could subject federal officials to liability under § 1985(3), and the circuits that had decided the issue were split. . . There was therefore, as in *Abbasi*, no clearly established law on the question. As the Agent Defendants are entitled to qualified immunity on the § 1985(3) allegations in the complaint, we affirm their dismissal on that ground.")

Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015, 1061-62 & nn. 43, 44 (9th Cir. 2020) (*on denial of reh'g and reh'g en banc*) ("[I]t was not clearly established in 2006 or 2007 that covert surveillance conducted on the basis of religion would meet the RFRA standards for constituting a substantial religious burden on individual congregants. There simply was no case law in 2006 or 2007 that would have put the Agent Defendants on notice that covert surveillance on the basis of religion could violate RFRA. And at least two cases from our circuit could be read to point in the opposite direction, though they were brought under the First Amendment's Religion Clauses rather than under RFRA . . . . *Vernon* and *Presbyterian Church* were decided before the surveillance Plaintiffs allege substantially burdened their exercise of religion. Both cases cast doubt upon whether surveillance such as that alleged here constitutes a substantial burden upon religious practice. There is no pertinent case law indicating otherwise. It was therefore not clearly established in 2006 or 2007 that Defendants' actions violated Plaintiffs' freedom of religion, protected by RFRA. . . . These cases do not, however, entitle the Agent Defendants to qualified immunity as to claims involving intentional discrimination based on Plaintiffs' religion. As discussed in *supra* Part IV.B, those claims do not require that Plaintiffs show a substantial burden on the exercise of their religion. That principle was clearly established well before the events in this case. . . Thus, to the extent that Plaintiffs' religion-based *Bivens* claims may proceed, the Agent Defendants are not entitled to qualified immunity for those claims.")

Stoddard-Nunez v. City of Hayward, 817 F. App'x 375, ___ (9th Cir. 2020), *pet. for cert. filed*, No. 20-1006 (U.S. Jan. 15, 2021) ("At the time of the incident, it was clearly established that officers are not entitled to qualified immunity for shooting at an individual in a fleeing vehicle that does not pose a danger to them or to the public. . . Therefore, Officer Troche is not entitled to qualified immunity under Jessie's version of events, and we reverse the district court's grant of qualified immunity.")

Liberti v. City of Scottsdale, 816 F. App'x 89, ___ (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1387 (2021) ("No existing precedent would have given the officers notice that Officer Bailey's grabbing of Liberti's elbow in an attempt to get him to sit down or that the officers' additional attempts to

subdue him when he fled were unconstitutional. These uses of force fall 'far from an obvious case in which any competent officer would have known [their uses of force] ... would violate the Fourth Amendment.'. . Likewise, there is no case that would establish that Officer Fernandez-Kafati's use of deadly force was obviously unconstitutional where: (1) Liberti had already fled from the officers and was not complying with their orders; (2) Liberti had a knife in his hand; (3) Officer Bailey's prior use of a Taser to subdue Liberti had proven ineffective; (4) Liberti was moving toward either Officer Fernandez-Kafati or the shopping center with a knife in hand; and (5) Officer Fernandez-Kafati was the only officer standing between Liberti and the rest of the open-air shopping center where members of the public were present. This keeps us from finding that the officers had 'fair and clear warning' that their actions were unconstitutional.")

Shay v. City of Huntington Beach, 816 F. App'x 47, __ (9th Cir. 2020) ("We . . .find that Officer Subia's conduct of pointing a Taser at Nathan's face, and threatening to use it if he did not comply, did not violate clearly established law. . . While the threat here may have been excessive, its unconstitutionality is not 'beyond debate.'. . Indeed, we afforded qualified immunity to an officer who used a Taser on a non-threatening suspect under the law applicable here in *Thomas v. Dillard*, 818 F.3d 864, 890–92 (9th Cir. 2016) (decided months after Officer Subia pointed the Taser at Nathan). Thus, the lack of precedent clearly establishing this conduct to be unconstitutional requires finding that Officer Subia is entitled to qualified immunity on this excessive force claim. The Shays have not provided a case where an officer acting under similar circumstances, as those here, was held to have violated the First or Fourth Amendment. Nor have they established this as a 'rare "obvious case"' where the Officers' conduct was clearly unlawful. . . The district court properly held that the Officers were entitled to qualified immunity.")

Wilk v. Neven, 956 F.3d 1143, 1150 (9th Cir. 2020) ("Any reasonable prison official in the defendants' position would know that the actions defendants took, and failed to take, violated the Eighth Amendment. None of the defendants can claim ignorance to a prisoner's right to be protected from violence at the hands of other inmates. That right has been clearly established since the Supreme Court's decision in *Farmer v. Brennan* in 1994. . . We have recently and explicitly held that it is clearly established that prison officials must 'take reasonable measures to mitigate the [known] substantial risk[s]' to a prisoner. . . Wilk's case does not involve the sort of 'novel factual circumstances' contemplated by *Hope*. . . Rather, the facts are 'materially similar' to previous cases.")

Hunter v. City of Federal Way, 806 F. App'x 518, ___ (9th Cir. 2020) ("A recent, chokehold-specific precedent confirms that Durell's chokehold violated Hunter's clearly established rights. *Tuuamalemalo v. Greene* observed that, at least as of January 25, 2014, '[t]here is a robust consensus among the circuits that the use of a chokehold on a non-resisting person violates the Fourth Amendment.' 946 F.3d 471, 477 (9th Cir. 2019) (per curiam). At some points, *Tuuamalemalo* frames its holding as covering chokeholds administered against 'non-resisting, restrained person[s].'. . Tuuamalemalo was 'restrained at the time of the chokehold, as the officers had 'pinn[ed] [Tuuamalemalo] to the ground' before the chokehold was applied. .

. Here, Durell pushed Hunter against his car and put Hunter's arms behind his back before applying the chokehold, so Hunter was restrained when the chokehold was applied. And 'the [applicable] standard ... requires us to view the facts in the light most favorable to the plaintiff. At this stage in the proceedings, we must assume that [Hunter] was not resisting when [Durell] used a chokehold on him.'. . Moreover, the plaintiff in *Tuuamalemalo* had previously been 'aggressive' with the officers who choked him, justifying a grant of qualified immunity for a punch thrown at him before the chokehold, . . . whereas Hunter never posed a threat of any kind. Durell's qualified immunity argument accordingly fails.")

Bennett-Martin v. Plasencia, 804 F. App'x 560, ___ (9th Cir. 2020) ("Because existing precedent does not place it 'beyond debate,'. . . that Officer Plasencia violated Bennett-Martin's constitutional rights, he is entitled to qualified immunity. . . The dissent argues that we construe the doctrine of qualified immunity too broadly and that *Quiroga*'s rule that 'a violation of section 148(a)(1) requires more than mere noncooperation with an officer's orders, . . . gave Officer Plasencia 'fair warning' that violating Bennett-Martin's constitutional rights[.]. . We disagree. The Supreme Court 'has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . And in the warrantless-arrest context, the Supreme Court has 'stressed the need to "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment."'. . Accordingly, we decline to contravene the Supreme Court's repeated warnings by 'narrow[ing]' the doctrine of qualified immunity. . . Nor does our disposition 'send a signal to officers' that they can arrest 'young people' who provide their location to a parent. . . Rather, we merely hold that Bennett-Martin cannot recover compensatory and punitive damages from Officer Plasencia, because he could have reasonably believed there was probable cause to arrest Bennett-Martin for not complying with his orders during an investigation. We need not (and do not) decide whether Officer Plasencia lacked probable cause to arrest Bennett-Martin.")

Bennett-Martin v. Plasencia, 804 F. App'x 560, ___ (9th Cir. 2020) (Marbley, C.J., dissenting) ("I respectfully dissent from my colleagues on the issue of qualified immunity. I believe they construe the doctrine too narrowly and overlook an important collateral consequence of their decision. Therefore, I would reverse the district court's order granting summary judgment to Officer Jose Plasencia. As a threshold matter, the Supreme Court has recognized that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . In fact, the Court has 'expressly rejected a requirement that previous cases be fundamentally similar.'. . For this reason, the salient question for us is whether the state of the law on June 3, 2014 gave Officer Plasencia fair warning that his arrest of Ms. Amina Bennett-Martin for violating California Penal Code section 148(a)(1) was unconstitutional. . . I believe section 148(a)(1) itself, and the law surrounding that statue, were sufficiently clear to place Officer Plasencia on notice.")

J.P. by & through Villanueva v. County of Alameda, 803 F. App'x 106, ___ (9th Cir. 2020) ("Because no law clearly established that child welfare workers could be liable to a sibling who

suffered no direct injury as a result of a state-created danger or special relationship, the defendants were entitled to qualified immunity.")

J.P. by & through Villanueva v. County of Alameda, 803 F. App'x 106, ___ (9th Cir. 2020) (Paez, J., dissenting) ("Ninth Circuit precedent clearly establishes that children 'ha[ve] a protected liberty interest in safe foster care placement once they [become] wards of the state.'. . The child welfare workers here were thus well on notice that they had an affirmative obligation to (i) 'safeguard [J.P.'s] wellbeing' after he was placed in their custody in foster care. . . and (ii) not act with deliberate indifference toward a known or obvious risk of danger[.] . . They overlooked these obligations when they allowed J.P. and his three-year-old sister to continue living in a foster home even after she had ingested methamphetamine there. . . And, contrary to the majority's position, J.P. *did* allege that he suffered a direct harm, even though he did not personally ingest methamphetamine; he claims that he suffered emotional distress as a result of losing his younger sister when she died from ingesting methamphetamine a second time at that home. . . I also disagree that it was not clearly established that the First Amendment protects cohabiting siblings from unwarranted government interference in their relationship. As the Supreme Court recognized almost forty years ago, childhood siblings share precisely the 'kind[ ] of highly personal relationship' that warrant a 'substantial measure of sanctuary from unjustified interference by the State.'. . .Our decision in *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991), does not compel us to hold otherwise. *Ward* held only that the Fourteenth Amendment right to familial association does not protect a relationship between adult siblings.")

Tobias v. East, 803 F. App'x 93, ___ (9th Cir. 2020) ("Although Tobias was only 13 years old and his unequivocal request for counsel was improperly brushed aside, his early-evening interrogation lasted only 90 minutes, involved no physical threats or abuse, and otherwise relied on interrogation techniques that cannot be said, either singly or in the combination presented here, to have violated clearly established law (*e.g.*, bluffing about the strength of the evidence the officers had, arguing that the courts would go easier on the suspect if he confessed to what he had done, and shaming the suspect for the effect a prosecution would have on his family). Although the question is a close one in light of the patent violation of Tobias's right to counsel, in our view Tobias has failed to show that the officers' conduct in the interrogation constituted impermissible coercion under clearly established law. . . . Here, the particular circumstances of the interrogation do not present the same sort of confluence of features that we have previously held to be coercive. . . On the contrary, they appear to be *less* coercive than other cases in which we have found that coercion had *not* been established. . . Because it would not have been apparent to any reasonable officer that the circumstances of this specific interrogation were unconstitutional, the officers were entitled to qualified immunity on Tobias's claim that the officers violated his Fifth Amendment right against compelled self-incrimination. . . .The district court also erred in denying qualified immunity to the detectives on the claim that the interrogation violated Tobias's Fourteenth Amendment right to substantive due process. . . Although this claim (unlike the Fifth Amendment claim) does not require a showing that the confession was used against Tobias, '[t]he standard ... is quite demanding," requiring something akin to 'police torture or other abuse' or

comparable conduct that 'shocks the conscience.'. . For reasons similar to those discussed above with respect to Tobias's coerced confession claim, we conclude that, even construing the facts in the light most favorable to Tobias, he failed to show that any reasonable officer would have understood that the objective circumstances of the interrogation here met the demanding 'shocks the conscience' standard. The facts of this case are materially different from previous cases in which we have found a substantive due process violation for police conduct during an interrogation. . . . Because controlling precedent does not establish 'beyond debate' that the officers' conduct here shocks the conscience, the officers are entitled to qualified immunity.")

Tobias v. East, 803 F. App'x 93, ___ (9th Cir. 2020) (Wardlaw, J., dissenting in part) (not reported) ("I respectfully dissent from the majority's conclusion that the interrogation tactics used by Detectives Michael Arteaga, Jeff Cortina, and Julian Pere did not violate clearly established Fifth and Fourteenth Amendment law. . . The detectives in this case cursed at Art Tobias (then 13 years old), ignored his request for counsel, repeatedly told him that he looked like a 'cold-blooded killer,' falsely said that somebody had 'given him up,' shamed him for 'dragging [his] family into this,' promised him likely leniency if he confessed, and threatened him with a harsh sentence if he stayed silent. After more than an hour of this treatment, Tobias broke down and confessed to a murder he did not commit. 'It has ... long been established that the constitutionality of interrogation techniques is judged by a higher standard when police interrogate a minor.' *Crowe v. Cty. of San Diego*, 608 F.3d 406, 431 (9th Cir. 2010). In *Crowe*, we held that officers committed a Fourteenth Amendment substantive due process violation when they 'cajoled, threatened, lied to, and relentlessly pressured' two young teenagers into falsely confessing. . . That is precisely what Detectives Arteaga, Cortina, and Pere did here. *Crowe* clearly established that the detectives' conduct violated the Fourteenth Amendment. And in light of *Crowe*, every reasonable officer would also have understood that the interrogation tactics here were unconstitutionally coercive, in violation of the Fifth Amendment. For these reasons, I would affirm the district court's conclusion that Detectives Arteaga, Cortina, and Pere are not entitled to qualified immunity on the coercive interrogation and substantive due process claims.")

Vazquez v. County of Kern, 949 F.3d 1153, 1164-66 (9th Cir. 2020) ("'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.'. . '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'. . . '[T]he clearly established right must be defined with specificity.'. . However, '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.'. . Thus, '[w]hen a violation is obvious enough to override the necessity of a specific factual analogue, ... it is almost always wrong for an officer in those circumstances to act as he did.'. . Training materials and regulations are also relevant, although not dispositive, to determining whether reasonable officers would have been on notice that their conduct was unreasonable. . . . In this circuit, '[i]t is clearly established that the Fourteenth Amendment protects a sphere of privacy, and the most "basic subject of privacy ... the naked body."'. . Anderson also

likely attended a PREA training. . . Under the PREA, sexual abuse includes '[v]oyeurism, which is defined as the inappropriate visual surveillance of a detainee for reasons unrelated to official duties.'. . Moreover, Kern County Juvenile Hall's policies require supervision of showers to be provided by staff of the same gender, and, absent exigent circumstances or incidental to a routine safety check, require that a ward be allowed to shower and perform bodily functions without nonmedical staff of the opposite gender from viewing them. Therefore, given that we have clearly recognized a Fourteenth Amendment right to bodily privacy, the Juvenile Hall administrative policies, and the training Anderson likely attended, he is not entitled to qualified immunity for Vazquez's Fourteenth Amendment bodily privacy claim. . . . 'Where guards themselves are responsible for the rape and sexual abuse of inmates, qualified immunity offers *no* shield.' . . 'In the simplest and most absolute of terms the ... right of prisoners to be free from sexual abuse [is] unquestionably clearly established [in the Ninth Circuit] ... and no reasonable prison guard could possibly [believe] otherwise.'. .Anderson argues that his alleged conduct—including sexual comments and contact—is not equivalent to the sexual abuse that we have found unconstitutional. Yet, in *Fontana*, we noted that the alleged similar conduct, was '*malum in se*' and that '[n]o reasonable officer could believe that this conduct did not violate [the plaintiff's] constitutional rights.'. . Moreover, the Kern County Juvenile Hall policy prohibiting staff members from being alone in a room with minors absent an emergency as well as Anderson's likely PREA training provided him with notice that his alleged conduct was unreasonable. . . And, beyond the clearly established case law, training, and juvenile hall policies, it is 'obvious' that a juvenile corrections officer should not sexually harass or abuse a juvenile ward as it is always wrong for a juvenile corrections officer to engage in such conduct. . . Accordingly, we conclude that Anderson is not entitled to qualified immunity for Vazquez's bodily integrity or punishment claims.")

Slater v. Deasey, 789 F. App'x 17, 21 & n.3 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 550 (2020) ("We take seriously the Supreme Court's warning that '"clearly established law" should not be defined "at a high level of generality."'. . This case presents no such risk, as *Drummond* provides 'fair warning' to Defendants that their alleged actions were unconstitutional. . . In *Drummond*, we clearly established that 'squeezing the breath from a compliant, prone, and handcuffed individual ... involves a degree of force that is greater than reasonable.'. . There, officers placed body weight on the arrestee's back and neck while he was handcuffed and lying on his stomach. . . Here, viewing the evidence in the light most favorable to Plaintiffs, Slater was hogtied and placed on his stomach in the back of the police car, and the deputies applied pressure to his body during the second and third hobbling, after pressure was already applied to his shoulders in the prone position during the first hobbling. Deputy Gentry testified that he placed pressure on Slater's left rib area with his knee while applying the second hobble. Deputy Brandt, who arrived after the application of the first hobble, and who was positioned on the driver's side of the car, testified that he put his foot against Slater's shoulder to prevent Slater from sliding out of the car. Prior to closing the patrol car door, Deputy Brandt heard Slater make a spitting noise. Before long, Slater had vomited and largely stopped breathing. We conclude that the circumstances here are sufficiently analogous to *Drummond* such that Defendants were on notice that their use of force violated the Fourth Amendment. . . . *Drummond* specifically involved officers squeezing the breath from an individual

'despite his pleas for air.' . . However, no court has interpreted *Drummond* to require a restrained suspect to 'plead for air' before receiving Fourth Amendment protection. [citing cases]")

Slater v. Deasey, 943 F.3d 898, 898-909 (9th Cir. 2019) (Collins, J., with whom Bea, Ikuta, and Bress, JJ., join, dissenting from the denial of rehearing en banc) ("In holding that the police officers in this case violated clearly established law when they restrained Joseph Slater in the back of a patrol car, allegedly causing his death, the panel continues this court's troubling pattern of ignoring the Supreme Court's controlling precedent concerning qualified immunity in Fourth Amendment cases. Indeed, over just the last ten years alone, the Court has reversed our denials of qualified immunity in Fourth Amendment cases at least a half-dozen times, often summarily. By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal. I respectfully dissent from our failure to rehear this case en banc. Two particular features of the panel's decision underscore its neglect of binding Supreme Court authority. First, in addressing whether the relevant law was 'clearly established,' the panel disregarded the Court's clear instruction that, in Fourth Amendment excessive force cases, 'police officers are entitled to qualified immunity unless existing precedent "*squarely governs*" the *specific* facts at issue.'. . There is no such squarely governing precedent here, and the panel did not claim there was. Instead, the panel simply ignored *Kisela* (and all of our other recent reversals in Fourth Amendment qualified immunity cases) and denied qualified immunity based on its identification of a single Ninth Circuit decision—*Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003)—that the panel concluded was 'sufficiently analogous' to this case. . . In applying this lesser 'sufficiently analogous' standard, the panel committed the very same error for which we were summarily reversed in *Kisela*. . . Second, the panel violated governing Supreme Court authority when it extracted from *Drummond* a 'clearly established' rule that is framed at a much higher level of generality than *Drummond* itself. As the Supreme Court has stated, with evident exasperation, '[w]e have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . Despite professing to '"hear the Supreme Court loud and clear,"'. . . the panel is jurisprudentially a bit deaf, because its decision here significantly raised the level of generality of the rule in *Drummond*, and in doing so, it overlooked critical differences between *Drummond* and this case. The Plaintiffs' claim in this tragic case is that, by using 'hobbles' (a form of restraining belt) to prevent Slater from moving around in the patrol car, and by applying brief incidental pressure to Slater while applying the hobbles, the officers caused him to suffer 'positional or restraint asphyxia,' resulting in his death. According to the panel, the officers were not entitled to qualified immunity for these actions because '[i]n *Drummond*, we clearly established that "squeezing the breath from a compliant, prone, and handcuffed individual ... involves a degree of force that is greater than reasonable."'. . But this statement literally elides critical differences between this case and *Drummond* by improperly using ellipses to generalize *Drummond*'s much more specific holding that 'any reasonable person' should have known that 'squeezing the breath from a compliant, prone, and handcuffed individual *despite his pleas for air* involves a degree of force that is greater than reasonable.'. . That critical feature of *Drummond* is missing here: in this case, once the officers

noticed that Slater appeared to be in trouble, they promptly summoned paramedics (who had examined Slater earlier and were still on the scene). Moreover, *Drummond* differs in a second crucial respect, inasmuch as the nature and extent of the force applied by the officers in the two cases are very different. While the two officers in *Drummond* literally 'squeez[ed] the breath' from Drummond by 'press[ing] their weight against his torso and neck, crushing him against the ground' for a 'substantial period of time,'. . . the specific challenged actions of the officers here did not involve any such direct, sustained compression with the officers' body weight. Instead, Plaintiffs claim that the manner in which the hobbles were applied put Slater in a *position* such that, coupled with the brief incidental pressure placed on his back during securing of the hobbles, he was at risk of 'positional or restraint asphyxia.' Given these significant distinctions, *Drummond* cannot be described as ' "squarely govern[ing]" the specific facts at issue.'. .Under the qualified immunity standards that have been clearly established by the Supreme Court, the district court's dismissal of this action should have been affirmed. I dissent from our failure to rehear this case en banc. . . . Although the Supreme Court has issued numerous opinions over the last ten years that have refined and limited what it means to say that a right was 'clearly established'for qualified immunity purposes, the panel largely ignored that case law. Instead, quoting from a 2003 decision of this court, the panel relied primarily on a more general proposition that qualified immunity turns on: 'whether the right was clearly established in light of the specific context of the case' such that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . Applying that more general standard, the panel held that qualified immunity was inapplicable because 'the circumstances here are sufficiently analogous to *Drummond* such that Defendants were on notice that their use of force violated the Fourth Amendment.'. . The panel's analysis disregards the relevant qualified immunity standards as more specifically articulated in the Supreme Court's recent case law. Since our 2003 opinion in *Drummond*, the Supreme Court has issued no less than eight opinions reversing this court's denial of qualified immunity in Fourth Amendment cases—four of which were summary reversals. [citing cases] During that same time period, the Court has issued six more opinions reversing the other circuit courts' denial of qualified immunity in Fourth Amendment cases, and three of those were summary reversals. [citing cases] Given that the Supreme Court has thus issued a total of 14 opinions since 2003 reversing the circuit courts' denials of qualified immunity in Fourth Amendment cases, including seven summary reversals, the panel clearly erred when it disregarded much of what the Court said in those cases. This recent Supreme Court precedent has reiterated two important and closely related rules, and the panel violated both of them in its decision. The first of these rules is the more general principle—applicable to all qualified immunity cases—'that clearly established law should not be defined at a high level of generality.'. . Because an officer is entitled to qualified immunity unless then-existing precedent 'clearly prohibit[s] the officer's conduct in the *particular circumstances* before him,'. . . 'general proposition[s]' are 'of little help in determining whether the violative nature of particular conduct is clearly established[.]'. . If it were permissible to generalize beyond the specific points established in the existing precedent, '"[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."'. . This court has nonetheless routinely strayed from this rule,

prompting the Supreme Court to admonish that it has ' "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality."'. . In its amended memorandum disposition, the panel now at least pays lip service to this rule by quoting *White*'s recitation of it, but the panel then still proceeds to flout that rule by relying on higher-level generalizations when defining the relevant clearly established law. . . The second rule that emerges from the Supreme Court's recent case law is a close corollary of the first, and it underscores the especially heightened need for specificity in the context of a Fourth Amendment excessive force case. . . Because '[u]se of excessive force is an area of the law "in which the result depends very much on the facts of each case," ... police officers are entitled to qualified immunity unless existing precedent "*squarely governs*" the *specific* facts at issue.'. . As this court recently emphasized in a published decision concerning qualified immunity in the Fourth Amendment context, 'we must locate a controlling case that "squarely governs the specific facts at issue," except in the "rare obvious case" in which a general legal principle makes the unlawfulness of the officer's conduct clear despite a lack of precedent addressing similar circumstances.'. . .This watered-down 'sufficiently analogous' test more closely resembles the standard that we applied in *Kisela* and that earned us a summary reversal by the Supreme Court. . . Moreover, as set forth below, the panel's effort to stretch *Drummond* to cover the facts of this case violates both the Court's repeated admonition not to resort to higher levels of generality and the Court's insistence on identifying a controlling precedent that squarely governs the specific facts at issue. . . . The panel's broadening of *Drummond* confirms just how far the panel has departed from the controlling qualified immunity standards. The focus of the qualified immunity inquiry has to be on the specific *actions* of the officers, and whether the law clearly established that 'the Fourth Amendment prohibited the officer[s'] conduct in the situation [they] confronted.'. . But the panel's broadening of *Drummond* converts it into a rule about *outcomes*: if 'asphyxia' results, it does not matter whether it was caused by the officers' use of direct 'compression' (as in *Drummond*) or was caused by a collection of restraints, together with brief incidental compression (as in this case). However, the relevant question for qualified immunity is not what outcome occurred as a result of the officers' actions; the relevant question is *what specific actions did the officers take*. By ignoring all of these obvious differences between *Drummond* and this case, the panel has effectively applied an unstated but much broader rule that condemns a set of police restraints that are not covered by the requisite controlling precedent that 'squarely governs the specific facts at issue.'. . The panel's reasoning and result cannot be squared with the Supreme Court's demanding standards for defeating qualified immunity.")

TENTH CIRCUIT

Dalton v. Reynolds, No. 19-2047, 2021 WL 2641859, at *8-9 (10th Cir. June 28, 2021) ("At the time of the Officers' conduct, it was clearly established in this circuit that it is unlawful to provide less police protection to a sub-class of domestic violence victims, like those whose assailants were police officers with whom they had been in a domestic relationship. We held in *Watson* that providing less police protection to victims of domestic violence than to victims of non-domestic

violence can form the basis of an equal protection violation. . . . Despite this precedent, the Officers argue that in the absence of a Tenth Circuit or Supreme Court case identifying the specific sub-class of persons at issue here—namely, persons domestically abused by police officers with whom they had been in a domestic relationship—the Estate's equal protection claim must fail. They argue *White v. Pauly*, —— U.S. ——, 137 S. Ct. 548, 196 L.Ed.2d 463 (2017), demands a higher showing of factual similarity before a case clearly establishes that particular conduct violates a constitutional provision. But our circuit *has* clearly established precedent that police officers may not intentionally discriminate in providing police protection to domestic violence victims. . . . Here we have two factually similar cases, *Watson* and *Price-Cornelison*, which clearly established at the time of the Officers' conduct that providing less protection to domestic violence victims, or certain sub-classes of domestic violence victims, violates the Equal Protection Clause. These cases would put a reasonable officer on notice that it is unlawful to provide less police protection to victims of domestic violence whose assailants are police officers with whom they had been in a domestic relationship than is provided to victims without police assailants. . . In sum, the Estate has satisfied both prongs necessary to overcome the Officers' qualified immunity defense. Based on the facts found by the district court, the Officers violated Ms. Bascom's clearly established equal protection right to the same police protection as other domestic violence victims.")

Truman v. Orem City, No. 19-4133, 2021 WL 2621109, at *5-8 (10th Cir. June 25, 2021) ("Mr. Truman's allegations are sufficient to overcome the prosecutor's claim of qualified immunity. He plausibly alleges (1) the prosecutor's actions violated his constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer and (2) the right was clearly established at the time of the prosecutor's conduct. . . . Mr. Truman's allegations paint a picture of arbitrary executive action that shocks the conscience: the prosecutor intentionally presented false information to the medical examiner to get him to change Mrs. Truman's manner of death to homicide and then put the medical examiner on the stand to testify based on that false information in order to secure Mr. Truman's conviction. Accordingly, Mr. Truman sufficiently alleges the prosecutor's actions violated his constitutional due process right not to be deprived of liberty as a result of the fabrication of evidence by a government officer, satisfying the first requirement to overcome the presumption of qualified immunity. . . .We also conclude the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer was clearly established at the time of the prosecutor's conduct. The constitutional violation at issue here was clearly established by our decision in *Pierce* in 2004. . . .The alleged facts in this case are obviously not identical to those in *Pierce*: prosecutor versus forensic analyst, incorrect dimension evidence versus faulty hair sample evidence. Even so, there are consistent factual strands running through these cases that put the prosecutor on notice that his alleged conduct violated Mr. Truman's constitutional rights. Just like in *Pierce*, Mr. Truman alleges that the prosecutor knowingly used false evidence to convict Mr. Truman and to deprive him of due process. Such consistency is enough to defeat qualified immunity. The same constitutional right at issue in *Pierce* is at issue in this case. Accordingly, the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer was clearly established by *Pierce* at the time of the prosecutor's actions in 2013, satisfying the second requirement to overcome the

presumption of qualified immunity. This is also an 'obvious case' of a constitutional violation. . . Any reasonable prosecutor understands that providing a medical examiner materially false information that influences his expert opinion as to whether a homicide occurred and then putting that medical examiner on the stand to testify based on that false information prevents a fair trial. . . Such conduct is 'obviously egregious,'. . . and so the 'unlawfulness of the officer's conduct is sufficiently clear even [if] existing precedent does not address similar circumstances.'. . A recent Supreme Court case, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curium), is instructive. . . . The Supreme Court rejected the Fifth Circuit's finding of qualified immunity. The inmate in *Taylor* could not identify a case in which a court held that an inmate confined to extremely unsanitary cells for six days offends the Constitution. But the Supreme Court made clear that he did not have to. It explained that 'no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time.'. . In support, the Court reasserted its holding in *Hope v. Peltzer*, 536 U.S. 730, 741 (2002), for the proposition that 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. .This proposition applies with equal force here. The right not to be deprived of liberty as a result of the fabrication of evidence by a government officer is a general constitutional rule identified in decisional law prior to the prosecutor's conduct. . . .Just like any reasonable correctional officer should understand the inmate in *Taylor*'s conditions of confinement offended the Constitution, so too should any reasonable prosecutor understand that providing a medical examiner fabricated evidence and then putting him on the stand to testify based on that false information offends the Constitution.")

Huff v. Reeves, 996 F.3d 1082, 1088-90 (10th Cir. 2021) ("*Childress* would be highly relevant, indeed dispositive, if the evidence established that Trooper Reeves was shooting only at Norris and the wounds to Ms. Huff were just 'the unfortunate ... accidental effects of otherwise lawful conduct.'. . If, however, Reeves intentionally shot Ms. Huff (perhaps because he thought she was implicated in the robbery and murder), *Childress* is not in point. We therefore begin by addressing whether the record would support a jury finding that Reeves intentionally shot Ms. Huff. Concluding that there was sufficient evidence to support such a finding, we then turn to whether a shooting in that circumstance would violate Ms. Huff's rights under the Fourth Amendment and whether that law was clearly established at the time of the incident. The district court correctly observed that Reeves denied under oath that he saw Ms. Huff when he was firing his weapon. But that denial is not dispositive. The record contains ample evidence from which a jury could reasonably infer that Reeves saw and intentionally shot Ms. Huff after she exited the SUV. To begin with, the very fact that Ms. Huff was repeatedly struck by bullets from Reeves's gun strongly implies that she was in his line of sight. The shooting was in broad daylight. And the fact that she was struck by bullets so often (at least 10 times) makes it hard to believe that she was not being aimed at. Nor can her being struck so often be blamed on her proximity to Norris, who was struck only four times, compared to her 10. Ms. Huff testified at her deposition that she and Norris exited on *opposite sides* of the SUV and that she 'had [her] hands up and ran a short distance ... into the field' abutting Onapa Road. . . She said that she was 'running away from Cedric Norris' and 'never

saw [him] again once he exited the vehicle.'. .Although circumstantial, the evidence described in the preceding paragraph is more than sufficient to permit a factfinder to reject Reeves's account. . . . Here, Ms. Huff testified that she raised her hands in surrender as she approached the officers when she was first shot. If her version of events is believed, she was not evading apprehension and she posed no threat to the officers or anyone else. Perhaps Reeves reasonably viewed the situation otherwise, viewing her as an accomplice to murder who was shooting at him. But that is a question for the jury. On facts that could reasonably be found by the jury, Reeves's shooting at Ms. Huff was contrary to clearly established Fourth Amendment law. We acknowledge that none of the above-cited cases addresses the *precise* set of facts now before us. But in our view 'existing precedent ... ha[s] placed the ... question beyond debate.'")

Frasier v. Evans, 992 F.3d 1003, 1013-23 & n.4 (10th Cir. 2021), *pet. for cert. filed,* No. 21-57 (U.S. July 8, 2021) ("We begin by reviewing the district court's denial of qualified immunity to the officers on Mr. Frasier's First Amendment retaliation claim. The court held that, although Mr. Frasier's alleged right to record the officers performing their official duties in public spaces was not clearly established at the time of the underlying events in August 2014, the officers nevertheless were not entitled to qualified immunity because the record supported a finding that the officers actually knew from their training that the right existed. . . .The officer defendants challenge the district court's denial of their qualified-immunity defense with respect to Mr. Frasier's First Amendment retaliation claim. They contend that the court should have granted them immunity once it held that judicial precedent did not clearly establish in August 2014 Mr. Frasier's alleged First Amendment right to record them performing their official duties in public spaces. We agree. More specifically, the district court erred in concluding that the officers were not entitled to qualified immunity because they actually knew from their training that such a First Amendment right purportedly existed—even though the court had determined that they did not violate any clearly established right. There are two salient, independent grounds for concluding that the district court's ruling was wrong. First, and perhaps most significantly, a defendant's eligibility for qualified immunity is judged by an objective standard and, therefore, what the officer defendants subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law question. Second, judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry. . . .Mr. Frasier contends nonetheless that the district court was right to deny the officers their defense because qualified immunity does not protect those who 'knowingly violate the law.'. . He further contends that we and other circuits have recognized that an officer does not warrant immunity under *Harlow* when he actually knew that he was violating the law, irrespective of whether the law was clearly established at the time. . . Like the district court, Mr. Frasier locates the origin of this somewhat novel interpretation of *Harlow* in Justice Brennan's concurrence in that case. . . We, however, reject the idea that *Harlow* permits an exception to its objective standard based on an official's subjective understanding or knowledge of the law. We note that 'a concurring opinion is not binding on us'—even one from a Supreme Court Justice—and, therefore, such an opinion is relevant only insofar as its analysis is

'persuasive.'. . And Justice Brennan's concurrence is not a persuasive reading of the scope of *Harlow*'s holding. . . Mr. Frasier tells us that we—as well as other federal courts of appeals—have already adopted Justice Brennan's *Harlow* concurrence. In this connection, he particularly cites to *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989), asserting that we 'specifically stated [in that case] that a "government official who actually knows that he is violating the law is not entitled to qualified immunity even if [his] actions [are] objectively reasonable."'. Although Mr. Frasier is correct that we used that language in *Pleasant*, he neglects to mention that it only appears in a parenthetical purporting to describe the holding of Justice Brennan's *Harlow* concurrence. . . . Therefore, Mr. Frasier's reliance on *Pleasant* is misguided. Furthermore, we also decline to follow the out-of-circuit caselaw that Mr. Frasier offers to us. Irrespective of whether he has accurately cited those decisions as supporting his argument that an official cannot receive qualified immunity when he actually knows he violated the law, we do not believe that those cases can cast any doubt on our baseline conclusion—firmly grounded in Supreme Court precedent—that 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.'. . . As for the second point, the district court was wrong to deny the officers qualified immunity based on their knowledge of Mr. Frasier's purported First Amendment rights that they gained from their training. Judicial decisions are the only valid interpretive source of the content of clearly established law; whatever training the officers received concerning the First Amendment was irrelevant to the clearly-established-law inquiry. . . Indeed, it is beyond peradventure that judicial decisions concretely and authoritatively define the boundaries of permissible conduct in a way that government-employer training never can. Thus, irrespective of the merits of the training that the officer defendants received concerning the First Amendment, it was irrelevant to the clearly-established-law inquiry here. The district court consequently erred in denying the officers qualified immunity based on the actual knowledge that they purportedly gained from such non-judicial sources. In conclusion, we hold that the district court applied an erroneous rationale in denying the officer defendants qualified immunity on Mr. Frasier's First Amendment retaliation claim. If the officers did not violate Mr. Frasier's clearly established First Amendment rights—and the district court itself said they did not—then the officers are entitled to qualified immunity. This is so, even if the officers subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights. . . .Mr. Frasier contends that we should nevertheless affirm the district court's judgment denying qualified immunity to the officers on the alternative ground that his First Amendment right to record the officers performing their official duties in public spaces was actually clearly established in August 2014, even though the district court ruled to the contrary. . . . . We do not consider, nor opine on, whether Mr. Frasier actually had a First Amendment right to record the police performing their official duties in public spaces. . . We exercise our discretion to bypass the constitutional question of whether such right even exists. In doing so, we are influenced by the fact that neither party disputed that such a right exists (nor did the district court question its existence). . . And because we ultimately determine that any First Amendment right that Mr. Frasier had to record the officers was not clearly established at the time he did so, we see no reason to risk the possibility of 'glibly announc[ing] new constitutional rights in dictum that will have no effect

whatsoever on the case.'. . . Mr. Frasier does not assert that any on-point Tenth Circuit authority provided clearly established law in August 2014 concerning his First Amendment retaliation claim, and we are not aware of any. Yet, Mr. Frasier argues that his right to record the police performing their official duties in public spaces was clearly established by two 'general constitutional rule[s] already identified in the decisional law.'. . He points in particular to two principles: (1) 'the creation and dissemination of information are speech within the meaning of the First Amendment,' and (2) '[n]ews gathering is an activity protected by the First Amendment.'. . . We find unpersuasive, however, Mr. Frasier's effort to show that these general principles clearly established a First Amendment right applicable to these circumstances, which involve the recording of police officers performing their official duties in public spaces. . . . Mr. Frasier's attempt to distill a clearly established right applicable here from the general First Amendment principles protecting the creation of speech and the gathering of news runs headfirst into the Supreme Court's prohibition against defining clearly established rights at a high level of generality. Mr. Frasier fails to demonstrate how the alleged unlawfulness of the officers' conduct in retaliating against him for recording them 'follow[s] immediately from' the abstract right to create speech and gather news. . . Furthermore, to the extent that Mr. Frasier relatedly asserts—referencing *Hope v. Pelzer* and its progeny—that these general constitutional principles apply to these facts 'with obvious clarity,'. . . such that reasonable officers in the defendants' positions would have known that their conduct was unlawful, his suggestion falls far from the mark. That is because *Hope*'s holding historically has been applied to only the 'rare "obvious case,"'. . involving 'extreme circumstances,'. . . or 'particularly egregious' misconduct[.] . . Even a cursory consideration of these facts—in the light of cases like *Taylor* and *Hope*—makes clear that this is not such a rare case. . . . Mr. Frasier argues next that even if 'the well-established First Amendment protection provided to speech creation and newsgathering were too general to apply with obvious clarity to Defendants' conduct, the weight of authority from other Circuits clearly established [his] First Amendment right to record the Defendants.'. . He directs our attention in particular to four pre-August 2014 circuit court decisions: *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); and *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). Even if we assume that all four decisions—*i.e.*, *Alvarez*, *Glik*, *Smith*, and *Fordyce*—clearly stand for the proposition that there is a First Amendment right to record the police performing their duties in public spaces, . . . those decisions do not indicate that this right was clearly established law in our circuit in August 2014. . . . And circuit judges have disagreed regarding whether this purported First Amendment right to record was clearly established around August 2014. . . .In other words, the out-of-circuit authorities appear to be split on the clearly-established-law question. And, in the teeth of this circuit split, we could not reasonably conclude that the 'clearly established weight of authority from other courts' has "found the law to be as [Mr. Frasier] maintains.'"'. . And, more specifically, the out-of-circuit authorities that Mr. Frasier cites do not convince us that, in August 2014, reasonable officers in the positions of the officer defendants here would have had 'fair notice that [their] conduct was unlawful.'. . . In conclusion, we hold that the district court erred in denying the officers qualified immunity with respect to Mr. Frasier's First Amendment retaliation claim. Irrespective of whether the officers subjectively knew from their training that Mr. Frasier

possessed a First Amendment right to record them performing their official duties in public spaces, this right (which we assume to exist) was not clearly established law in August 2014 when they allegedly retaliated against Mr. Frasier for recording them. Accordingly, Mr. Frasier has not shouldered his burden on the second prong of the qualified-immunity standard (the clearly-established-law prong), and the officers are therefore entitled to judgment in their favor on this claim.")

Vette v. K-9 Unit Deputy Sanders, 989 F.3d 1154, 1171-72 (10th Cir. 2021) ("We . . . conclude that, under the totality of circumstances, Sergeant Sanders's alleged use of force against Mr. Vette—viz., striking him in the face and releasing a police dog to attack him after he was already apprehended—was objectively unreasonable. Accordingly, Sergeant Sanders violated Mr. Vette's right under the Fourth Amendment to be free from excessive use of force. . . .In December 2017, a reasonable officer would have been on notice that striking Mr. Vette in the face and releasing a dog to attack him, after he was already apprehended by two officers, was unconstitutional. Specifically, as of 2017, our precedent was clear 'that continued use of force after an individual has been subdued is a violation of the Fourth Amendment.'")

Crowson v. Washington County State of Utah, 983 F.3d 1166, 1183-84 (10th Cir. 2020) ("To conclude *Mata* put all reasonable doctors on notice that failing to obtain a test result violates an inmate's rights would place the notice at too high a level of generality. As discussed, *Mata* does not require testing and, consequently, Dr. LaRowe's conduct falls into a grey area created by the holdings of *Estelle* and *Self* on the one hand and *Mata* on the other. We therefore cannot conclude that every reasonable official would have known it was a violation of Mr. Crowson's constitutional rights to proceed with a diagnosis in the absence of blood test results. Rather, it fell within the realm of reasonable debate. . . .For purposes of our analysis, we assume Dr. LaRowe violated Mr. Crowson's Fourteenth Amendment rights by treating him for withdrawal without first obtaining the results from a previously ordered blood test. Because we have found no decisions from the Supreme Court or this court that clearly establish the unconstitutionality of such conduct, we conclude Dr. LaRowe is entitled to qualified immunity, and we reverse the district court's denial of summary judgment.")

Harris v. Mahr, 838 F. App'x 339, ___ (10th Cir. 2020) ("Even assuming without deciding that Plaintiffs had a plausible claim for violation of a constitutional right based on a failure to intervene, the constitutional right was not clearly established. . . Therefore, the denial of qualified immunity was error. . . .Plaintiffs claim that Sergeant Mahr failed to intervene in an unlawful entry and search of their apartment. To show that such a duty was 'clearly established,' they rely primarily on an excessive force case stating 'that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence.' *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)). Additionally, they also rely upon two unpublished decisions that apply the duty to intervene in unlawful entry cases. . . These cases, however, fail to show that the law was clearly established

at the time of the incident. Although *Vondrak* recites a broad duty to intervene, it lacks any specificity, especially as to unlawful entry and search cases. The same is true of the case *Vondrak* relied upon. . . In *Vondrak,* we said that the duty to intervene applies to excessive force and unlawful arrests, as well as 'any constitutional violation [that] has been committed by a law enforcement official.'. . But it does not discuss unlawful entries or searches, thus making it a highly generalized statement. . . In *Reid*, this court found defendants liable for failing to intervene in an unlawful entry because they were 'present and heard the conversation between plaintiff and [the other officer]; yet they did not act to stop the allegedly unconstitutional action.'. . In this case, however, Sergeant Mahr was not alleged to be at the door with the searching officers and he previously told them *not* to enter the apartment without a warrant. These factual differences undermine *Reid*'s ability to clearly establish the law, especially when considering the importance of the facts to a failure-to-intervene claim. . . .Given the lack of caselaw, Plaintiffs ultimately must contend that Sergeant Mahr's conduct was 'so obviously unconstitutional' that they do not need to identify an on-point case. . . Plaintiffs point to this court's 'sliding scale' approach where 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.' . . Not only are the 'constitutional principles' surrounding a failure to intervene in an unlawful search unclear, but Plaintiffs acknowledge that Sergeant Mahr initially told APD officers not to enter the apartment without a warrant. His failure to take additional steps is not the type of 'egregious' conduct that warrants foregoing our traditional requirement of an on-point case. Finally, Plaintiffs argue that this court should reject the doctrine of qualified immunity altogether. Plaintiffs recognize that they failed to raise this argument in the district court but ask us to use our discretion to consider it on appeal. However, despite any difficulties the framework presents, we remain obligated to follow qualified-immunity precedents of the Supreme Court and Tenth Circuit. . .Therefore, we decline Plaintiffs' offer to upend the doctrine.")

Bond v. City of Tahlequah, Oklahoma, 981 F.3d 808, 825-26 (10th Cir. 2020), *pet. for cert. filed,* No. 20-1668 (U.S. May 27, 2021) ("Having held that a reasonable jury could find the officers violated the Fourth Amendment under the *Allen* line of cases, our analysis of clearly established law narrows to *Allen* and *Sevier*. . . As an unpublished decision, *Hastings* 'provides little support for the notion that the law is clearly established.'. . *Estate of Ceballos* was decided after the underlying events here and, as we explained there, resolution of the clearly established law prong is necessarily governed by cases published before the alleged violation. . . But *Ceballos* does advance our analysis because it concludes that *Allen,* an opinion issued before the officers' actions here, clearly established

> that an officer violates the Fourth Amendment when his or her reckless or deliberate conduct results in the need for lethal force or when the officers rely on lethal force unreasonably as a first resort in confronting an irrational suspect who is armed only with a weapon of short-range lethality and who has been confined on his own property. [footnote omitted]

Estate of Ceballos, 919 F.3d at 1219.

This clearly established law is directly applicable to the facts in this case: Here, the officers knowingly confronted a potentially irrational subject (Dominic was inebriated) who was armed only with a weapon of short-range lethality (a hammer) and who had been confined (in a garage). *Allen* established that applying lethal force after deliberately or recklessly manufacturing the need to do so in such a scenario is a constitutional violation. . . Moreover, the distinction in facts between this case and *Allen* tends to show why this matter is further from the line of reasonableness, not closer. In *Allen*, the officers had not threatened the decedent, but here Officer Girdner was moving toward Dominic, in an apparent effort to search him without a reasonable suspicion Dominic was armed. In *Allen*, the decedent was already armed when the officers arrived, whereas Dominic did not arm himself until after the officers had cornered him. And in *Allen*, the decedent had a gun; Dominic had only a hammer. . . Our conclusion that *Allen* clearly established the officers' conduct was unconstitutional when viewed in the light most favorable to the Estate, is bolstered by our similar holdings in *Hastings* and *Estate of Ceballos*. A reasonable officer, faced with the circumstances here and presumptively aware of our decision in *Allen*, would have known that cornering Dominic in the garage might recklessly or deliberately escalate the situation, such that an officer's ultimate use of deadly force would be unconstitutional.")

Hubbard v. Nestor, 830 F. App'x 574, ___ (10th Cir. 2020) ("It was clearly established at the time of Defendants' conduct that the Fourteenth Amendment 'prohibits *any* punishment' of a pretrial detainee without due process. . . Importantly here, it was also clearly established that 'a showing of an expressed intent to punish on the part of detention facility officials'—standing alone—is sufficient to demonstrate 'the disability is imposed for the purpose of punishment.'. . This clearly established standard is sufficiently specific to have put Defendants on notice that their actions—intentionally punishing Plaintiff by placing him on disciplinary status or in disciplinary segregation without giving him an opportunity to be heard—violated his due process rights. The thrust of Defendants' counterargument is that this clearly established law is too general for them to have understood their conduct violated the Fourteenth Amendment. That is, Defendants contend they are entitled to qualified immunity because there is no Supreme Court or Tenth Circuit decision on point to inform them that their actions under these particular circumstances constituted unconstitutional punishment. But in doing so, Defendants fail to grapple with the district court's factual determinations that they intended to punish Plaintiff by placing him on disciplinary status or in disciplinary segregation. In light of these facts, which this court lacks authority to review, we have no trouble concluding a reasonable detention facility officer in Defendants' shoes would have known their actions violated Plaintiff's due process rights. We are thus unable to grant Defendants the immunity they seek.")

Brown v. Flowers, 974 F.3d 1178, 1186-87 (10th Cir. 2020) ("We conclude that Flowers violated a clearly established right. We have long held that nonconsensual, coerced sex between a jailer and an inmate violates the Constitution. . . And cases like *Castillo*, *Barney*, and *Smith* demonstrate that our caselaw does not distinguish between sexual abuse accomplished through physical and nonphysical coercion. . . Given the context of this case and the facts as we must construe them in this interlocutory appeal—the inherently coercive nature of prisons, Flowers giving Brown

cigarettes, and Brown's testimony, including the fact that she was crying during the sex—existing caselaw made it 'clear to a reasonable officer that' Flowers's 'conduct was unlawful.'. . And considering the nature of the constitutional violation—where Flowers's use of force was in no way related to his duties as a jailer, as opposed to being at the 'hazy border between excessive and acceptable force'—a case involving the same type of coercion and evidence of lack of consent is unnecessary to place the unconstitutionality of Flowers's conduct 'beyond debate.'. . We therefore conclude that Flowers violated a clearly established right, and we affirm the district court.")

Mglej v. Gardner, 974 F.3d 1151, 1170-71 (10th Cir. 2020) ("[V]iewing the evidence in the light most favorable to Mglej, then, the lasting physical injury he suffered and the extreme prolonged pain inflicted on him is sufficient for Mglej to meet his burden of establishing an actual, non-de minimis injury to support an excessive force claim based on being handcuffed too tightly. . . Furthermore, as the cases cited above indicate, such a Fourth Amendment violation was clearly established in August 2011. . . In particular, this court previously recognized, in 2008, that a claim that overly tight handcuffs caused permanent nerve damage was sufficient to establish a Fourth Amendment excessive force claim. . . The district court, therefore, did not err in denying Deputy Gardner qualified immunity on this excessive force claim. . . .In the district court, Deputy Gardner did not specifically challenge that this constitutional violation—malicious prosecution—was clearly established in August 2011. In any event, it was. In 2008, the Tenth Circuit stated that 'it of course has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures.'")

Emmett v. Armstrong, 973 F.3d 1127, 1134-37 (10th Cir. 2020) ("[A]lthough Officer Armstrong did not verbally identify himself as a police officer, because the totality of the circumstances show that it was objectively reasonable for Officer Armstrong to believe that Emmett knew he was a police officer, Emmett's arrest for interfering with a peace officer did not violate his Fourth Amendment rights. Because no constitutional right was violated, we need not determine whether that right was clearly established. . . . Our review of a Fourth Amendment excessive force claim looks at the facts and circumstances as they existed at the moment the force was used, while also taking into consideration the events leading up to that moment. . . .Taking all the facts in the light most favorable to Emmett, therefore, it was not objectively reasonable for Officer Armstrong to deploy his taser. . . . [T]he relevant inquiry is whether, in October of 2013, there were applicable Tenth Circuit cases putting Officer Armstrong on notice that using a taser without providing an adequate warning against a misdemeanant who had ceased actively resisting was unconstitutional. We conclude that there was Tenth Circuit precedent—*Casey* and *Cavanaugh*—putting Officer Armstrong on notice that his use of force was unreasonable.")

Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners, 965 F.3d 1114, 1115, 1120-22 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1382 (2021) (Tymkovich, C.J., concurring) ("In my view, Ms. Contreras has failed not only to demonstrate the violation of a clearly established constitutional right, but also the violation of a constitutional right at all. . . . Although

the corrections officers sought to protect A.L. from harm, it seems likely that negligence undermined their efforts. Negligence offers much cause for concern here; but precedent tells us it cannot elicit constitutional intervention. . . To be clear, the facility likely could have addressed the risk of detainee-on-detainee violence more effectively. But we must abide by the Supreme Court's mandate to assess both objective risk and subjective awareness of that risk. The subjective inquiry requires that we ask whether the officers knew of a substantial risk and consciously disregarded the dangers that risk posed to A.L. I cannot infer subjective knowledge of any substantial risk to A.L. from this record. And no evidence indicates the corrections officers manifested the requisite actual knowledge of this risk, in any event. I would accordingly conclude that Ms. Contreras has failed to carry her burden. . . . Even if we were to conclude a constitutional violation had occurred, the circumstances of this case nonetheless cannot satisfy the rigorous standards the Supreme Court has articulated for clearly established law. . . . Ms. Contreras frames the constitutional violation at a high level of generality: '[A] known but disregarded threat to an inmate's physical safety, combined with evidence of prior assaults and information about a specific threat can establish deliberate indifference.'. . As a threshold matter, I doubt this formulation can satisfy the rigorous standards for specificity required by the Supreme Court. . .But even if—for the sake of argument—we take this rule as given, the two Tenth Circuit authorities cited most extensively by Ms. Contreras, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), and *Howard v. Waide*, 534 F.3d 1227 (10th Cir. 2008), do not yield fair notice of a constitutional violation in this case. . . . The out-of-circuit authorities cited by Ms. Contreras fare little better. . . . In sum, no authorities clearly establish a constitutional violation under these circumstances.")

Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners, 965 F.3d 1114, 1122-23 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1382 (2021) (Carson, J., concurring in part and concurring in the judgment) ("Make no mistake. We expect corrections officers to protect those under their supervision—especially children. The officers here—more attuned to a television show than the juveniles in their charge—allowed violent inmates to brutally assault A.L. I find their failure to protect A.L. inexcusable. But 42 U.S.C. § 1983 provides no remedy to Plaintiff for unprofessional or negligent conduct. Instead, Plaintiff may only recover against the officers if they violated a clearly established constitutional right. . . . I would not reach the constitutional question because, even if the officers violated A.L's constitutional rights, those rights were not clearly established. When our body of caselaw contains no case with remarkably similar facts, we look to a 'sliding scale' analysis to determine whether clearly established law prohibited an officer's conduct. . . Under the sliding scale, the worse the conduct given prevailing constitutional principles, the less specificity is required from prior caselaw to clearly establish the violation. . .Some recent decisions suggest the sliding scale approach may conflict with current Supreme Court authority, but no case has overruled it. . . .With no case overruling it, the sliding-scale approach lives in this Circuit. But that said, we must apply it cautiously as contemporary Supreme Court cases require an ever-increasing level of factual similarity for prior decisions to place a statutory or constitutional question beyond debate. . . . I view this case as exceedingly close on both prongs of the qualified immunity analysis. Ultimately, however, I conclude the precedents from this Circuit and the Supreme Court do not place the constitutional question beyond debate (even

considering the sliding scale approach). Plaintiff's claims must therefore fail against the individual officers. So I join Chief Judge Tymkovich's opinion as far as it addresses the 'clearly established' prong of the qualified immunity analysis. Because I would not reach the constitutional question, I join neither Judge Baldock's nor Judge Tymkovich's well-presented analysis of that issue.")

Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners, 965 F.3d 1114, 1125, 1134-37 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1382 (2021) (Baldock, J., concurring in part, dissenting in part) ("Corrections officers cannot absolutely guarantee the safety of those in their care. Nor does the Constitution sweep so broadly as to require every cell in a detention center to always remain locked for the protection of its guests. But after violent threats have been made by a group of particularly violent detainees, any reasonable official cognizant of his duty to protect would know that the failure to secure the control panel while a would-be assailant is outside his cell is objectively unreasonable. . . . Because Sergeant Luna's conduct was plainly incompetent, qualified immunity should afford him no shelter. . . . Given Sergeant Luna's knowledge of past incidents involving the control panel and the particular risk A.H. posed outside his cell—combined with all the other material facts in the record—Luna's mental state at the time of the attack is within the province of a jury, not this Court. For these reasons, I would conclude Plaintiff has carried her burden of demonstrating Sergeant Luna was deliberately indifferent to A.L.'s safety and violated his constitutional right to protection from violence. . . .This brings me to the second part of our qualified-immunity analysis. My colleagues conclude that Sergeant Luna is entitled to qualified immunity even if he violated the Constitution because A.L.'s asserted constitutional right was not clearly established at the time of the violation. Respectfully, I remain unpersuaded. . . . In every case, we first look for a Supreme Court or Tenth Circuit decision on point to determine whether the legal rule under which a plaintiff seeks to hold a defendant liable is clearly established. . . Absent any such decision, we consider whether the clearly established weight of authority from our sister circuits holds the rule to be as the plaintiff maintains. . . Neither the Supreme Court nor this Court, however, has ever required 'the very action in question' to have 'previously been held unlawful.'. . .To be sure, prior decisions involving similar facts provide strong support for a conclusion that the law was clearly established. This is why, in most cases, 'like' decisions are necessary before we reach such a conclusion. They are not necessary in every case, however, because the Supreme Court has told us that 'general statements of the law are not inherently incapable of giving fair and clear warning' to reasonable persons. . . . While 'like cases' undoubtedly bear upon 'fair notice,' the relevant standard in ascertaining 'clearly established law' is the latter, not the former. The qualified-immunity standard simply does not call for a 'single level of [rule] specificity sufficient in every instance.' . . Rather, the precedent on which a court relies to conclude the law was clearly established need only 'be *clear enough* that every *reasonable* official would interpret it to establish the particular rule the plaintiff seeks to apply.'. . Throughout the development of the 'clearly established law' standard, the Supreme Court has stressed that the specificity of the rule is especially important in Fourth Amendment cases. . . The concerns associated with defining clearly established law 'at a high level of generality' is most salient in the Fourth Amendment context due to the imprecise nature of the relevant legal standards and how such standards apply in rapidly evolving circumstances. . . This is particularly true in

excessive force cases because '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.'. . Because every § 1983 case does not sit at one end of a spectrum or the other, we have recognized, based on what the Supreme Court has told us, that the degree of specificity required from prior caselaw depends on the character of the challenged conduct. . . .My colleagues' reservations about our sliding-scale approach comes as no surprise given the Supreme Court's recent qualified-immunity decisions. The Court's slew of per curiam reversals in the past five years—nearly all of which concern the use of excessive force—appears to have most circuit courts tiptoeing around qualified immunity's clearly established prong. But as Judge Carson recognizes: 'With no case overruling it, the sliding-scale approach lives in this Circuit.' . . Until either this Court or the Supreme Court sounds the death knell for our sliding-scale approach, we are bound to apply it rather than merely pay lip service to it. . .With this understanding of the applicable standard in mind, let's consider whether Sergeant Luna is entitled to qualified immunity. Four decades ago, this Court held that the Constitution imposes a duty on corrections officers to take reasonable measures to protect inmates under their charge from violence at the hands of other inmates. . . Then in *Farmer*, decided in 1994, the Supreme Court clarified the contours of this rule, holding that a breach of this duty violates the Constitution where a corrections officer 'knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'. . [T]he rule under which Plaintiff seeks to hold Sergeant Luna liable is just this: When a detention center officer knows a detainee faces a substantial risk of serious harm from another detainee yet fails to employ reasonable available measures to lessen the risk, the officer breaches his or her constitutional duty to protect the vulnerable detainee. But the fact a constitutional duty to protect arises in the face of an officer's knowledge does not mean it is *necessarily* clear in every case, or even most cases, what reasonable measures consist of or, in other words, what such duty to protect specifically requires of the officer. . . The salient question here is whether this rule was sufficiently specific *in the factual context of this case* to give Sergeant Luna fair warning that his failure to secure the control panel could give rise to constitutional liability. . . [court lays out facts of this case] What Sergeant Luna effectively contests is whether a reasonable corrections officer under these circumstances would have understood the state of the law on the morning of the attack required him to ensure the control panel was locked. The constitutional question here is beyond 'beyond debate.'. . . Put differently, this rule is sufficiently specific to have put Sergeant Luna on notice that his failure to ensure the control panel was secure violated A.L.'s constitutional right to protection from violence at the hands of J.V., J.S., and A.H. Because any reasonable corrections officer in Sergeant Luna's position would have known his conduct violated A.L.'s asserted right, Luna should not be entitled to qualified immunity.")

Kapinski v. City of Albuquerque, 964 F.3d 900, 904-07, 910 (10th Cir. 2020) ("Qualified immunity is intended to give officials 'breathing room to make reasonable but mistaken judgments.'. . It creates a framework intended to provide defendants with an ability to end suits early in litigation so that they, as public employees, may continue to go about their official business without the persistent threat of defending themselves in court. . . .Consistent with *Hunter*,

our precedents confirm that where a § 1983 claim premises liability on an alleged *Franks* violation, courts may decide the probable cause question at the summary judgment stage. . . And indeed, they may do so without first characterizing ambiguous omitted material in plaintiff's favor. . . Thus, we decline Kapinski's invitation to treat his characterization of the video as the omitted material. Instead, the more appropriate approach is to simply assume that Detective Juarez included the video footage with all of its uncertainties and ambiguities as an attachment to the warrant affidavit. Viewing the amended warrant application in this way, we conclude that it supports probable cause for Kapinski's arrest and prosecution. . . . Kapinski argues the clearly established prong is satisfied by alleging 'critical information' was omitted from Detective Juarez's affidavit. . . Under this theory, the criticality of the omitted information need not be proven by reference to precedent; it is enough that the alleged omissions are the type of information that 'any reasonable person would have known ... was the kind of thing the judge would wish to know.'. . But this standard finds no support in our precedent, and its application fails to comport with the notion that 'qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.'. . As we said in *Harte v. Board of Commissioners*, alleged reckless omissions in warrant affidavits require courts to examine existing law with a high degree of specificity. . . And, importantly, a critical distinction exists between deliberate falsehoods and reckless omissions when assessing whether a putative *Franks* violation is clearly established. . . Where *intentional misstatements* are concerned, our precedent clearly establishes that lying in a warrant affidavit is unconstitutional. . . Because there is 'little ambiguity as to what kind of conduct constitutes lying,' this general principle suffices to place the question beyond constitutional debate and put reasonable law enforcement officers on notice, even in the absence of factually analogous precedent. . . But where *reckless omissions* are alleged, significant ambiguity exists around how the law applies to a particular factual situation. . . That is, 'when determining whether an officer has recklessly disregarded the truth in a warrant application, the result depends very much on the facts of each case.'. . Thus, similar to excessive force claims, the context-dependent nature of Kapinski's reckless omission claim necessitates a factually analogous precedent to overcome the clearly established prong of qualified immunity. . .Kapinski fails to put forward any such precedent. *Harte* provides no support because there we held that only a theory of liability premised on an intentional misrepresentation in a warrant affidavit was clearly established.")

Corona v. Aguilar, 959 F.3d 1278, 1284-86 (10th Cir. 2020) ("As a general matter, this court's precedent does permit a police officer to '*ask* for identification from passengers' in a lawfully stopped vehicle even when there is no particularized suspicion the passenger has engaged in or is engaging in criminal activity. . . The question before us, however, is not whether Defendant Aguilar violated the Fourth Amendment by *asking* Plaintiff to provide his ID. Defendant Aguilar's initial *request* for ID may have been lawful, but he could not—in the absence of 'reasonable suspicion of some predicate, underlying crime'—lawfully *arrest* Plaintiff for concealing identity based solely on his failure or refusal to identify himself. . . . In sum, the facts known to Defendant Aguilar when he demanded identification were insufficient to give rise to a particularized and objective basis for suspecting Plaintiff had committed any offense or was engaging in criminal activity. Without reasonable suspicion to believe Plaintiff had violated N.M. Stat. Ann. § 30–22–

1(D) or committed some other predicate, underlying crime, Defendant Aguilar lacked probable cause to arrest Plaintiff for concealing identity. . . Thus, Plaintiff has carried his burden of showing Defendant Aguilar violated his Fourth Amendment right to be free from unlawful arrest. . . .Having concluded Plaintiff has satisfied the first step of our qualified-immunity inquiry, we must now consider whether Plaintiff's asserted Fourth Amendment right was clearly established on August 3, 2014, when Defendant Aguilar effected the challenged warrantless arrest. In concluding Plaintiff carried his burden of demonstrating the law was clearly established at the relevant time, the district court relied on our decision in *Keylon v. City of Albuquerque*, 535 F.3d 1210 (10th Cir. 2008). On appeal, Plaintiff likewise argues *Keylon* would have put a reasonable officer in Defendant Aguilar's position on adequate notice his conduct violated the Fourth Amendment. We agree. . . .The circumstances at issue in *Keylon* are closely analogous to those at issue here. *Keylon* considered the same interplay between N.M. Stat. Ann. §§ 30–22–3 and 30–22–1(D) in the context of a § 1983 claim alleging unlawful arrest in violation of the Fourth Amendment. And in *Keylon*, this court determined materially similar conduct—that is, conduct involving neither physical resistance nor fighting words—neither constituted 'resisting, evading, or obstructing' law enforcement nor could justify a warrantless arrest for concealing identity. *Keylon* thus places the constitutional question regarding the illegality of Defendant Aguilar's conduct 'beyond debate.'")

Kalbaugh v. Jones, 807 F. App'x 826, ___ (10th Cir. 2020) ("Taking the facts in the light most favorable to Plaintiff, a reasonable jury could conclude that Defendants continued to beat Plaintiff after he was effectively subdued. And under the *Graham* factors this would be a violation of his constitutional rights. Although Plaintiff's crimes were significant (he had led officers on a high-speed chase, he had weapons on his person, and he ran from arresting officers), under his version of events — that he was trying to lie down with his hands out to show he was not resisting—he did not 'pose[ ] an immediate threat to the safety of the officers or others[.]' . . Defendants are free to argue to a jury that Plaintiff was not subdued, but this disputed issue of material fact precludes summary judgment. Having concluded that Plaintiff established a constitutional violation, 'we next address whether—at the time of the events of this case—it was clearly established that [Defendants'] actions constituted excessive force.'. . .We have held that an officer violated clearly established law by shooting the victim after the officer had 'enough time to recognize and react to the changed circumstances and cease firing his gun.'. . Thus, 'it is clearly established that officers may not continue to use force against a suspect who is effectively subdued.'. . 'Force justified at the beginning of an encounter is not justified *even seconds later*, if the justification for the initial force has been eliminated.'. . Taking the facts in the light most favorable to Plaintiff, Defendants violated clearly established law if they continued beating Plaintiff after it would have been clear to a reasonable officer that he had been effectively subdued. We reverse the district court's order granting qualified immunity to Defendants on Plaintiff's excessive-force claim and remand for further proceedings.")

Estate of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1170-77 (10th Cir. 2020) ("We . . . must assume for purposes of summary judgment that Mr. Smart was unarmed. . . Importantly,

however, the assumption that Mr. Smart was unarmed does not resolve whether the officers violated his constitutional rights. The salient question is whether the officers' mistaken perceptions that Mr. Smart was the shooter were reasonable. . . .[B]ecause we assume for purposes of summary judgment that Mr. Smart was *not* the active shooter, the relevant question here is whether the officers acted reasonably in light of the mistaken perception that Mr. Smart was the active shooter. Several pieces of evidence, when construed in the light most favorable to the plaintiffs, cast some doubt on the reasonableness of the officers' belief that Mr. Smart was an active shooter. . . . Considering all the evidence in the light most favorable to the plaintiffs, the jury could conclude that the officers unreasonably concluded that Mr. Smart was the active shooter. That is, the jury could conclude that the officers violated Mr. Smart's constitutional right to be free from excessive force. . . . The state of the law on March 10, 2012, did not provide fair warning to Officers Froese and Chaffee that it was unconstitutional for them to open fire on a fleeing person they (perhaps unreasonably) believed was armed in what they believed to be an active shooter situation. On this prong of the analysis, we assume that Mr. Smart was unarmed, and that Officers Froese and Chaffee were unreasonable to think otherwise. We nevertheless conclude that their decision to open fire on Mr. Smart did not violate clearly established law. . . .It is true that *Zuchel* and *King* both involve police shooting a suspect they mistakenly believed to be armed and dangerous. But neither provides meaningful guidance here. Unlike the officers in those cases, Officers Froese and Chaffee saw a suspect brandishing and firing a gun—although they may have been mistaken in identifying that suspect as Mr. Smart. And these events transpired in a large, chaotic crowd of potential victims. Thus, although *Zuchel* and *King* establish that officers *can* violate clearly established law by acting on a grossly mistaken belief that a suspect poses a deadly threat, neither case—nor any other Tenth Circuit or Supreme Court case our research has uncovered—would have given fair notice to officers deciding whether to engage a perceived active shooter in a crowded area. . . .The dissent cites several cases it argues 'clearly establish the unlawfulness of shooting a person who does not present a reasonable threat to the safety of officers or the public.'. . But none of these cases offers meaningful guidance to officers engaging a suspected active shooter because none of them involves the need to neutralize a hostile gunman surrounded by potential victims. . . .In summary, there is evidence from which the jury could conclude that the officers were mistaken in their belief that Mr. Smart was the active shooter. And there is also evidence from which the jury could conclude, with the benefit of hindsight, their mistake was not reasonable. But there is no clearly established law that establishes, under the unique facts presented during an active shooter situation, that the officers should have been on notice their actions were unconstitutional. . . . Construing the facts in favor of the plaintiffs, . . . we credit Officer Froese's testimony on this point and assume neither officer warned Mr. Smart before opening fire. Even so, no clearly established law required such a warning in this situation. . . . We have not previously had occasion to address whether officers must give a verbal warning before engaging a suspect in a situation involving, as this one did, an active shooter in a crowded public place. . . But other courts have not required such a warning when officers are faced with rapidly evolving circumstances involving deadly threats. . . . Because no relevant authority required the officers to give a warning under these circumstances, even assuming the officers failed to warn Mr. Smart before opening fire, we cannot conclude their failure to do so violated clearly

established law. . . . Finally, the plaintiffs argue a reasonable jury could find that Officer Chaffee violated clearly established law by shooting Mr. Smart after it became clear he posed no threat. We agree and therefore reverse the district court's grant of summary judgment on this point with respect to Officer Chaffee. . . .[A] reasonable jury could conclude that Officer Chaffee violated Mr. Smart's right to be free from excessive force by firing the final shots at Mr. Smart after Officer Chaffee had had 'enough time ... to recognize and react to' the fact that Mr. Smart no longer posed a threat (if in fact he ever *did* pose a threat). . . Turning now to the second prong of qualified immunity, 'it is ... clearly established that officers may not continue to use force against a suspect who is effectively subdued.'. . . [T]he evidence here, taken in the light most favorable to the plaintiffs, would also allow a reasonable jury to conclude that Officer Chaffee should have reacted to the changed circumstances and stopped shooting. Because this version of events would involve a violation of clearly established law, the district court erred in granting summary judgment as to Officer Chaffee's final shots.")

Estate of Smart by Smart v. City of Wichita, 951 F.3d 1161, 1178-85 (10th Cir. 2020) (Bacharach, J., dissenting) ("Mr. Marquez Smart, a young black man, was fatally shot five times in the back by Officers Froese and Chaffee. Under the plaintiffs' version of events, Mr. Smart was unarmed and nonthreatening as he was being chased. The district court nonetheless granted summary judgment to Officers Froese and Chaffee based on qualified immunity, holding that the Constitution did not clearly prohibit

- them from shooting an unarmed and nonthreatening man or
- Officer Chaffee from shooting the man as he was lying face down on the street.

The majority reverses the second holding, but this reversal does not go far enough. The Constitution clearly prohibited both officers from shooting an unarmed individual posing no threat to anyone. I would thus reverse the grant of summary judgment to Officers Froese and Chaffee as to their use of deadly force during the chase. . . .Viewed in the light most favorable to the plaintiffs, the evidence shows that Officers Froese and Chaffee used deadly force without a reasonable basis to believe that Mr. Smart had a gun or posed a danger to anyone. The district court and the majority thus properly acknowledge that the plaintiffs' version of events would entail a constitutional violation. But I would go further and regard this constitutional violation as clearly established. . . . The majority frames the issue based on the reasonableness of the officers' conduct rather than its egregiousness. Framing the issue this way, the majority twice acknowledges that a factfinder could justifiably determine that the officers had acted unreasonably in identifying Mr. Smart as the shooter. . . It's true that factual mistakes, as well as legal mistakes, may entitle an officer to qualified immunity. . . But the officers' alleged factual mistakes do not entitle them to summary judgment based on qualified immunity because a factfinder could appropriately conclude that those mistakes had been unreasonable. . . .Officers Froese and Chaffee repeatedly fired at Mr. Smart as they chased him, guns ablazing, with hundreds of innocent bystanders fleeing up and down the street. Given the rapidly moving crowd, a factfinder could reasonably conclude that the officers had unreasonably jeopardized not only Mr. Smart but also the hundreds of others. As they scurried in darkness, a misplaced gunshot could have killed someone else in the crowd. . . . Indeed, Officers Froese and Chaffee shot not only Mr. Smart but also four others (Darel Lucas, Rashayla

Hamilton, Latyra James, and Tationa Nolen). . . .The majority acknowledges that a factfinder could regard the officers' mistakes as unreasonable. The majority nonetheless concludes that the plaintiffs failed to identify a precedent involving an active shooter. I respectfully disagree with the majority's reasoning and conclusion. Qualified immunity does not protect officers when the underlying 'right's contours were sufficiently definite that any reasonable official in the [officer's] shoes would have understood that he was violating it.'. . In my view, any reasonable official would have understood the illegality of unreasonably shooting a person who is unarmed, nonthreatening, and running away. The illegality is apparent from three precedents . . . .When read together, *Garner*, *Carr*, and *Walker* clearly establish the unlawfulness of shooting a person who does not present a reasonable threat to the safety of officers or the public. In all three cases, the officers shot someone who was neither wielding a gun nor threatening anyone's safety. And *Carr* specifically noted that the violation was clearly established when the suspect had been shot multiple times, with all bullets entering the back of the body. . . Viewed favorably to the plaintiffs, the evidence shows that Officers Froese and Chaffee shot an unarmed man in the back multiple times even though he was unarmed and non-threatening. A reasonable officer would have known that this conduct violated a clearly established right under *Garner*, *Carr*, and *Walker*. Given these precedents, the sound of gunshots would not have caused reasonable police officers to think that they could unreasonably identify someone in the crowd as the shooter, chase him, and repeatedly fire at him in darkness as hundreds of others fled. The majority distinguishes *Garner*, *Carr*, and *Walker*, reasoning that they did not involve an active shooter. But the label 'active shooter' is problematic. An 'active shooter' is 'an individual [who] is actively engaged in killing or attempting to kill people with a firearm in a confined, populated area.'. . This definition arguably did not fit the situation when the officers opened fire on Mr. Smart. Officer Froese had thought that there were three shots; Officer Chaffee had thought that he heard four or five shots. But a factfinder could reasonably infer that once the gunshots began, the only gunshots had come from the officers rather than someone in the crowd. . . Given the reasonableness of this inference, the factfinder could justifiably find that the unknown shooter was no longer 'active' by the start of the chase. Irrespective of the label 'active shooter,' the majority concedes that a factfinder could justifiably find that the officers had unreasonably decided that Mr. Smart had a gun and that he had been the shooter. Given these concessions, how could reasonable police officers believe that the Constitution would permit them to fatally shoot someone without a reasonable belief that he had a gun, that he had been the shooter, or that he had done anything wrong? In my view, *Garner*, *Carr*, and *Walker* clearly establish that the Constitution does not permit a police officer to shoot a defenseless suspect without a reasonable belief that he was armed, that he was dangerous, or that he had committed *any* crime. . . A genuine factual dispute exists on the reasonableness of the officers' factual mistakes and their conduct. Because unreasonably chasing and shooting an unarmed person violates a clearly established constitutional right, I would reverse the award of summary judgment for Officer Froese and Officer Chaffee as to the use of deadly force during the chase.")

Quintana v. City and County of Denver, No. 20-CV-0214-WJM-KLM, 2021 WL 2913044, at *2–3 (D. Colo. July 12, 2021) ("Plaintiff contends that the Individual Defendants are not entitled

to qualified immunity based on the Supreme Court's recent decision in *Taylor v. Riojas*. . . and *McCoy v. Alamu*[.] . . According to Plaintiff, 'the Supreme Court is telegraphing to lower courts' through these cases 'that qualified immunity should be decided on a "reasonable officer" standard.'. . Defendants respond that 'it is undisputed that *Taylor* and *McCoy* do not alter the clearly established standard' and that these cases 'have no impact on the Court's prior ruling that Plaintiff failed to show that the law was clearly established as to her 42 U.S.C. § 1983 claims.'. . The Court agrees. In *Taylor*, the Supreme Court determined that the Fifth Circuit erred in granting qualified immunity to officers in an Eighth Amendment case where prisoners were housed in cells 'teeming with human waste' for six days. . . The Court concluded that when '[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution' and that the case cited by the Fifth Circuit in determining that the law was not clearly established for purposes of qualified immunity was 'too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right.'. .Likewise, in *McCoy*, the Fifth Circuit determined that a correctional officer who sprayed a prisoner in the face with a chemical agent without provocation was entitled to qualified immunity because the law was not clearly established that a 'single spray stepped over the *de minimis*' use of force line. . . The Court vacated and remanded *McCoy* to the Fifth Circuit 'for further consideration in light of *Taylor*....' . . . Contrary to Plaintiff's assertion, the Court does not read either *Taylor* or *McCoy* as fundamentally altering the qualified immunity analysis, namely that it is a plaintiff's burden to demonstrate that the right was clearly established at the time of the conduct at issue to overcome qualified immunity. . . Instead, *Taylor* and *McCoy* appear to be in line with the Supreme Court's prior rulings 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.' *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Plaintiff has still failed to come forward with cases demonstrating that the 'violative nature [the Individual Defendants'] particular conduct is clearly established.'. . Nor has she come forward with any Fourth Amendment cases that apply with obvious clarity to the specific facts of this case. Accordingly, because Plaintiff has not demonstrated that she can overcome the Individual Defendants' qualified immunity defense, the Court concludes that it would be futile to allow Plaintiff to add a Fourth Amendment claim against the Individual Defendants. This portion of the Motion is therefore denied.")

ELEVENTH CIRCUIT

Fuqua v. Turner, 996 F.3d 1140, 1150-53 (11th Cir. 2021) ("On appeal, Collier defends the District Court's conclusion that he is entitled to qualified immunity on two alternative grounds. First, Collier argues the District Court correctly concluded that given the administrative nature of the search, it was not clearly established that he needed Fuqua's consent to justify the warrantless search. Second, he argues that even if it were clearly established that he needed consent, he would still be entitled to qualified immunity because Fuqua failed to show that he did not have consent to search The Pig or Fuqua's private bedroom therein. We do not decide whether the District Court

correctly concluded that the administrative nature of the inspection obviated the need for a warrant or consent because we believe a reasonable officer in Collier's position could have believed he had consent. We affirm the District Court's conclusion that Collier was entitled to qualified immunity on that basis. . . . Although it is difficult to tell, Fuqua appears to challenge both Collier's search of The Pig and of Fuqua's bedroom within The Pig. The first question is whether Collier introduced sufficient evidence for us to conclude that a reasonable officer could have thought his search of The Pig justified by virtue of Collier's free and voluntary consent. If so, the question becomes whether a reasonable officer could have understood the scope of consent to extend to Fuqua's bedroom. We answer each question in turn and ultimately answer both in the affirmative. It follows that Collier was entitled to qualified immunity. . . . [W]e have a fairly defined picture of when law enforcement officers have effective consent to search private residences for evidence of criminal activity. We know that the mere failure to object to an officer's entry into the home does not constitute valid consent to the entry, but that some affirmative indication, even if non-verbal, that the officers are welcome to enter may be enough. We also know that an officer cannot procure valid consent by force or intimidation, whether verbal or physical. Finally, we know what factors might tip the determination one way or the other: how many officers are present; whether the officers are armed, whether the arms are visible, and whether they are drawn; whether the agents explain the purpose of the search; and whether the homeowner actively aided the officers in searching his home. Less clear, though, is how these principles map onto the context of the present case, which differs from the foregoing cases in at least three significant respects. First, the officer here is a deputy fire marshal rather than a conventional law enforcement officer. Second, the purpose of the search—at least facially—was to uncover violations of the fire code rather than evidence of criminal activity. And third, the premises searched here were a public establishment that was part of a highly regulated industry and the private bedroom within that public establishment. Even if Collier's conduct would have violated Fuqua's Fourth Amendment rights under the principles applicable to law enforcement officers conducting traditional law enforcement searches of standalone private dwellings, Fuqua has not directed us to any cases that would put an officer on clear notice that those principles apply in the same way within the quite different context in which Collier acted.")

Crocker v. Beatty, 995 F.3d 1232, 1240-43 (11th Cir. 2021) ("Under this Court's precedent, a right can be clearly established in one of three ways. Crocker must point to either (1) 'case law with indistinguishable facts,' (2) 'a broad statement of principle within the Constitution, statute, or case law,' or (3) 'conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'. . Although we have recognized that options two and three can suffice, the Supreme Court has warned us not to 'define clearly established law at a high level of generality.'. . For that reason, the second and third paths are rarely-trod ones. . . And when a plaintiff relies on a 'general rule[ ]' to show that the law is clearly established, it must 'appl[y] with *obvious clarity* to the circumstances.'. . . The district court held that Beatty was entitled to qualified immunity because the law underlying Crocker's First Amendment claim wasn't clearly established. We agree. Crocker's contrary argument appears to be of the Path-2 variety—*i.e.*, a contention that a 'broad statement of [First Amendment] principle' in our caselaw clearly

established his right to photograph the accident scene. For that proposition, he first points to our three-paragraph opinion in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). There, we said that '[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.'. . In particular, we held that the plaintiffs there 'had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.'. . So far, so good—that's certainly a 'broad statement.' But in our view, it is decidedly *not* 'obvious' that *Smith*'s 'general rule applies to the specific situation in question' here. . . To borrow the district court's phrasing, Crocker was 'spectating on the median of a major highway at the rapidly evolving scene of a fatal crash.' In that 'specific situation,' we don't think it would be obvious to every reasonable officer that *Smith* gave Crocker the right to take pictures of the accident's aftermath. . . .The dissent concludes otherwise on the ground that 'the broad pronouncement in *Smith* underscores the right's general applicability.'. . And so, as the dissent reads *Smith*, the 'right to record police activity' may be 'limited only by "reasonable time, manner and place restrictions."'. . Because the dissent finds no such restrictions in the record here, it would 'hold that Mr. Crocker's First Amendment right to record the fatal car crash was clearly established' by *Smith*. . . A couple of responses. First, there is the Supreme Court's oft-repeated instruction 'not to define clearly established law at a high level of generality.'. . With that negative injunction comes a positive command to ask 'whether the violative nature of *particular* conduct is clearly established.'. . And we must answer that question 'in light of the specific context of the case, not as a broad general proposition.'. .Second, we think that one of the few contextual clues *Smith* did leave behind counsels against reading it to have clearly established the law for the purposes of this case. Specifically, *Smith*'s reference to 'reasonable time, manner and place restrictions' (which the dissent echoes) calls to mind either 'a traditional public forum—parks, streets, sidewalks, and the like'—or a 'designated public forum'—*i.e.*, a place made a public forum by government action. . . *Smith*'s allusion to these restrictions indicates that the plaintiffs there attempted to film police activity while in a public forum of some sort—*Smith* would seem to be a First Amendment anomaly otherwise. Needless to say, I-95's median isn't a public forum of any stripe. It's not clear to us, then, that *Smith*'s (and the dissent's) time-place-and-manner gloss even applies here. . . To be clear, though, the question isn't whether *Smith* might imply to *us* some kind of public-forum predicate; rather, we must ask whether *every reasonable police officer in Beatty's position* would have known that Crocker had a right to record the accident's aftermath, subject only to reasonable time, place, and manner restrictions. . . We don't think so. Subject to exceptions not relevant here, Florida law prohibits individuals from parking on the side of a 'limited access facility' like I-95 . . . or walking on the same[.] When Beatty seized his phone, Crocker was arguably in violation of both prohibitions. The dissent's *Smith*-based argument implies that, in addition to banning individuals from parking or walking on interstates, Florida must also craft separate time, place, and manner restrictions governing the speech of people who break those laws. That seems odd to us—and at the very least not obviously correct. . . . For the foregoing reasons, we hold that *Smith*'s rule didn't apply with 'obvious clarity to the circumstances,'. . . and, therefore, that Beatty is entitled to qualified immunity on Crocker's First Amendment claim.")

Crocker v. Beatty, 995 F.3d 1232, 1259-61 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part) ("The majority says the law underlying Mr. Crocker's First Amendment claim was not clearly established at the time Deputy Beatty seized his phone. . . Specifically, the majority opinion says this Court's opinion in *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000), does not obviously apply to the facts here. . . But I think the majority cabins *Smith* too narrowly. In my view, *Smith* clearly establishes that Mr. Crocker had a right to photograph the accident scene and I would therefore reverse the grant of qualified immunity to Deputy Beatty on this claim. . . . It is true that *Smith* does not detail the specific facts presented there. . . But for me, the lack of factual detail does not do away with the right *Smith* announced. To the contrary, the broad pronouncement in *Smith* underscores the right's general applicability. *Smith* says there is 'a First Amendment right ... to photograph or videotape police conduct.'. . This statement is unambiguous and not couched in specifics that limit its application. Instead, the right is limited only by 'reasonable time, manner and place restrictions.'. . And the contours of the right announced in *Smith* do not require such precise definition. Unlike findings about the use of excessive force, for example, it is usually easy enough to know whether a plaintiff was recording police activity. Indeed, a number of district courts within this Circuit have relied on *Smith* to determine, in distinct factual contexts, that the right to record police activity is clearly established. . . I thus read *Smith* to clearly establish a general rule that the First Amendment protects a person's right to record police conduct—subject only to reasonable time, place, and manner restrictions. . . . Taking the facts in the light most favorable to Mr. Crocker, he was photographing police conduct. When Deputy Beatty seized his phone, Mr. Crocker was photographing the scene of a fatal car accident and the emergency response, including police activity, surrounding it. This record reveals no 'reasonable time, manner and place restrictions,' limiting Mr. Crocker's speech here. . . Permissible time, place, and manner restrictions are content-neutral restrictions on First Amendment conduct that are supported by a substantial government interest and do not unreasonably limit alternative avenues of communication. . . They are, by their nature, *rules*, not discretionary enforcement decisions by individual police officers. . . Again, this record suggests no such rules were in place here. And indeed, accepting Mr. Crocker's allegations as true, even Deputy Beatty understood that Florida's statutes regarding limited access facilities did not bear on Crocker's First Amendment activity. Mr. Crocker says when he asked Deputy Beatty whether it was illegal to photograph the scene, Beatty replied 'no, but now your phone is evidence of the State.' The right to record police activity is important not only as a form of expression, but also as a practical check on police power. Recordings of police misconduct have played a vital role in the national conversation about criminal justice for decades. I read today's opinion to parse this critical right too narrowly. I would hold that Mr. Crocker's First Amendment right to record the fatal car crash was clearly established and reverse the grant of qualified immunity to Deputy Beatty.")

Crocker v. Beatty, 995 F.3d 1232, 1252 (11th Cir. 2021) ("Until recently, we'd never even 'directly confronted a "hot car" case ....' *Patel*, 969 F.3d at 1182. Our one-time paucity of hot-car caselaw makes it tough for Crocker to win. Not even Patel—whose constitutional claim was much stronger—could overcome qualified immunity. . . And frankly, we can't see how Crocker's claim could succeed where Patel's failed. Crocker says that the clearly established law here comes from

our decision in *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008). We considered and rejected the analogy between *Danley* and hot-car cases in *Patel*, . . . and we do so again today. In *Danley*, a prisoner was pepper-sprayed in a poorly-ventilated cell, and although officials allowed him a brief shower, that proved ineffective—Danley ultimately spent 12 or 13 hours stuck 'in pepper-spray vapor in a poorly ventilated cell.'. . The use of force in *Danley* was 'altogether different' from the force used in *Patel*. . . So too here. Like Patel before him, Crocker also points to *Danley*'s citation of *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002). *Burchett* was another hot-car case, and there, the Sixth Circuit held that confining an arrestee 'for three hours in ninety-degree heat with no ventilation violated his Fourth Amendment right against unreasonable seizures.'. . To the extent Crocker contends that *Danley*'s citation of *Burchett* made *Burchett* part of our caselaw, we reject that incorporation-by-citation argument just as we did in *Patel*. . . Because Crocker's Fourteenth Amendment claim fails on the merits—and because the law underlying that claim wasn't clearly established, in any event—we hold that the district court correctly granted summary judgment for Deputy Beatty.")

Crocker v. Beatty, 995 F.3d 1232, 1265-66 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part) ("Finally I address whether, at the time of Mr. Crocker's arrest, it was clearly established that Deputy Beatty's conduct violated the Fourteenth Amendment. The majority gets it right here, as in *Patel v. Lanier County*, 969 F.3d 1173, 1184–88 (11th Cir. 2020), in saying that the mere act of detaining Mr. Crocker in the back seat of a hot car for approximately 30 minutes was not clearly established as amounting to objectively unreasonable force. . . However, *Patel* did not present the question of whether it was clearly established that prolonged detention in a hot car for the express purpose of inflicting punishment amounted to excessive force under *Bell*'s subjective test. 'Where the official's state of mind is an essential element of the underlying violation,' as it is under Bell, 'the [official's] state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity.'. . Here, Mr. Crocker presented evidence sufficient to raise a dispute of fact as to whether Deputy Beatty locked him in the back of a hot patrol car with the express intent of punishing him. Since Mr. Crocker has established a genuine issue of material fact about whether Deputy Beatty acted with express intent to punish, Beatty is not entitled to qualified immunity. We have held that '*Bell*'s prohibition on *any* pretrial punishment, defined to include conditions imposed with an intent to punish,' should make it 'obvious to all reasonable officials' that the Fourteenth Amendment prohibits imposing detention conditions with the express goal of punishment. . . Based on this rationale, *McMillian* held that it was clearly established that placing a pretrial detainee on death row for the express purpose of punishing him violated the Fourteenth Amendment even though there was 'no case with facts similar to McMillian's allegations.'. . The imposition of restrictive conditions with the express goal of punishment was sufficient to put the officers in *McMillian* on notice that their actions violated the Fourteenth Amendment. So too here. At the time of Mr. Crocker's arrest, it was clear enough that police officers may not intentionally expose pretrial detainees to extreme environmental conditions for the sole purpose of causing suffering. This 'broad statement of principle' clearly established Mr. Crocker's right to be free of intentionally inflicted punishment. . . And it should have been

'obvious' to Deputy Beatty that the Constitution prohibited him from intentionally turning off his air conditioning and leaving Mr. Crocker in the back of his hot patrol car with the sole purpose of causing him to suffer. . . I would therefore hold that the District Court erred in granting summary judgment to Deputy Beatty on this claim. I respectfully dissent.")

Helm v. Rainbow City, Alabama, 989 F.3d 1265, 1272-78 (11th Cir. 2021) ("The principle that an officer must intervene when he or she witnesses unconstitutional force has been clearly established in this Circuit for decades. . . When an officer witnesses another officer's excessive use of force and makes 'no effort to intervene and stop the ongoing constitutional violation[,] ... [the witnessing officer] is no more entitled to qualified immunity than [the officer using force].'. .Here, because no dispute exists that the officers were acting within the scope of their discretionary authority, we proceed to the next steps of the qualified immunity analysis, i.e., whether the officers in question violated the constitutional rights of T.D.H. or Helm and, if so, whether decisions of the Supreme Court, this Court, or the relevant state supreme court—in this case, the Alabama Supreme Court—clearly established that it was a violation. . . . None of the cases Officer Morris relies on are on all fours with this case. Unlike in *Callwood*, *Buckley*, and *Lewis*, it is undisputed here that at least four adult men were holding down T.D.H.—a teenage female—as she continued suffering from grand mal seizures. And resolving disputed factual issues in T.D.H.'s favor, she was not resisting, kicking, spitting, or biting. She was therefore 'fully secured' and 'completely restrained.' Similarly, unlike in *Estate of Hill*, T.D.H. was not combative, posed no threat to others, and, to the extent she posed a risk to herself, that risk could have been managed by simply holding her head to prevent injury from her uncontrollable movements—the technique doctors had taught her family and that her younger sister used before T.D.H. was carried out to the lobby. Officer Morris's use of his taser in drive stun mode, which is meant only to inflict pain, while four men held her down was unnecessary to alleviate T.D.H.'s medical condition or facilitate medical care. . . . Similar to the plaintiff in *Oliver*, T.D.H. was not suspected of a crime, posed no danger, did not act belligerently or yell at the officers, and did not disobey or resist the officers. . . T.D.H. had the misfortune of suffering a grand mal seizure in a public venue. Officer Morris's use of his taser on T.D.H. three separate times, while T.D.H. was held down by four men while suffering a grand mal seizure, 'was grossly disproportionate to any threat posed and unreasonable under the circumstances.'. . When viewed in the light most favorable to T.D.H., no reasonable officer in this situation would believe that the use of a taser against T.D.H. was necessary. Moreover, a jury could find that Officer Morris's repeated tasings of T.D.H. amounted to excessive force. . . We therefore conclude that on this summary judgment record T.D.H. has established a violation of the Fourth Amendment. . . . Officer Morris argues that he was confronted with unique circumstances 'in the specific medical-emergency context,' and thus there was no 'controlling' authority establishing that his actions were unlawful. Based on our precedent, we find this argument unpersuasive. . . . As discussed above, in *Oliver*, this Court held that an officer's use of his taser on the plaintiff was so 'utterly disproportionate ... that any reasonable officer would have recognized that his actions were unlawful.'. . The plaintiff in that case 'was not accused of or suspected of any crime, let alone a violent one; he did not act belligerently or aggressively; he complied with most of the officers' directions; and he made no effort to flee.'. . Based on the facts

viewed in the light most favorable to T.D.H., *Oliver* is materially indistinguishable from this case. . . . However, even if no preexisting case fits the facts of this case, Officer Morris's actions fall within the narrow 'obvious clarity' exception to establish a violation of clearly established rights. Under the 'obvious clarity' exception, this Court looks to the officer's conduct and 'inquires whether that conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law.'. . Officer Morris deployed his taser on a teenage girl three times as she lay immobilized on the floor with at least four to five adult men holding down her arms and legs while she suffered a medical emergency—a grand mal seizure. She was not suspected of committing a crime, and she posed no threat to others. This is one of those cases that lies at the very core of what the Fourth Amendment prohibits. Tasing an individual once (let alone three times) when the individual poses no threat to the officers or others and is experiencing a medical emergency goes so far beyond the sometimes-blurred border between reasonable and unreasonable force that 'qualified immunity will not protect [an officer] even in the absence of case law.'. . .Put simply, the record presents genuine disputed issues of material fact regarding how the events unfolded and whether, during that timeframe, Chief Carroll and Officers Kimbrough and Gilliland were close enough to see Officer Morris's use of excessive force and then attempt to intervene. Because a reasonable jury could find these Defendants failed to intervene in the use of excessive force by Officer Morris, despite having the opportunity to do so, we affirm the district court's denial of summary judgment on Counts Eight, Eleven and Twelve (in part). . . Finally, Officer Gilliland argues that the district court should have conducted an officer-specific analysis to determine whether his failure to intervene violated clearly established law. He claims a lack of controlling authority that would have put him on notice that, under the unique circumstances of this case, he should have intervened. However, as this Court expressed in *Priester*, '[t]hat a police officer had a duty to intervene when he witnessed the use of excessive force and had the ability to intervene was clearly established in February 1994.'. . Moreover, in cases where the use of force is declared clearly unconstitutional, the officers that failed to intervene are 'no more entitled to qualified immunity than [the officer using force].'. . Once this Court establishes that the use of force is not entitled to qualified immunity and other officers could have intervened but did not, the Court does not conduct a separate clearly established analysis pertaining to each officer's failure to intervene. . . We note, as well, that Officer Morris tased T.D.H. not once or twice, but three times, and there is no indication that Officer Gilliland orally told Officer Morris not to use the taser.")

Teel v. Lozada, 826 F. App'x 880, ___ (11th Cir. 2020) (per curiam) ("Under the unique circumstances here, it would be obviously clear to any reasonable officer that the display of force was excessive. As in *Mercado*, when the evidence is viewed and inferences are drawn in favor of Dr. Teel, 'this is one of the cases that lie so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.'. . 'We have repeatedly held that police officers cannot use force that is wholly unnecessary to any legitimate law enforcement purpose.'. .Officer Lozada's use of force was wholly unnecessary to any legitimate purpose here. As we have explained, Mrs.

Teel was not suspected of committing any crime. . . She was suicidal; the purpose of the family's 911 call was to keep her alive, and that should have been the purpose of Officer Lozada's interaction with her given his testimony that he believed her to be a threat only to herself. . . Yet Officer Lozada drew his gun even before he encountered Mrs. Teel, pointed the gun at her before she came near him, and fired at her without warning. Mrs. Teel was not pointing the knife at Officer Lozada or charging at him. By his own testimony she was coming toward him slowly, and he had the opportunity to retreat beyond her reach but simply chose to shoot her instead. Moreover, viewing the evidence in the light most favorable to Dr. Teel, Officer Lozada had time to warn Mrs. Teel, or even to direct her clearly to disarm herself but failed to do so. . . Given these facts, we conclude that Officer Lozada did not need 'case law to know that by intentionally shooting [Mrs. Teel three times], he was violating [her] Fourth Amendment rights.'. .Officer Lozada notes that he was trained on a '21-foot rule scenario,' in which a charging attacker with a knife could cover 21 feet in the time it would take to draw a firearm. . . He suggests that it cannot be clearly established that the use of a firearm within the range of 21 feet would be excessive force. Even assuming the rationale for this 21-foot rule is accurate, it is inapplicable here. Officer Lozada testified that in the training scenario, the person armed with a knife is 'running towards' the officer. . . Mrs. Teel, who was bleeding profusely from cuts in her arms and neck, was walking gradually—not running—toward Officer Lozada, so any conclusions we could draw about a charging assailant do not apply here. In this case, '[q]ualified immunity does not apply at the summary judgment stage given the light in which we must view the evidence now.'. . Although Officer Lozada 'may yet prevail on [qualified immunity] grounds at or after trial on a motion for a judgment as a matter of law,'. . . Dr. Teel is entitled to a trial on his excessive force claim.")

Cantu v. City of Dothan, 974 F.3d 1217, 1230-35 (11th Cir. 2020) ("This is not a case in which the suspect aggressively or violently fought against being arrested. To be sure, Lawrence did resist being handcuffed and taken into custody. He wrestled with the officers, broke free twice, and ran around the car as they chased him. But resisting arrest alone is not enough to justify the use of deadly force. . . Especially not when the resistance is non-violent, as it was in this case. Lawrence never threw any punches, never kicked any of the officers, never hit any of them, never tried to get one of their firearms, and never physically or verbally threatened to harm them. He never even cursed, at them or otherwise, until he lay mortally wounded on the pavement. Sergeant Woodruff's use of deadly force against Lawrence was unreasonable, and therefore, a violation of the Fourth Amendment unless she had probable cause to believe at the time she shot him that he posed a threat of serious physical harm or death to the one or more of the officers. . . She has put forward only one theory about that, which is that when she shot Lawrence, he had already gained control of the taser and could have used it to incapacitate one or more officers, then could have taken a service pistol from one of them, and then could have used that weapon to shoot one or all of them. Because the case is here on summary judgment, the question is whether there is a genuine issue of material fact about that; if so, the reasonableness of the use of deadly force must be presented to a jury. There is a genuine issue of material fact. As we have explained, in light of the dash camera video recording, a jury could reasonably find that at the time Woodruff shot Lawrence he did not have control of the taser, that Woodruff and Skipper had control of it, or at least they were

preventing Lawrence from exercising control. . . Viewing the video in the light most favorable to Cantu, Lawrence put his hand on the taser, or grabbed at it, as a defensive maneuver in an effort to prevent Woodruff from shocking him more with it. While he and Woodruff were struggling over the taser, Skipper reached in to grab the taser while Woodruff still had her hand on it, and it was then that Woodruff immediately let go of the taser, drew her gun, and shot Lawrence without warning as he was being held by Officer Rhodes. In that way, the officers' account of the facts — that Lawrence took the taser away from Woodruff and was controlling it when she shot him — is inconsistent with the video, or at least with a reasonable interpretation of the video. A jury could also reasonably find that there was no real threat that Lawrence, even if he already had control of the taser or was gaining control of it, could have used the taser to disable an officer and take control of a service pistol and use it to shoot one or more of the three officers. It is undisputed that the taser was not in prong mode, which is the mode designed to incapacitate. It had been converted to drive stun mode, which is designed to inflict pain and generally does not incapacitate. Woodruff knew the taser was in drive stun mode. Knowing that, a reasonable officer in her position would also have known that if Lawrence had gotten control of the taser and used it against Rhodes it was unlikely to incapacitate him. After all, Woodruff had just tased Lawrence at least twice in the abdomen, and that had not incapacitated him. Not only that but three officers were present during the incident. So even if Lawrence had somehow broken loose from Officer Rhodes' hold, had succeeded in pulling the taser away from Woodruff and Skipper, and had set about to tase one of the officers with it, and had somehow disabled that officer, and then had taken the officer's firearm from its holster, there is no reason to believe that Lawrence would not have been shot by an officer before he could do all of that. Both Rhodes and Woodruff were armed. The video shows that it took Woodruff only three seconds to draw her weapon and shoot Lawrence once she let go of the taser or of his hand or arm that had a partial hold on the taser. There is no reason Woodruff could not have done the same thing and done it as quickly if Lawrence had gotten the taser and set about to get Rhodes' firearm, or why Rhodes could not have shot Lawrence if he had obtained the taser and set about to get Woodruff's firearm. And it is undisputed that Sergeant Woodruff gave Lawrence no warning before she shot him. . . .In excessive force cases, the Supreme Court has cautioned against relying on its *Garner* and *Graham* decisions for clearly established law, because 'following the lead of the Fourth Amendment's text, [those decisions] are cast at a high level of generality.'. . That said, with extreme factual circumstances, a pre-existing decision with material similarity is not always necessary to clearly establish the applicable law. . . Even without a close fit, a plaintiff with a Fourth Amendment claim can clear the clearly established law hurdle and defeat a qualified immunity defense by 'showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official.'. . To do that in an excessive force case, 'a plaintiff must show that the official's conduct "was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point."'. . That means, as the Supreme Court recognized in the *Hope* decision, that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . The question remains the same: Did the defendant have fair warning when she engaged in the conduct giving rise to the claim that the conduct was unconstitutional?. . . The Supreme

Court's *Hope* decision laid the groundwork for the 'obvious clarity' exception — if 'exception' is the proper word for it. . . . We recognize that the Supreme Court has repeatedly emphasized that the clearly established law standard is a demanding one. . . And to keep the standard demanding, the obvious clarity exception must be kept narrow. . . This Court has followed those directions to keep the standard demanding and the exception to it narrow. But the exception does exist and, viewing the evidence in the light most favorable to the plaintiff as required at this juncture, the use of lethal force was so obviously excessive that any reasonable officer would have known that it was unconstitutional, even without pre-existing precedent involving materially identical facts. As we have explained earlier in this opinion, Lawrence was not committing a dangerous felony, or even a non-dangerous one. He was just trying to drop off at an animal shelter a stray dog he had found in a parking lot earlier that day. The underlying crime for which he was being arrested was, at worst, driving without a license, the maximum punishment for which is a $100 fine. The only flight he engaged in was running around his car on two occasions when he managed to break loose from the officers who were trying to handcuff him. He did resist being handcuffed and arrested, but not violently. He never punched, hit, or kicked any of the officers or attempted to do so. He never tried to harm any of them in any way. While being held by an officer who outweighed him by 75 pounds, another officer tased him at least twice in the abdomen. When he grabbed at the taser in an attempt to avoid being tased again, he and two of the three officers struggled over it, but Lawrence never gained control of it. At that point the officer who had been tasing him let go of the taser, drew her firearm, and fatally shot him without warning, all in the space of three seconds. She fired her pistol so suddenly that the other two officers initially did not know what had happened and thought that they had been shot. This fatal shooting 'lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent' even without a prior case on point.")

Williams v. Aguirre, 965 F.3d 1147, 1168-70 (11th Cir. 2020) ("Williams contends, and we agree, that under his version of the facts the officers violated his clearly established rights under the Fourth Amendment. More than three decades before the officers accused Williams of attempted murder, the Supreme Court held that a search warrant was void when an officer's lie was necessary for the warrant to establish probable cause. . . By the time of Williams's detention, we had concluded that 'the law [is] clearly established ... that the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest in order to detain a citizen ... if such false statements were necessary to the probable cause.'. . . This prohibition applies when an arrest affidavit 'is insufficient to establish probable cause' without an officer's false statement, . . . unless the seizure could have been supported as a warrantless arrest[.] . . . And it extends to any officer 'who provided information material to the probable cause determination.'. . To be sure, our precedents on malicious prosecution were unsettled when the officers accused Williams, but those doctrinal tensions concerned only the relationship between Fourth Amendment violations and malicious prosecution, the vehicle that we have held controls liability for these violations. . . We have never wavered about the prohibition of misstatements in warrant applications. . . . Our prohibition of intentional, material misstatements in warrant applications has long been a cornerstone of this Court's jurisprudence on the validity of

warrant-based seizures. . . In the light of this uncontroverted and well-established rule, we readily conclude that 'every reasonable official would interpret [our precedents] to establish' that intentional, material misstatements in warrant applications violate the Constitution. . . . A reasonable jury could find that the officers' accusations that Williams pointed a gun at them were intentionally false, and if we delete those false accusations from the warrant applications, no facts remain to support probable cause for attempted murder. So under Williams's version of events, the officers 'knowingly [made] false statements in an arrest affidavit about the probable cause for an arrest in order to detain' Williams, and those 'false statements were necessary' for the affidavit to prove probable cause. . . Because Williams has established a genuine dispute over whether the officers violated his clearly established rights under the Fourth Amendment, the officers are not entitled to qualified immunity at this stage of the suit. Notwithstanding the ambiguity in our standard of malicious prosecution, Williams had a clearly established right to be free from a seizure based on intentional and material misstatements in a warrant application. And if the jury credits Williams's version of events, the officers' conduct violated that right.")

Hooks v. Brewer, 818 F. App'x 923, ___ (11th Cir. 2020) ("[W]hile it is clearly established that an officer may not recklessly make material misstatements and omissions in a warrant affidavit, . . . we must determine it was clearly established that *Brewer's conduct* violated these principles[.] . . That typically means that binding precedent controls the case, but such precedent need not be identical—it must only 'squarely govern' our case. . . Plenty of authority does. Misstatements and omissions in affidavits pierce qualified immunity only when the 'new affidavit' lacks even *arguable* probable cause. . . This not-quite-probable-cause standard turns on whether 'under all of the facts and circumstances, an officer reasonably could—not necessarily would—have believed that probable cause was present.'. . But it also requires us to consider whether an officer 'in the *same circumstances* and possessing the *same knowledge*' as Brewer could have thought there was a significant chance that Hooks had methamphetamine in his home. . . If factual questions remain about the information Brewer 'possessed or could have possessed' we cannot conclude arguable probable cause existed because we cannot say that an officer with the *same information* as Brewer could think probable cause existed. . . And those are things we do not know. . . . In short, we accept plaintiff's story and answer the pure legal question of whether that version amounts to a violation of clearly established law. . . In this context, a defendant does not violate clearly established law if he has arguable probable cause. But that turns on circumstances the defendant faced and knowledge the defendant had. And because those things are not clear, we cannot grant summary judgment to Brewer.")

King v. Pridmore, 961 F.3d 1135, 1143-47 (11th Cir. 2020) ("King contends that the officers forced him to 'work' for them under threat of false criminal charges and physical violence. For our analysis, we will assume, *arguendo*, that it would indeed violate the Thirteenth and Fourteenth Amendments if the officers had made such threats. But that begs the question: is there evidence they actually did that? . . . .In short, based on the facts as taken from King's own deposition testimony, the officers didn't violate the Thirteenth or Fourteenth Amendment. Nevertheless, as will be seen next, we don't have to (so we don't) hang our hat solely on that peg of the analysis. .

. . King agrees that there is no materially similar case on point, so the first method is out. Consequently, the question is whether this case falls under the second or third methods to establish that the law at issue was clearly established. The second and third methods are known as 'obvious clarity' cases. . . 'They exist where the words of the federal statute or constitutional provision at issue are so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful, or where the case law that does exist is so clear and broad (and not tied to particularized facts) that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.'. . In *Dukes v. Deaton*, 852 F.3d 1035 (11th Cir. 2017), we conflated the two methods and referred to them together as a 'narrow exception.'. . Cases that fall under this narrow exception are rare and don't arise often. . . In light of the rarity of obvious clarity cases, if a plaintiff cannot show that the law at issue was clearly established under the first (materially similar case on point) method, that usually means qualified immunity is appropriate. . . . We have no difficulty concluding that this is not the sort of case that would justify applying the rare and narrow exception to requiring a plaintiff to identify a materially similar case on point. Again, sandwiched in between telling King that they were going to 'throw some charges' on him if he didn't help with the ruse, and that they were going to tow his girlfriend's car and they didn't know when or how he would be able to get it back, the officers told him '[if] you gonna start f**king us over, we'll f**k over you.' It cannot be maintained that all objectively reasonable officers in their position would have known—*with obvious clarity*—that what they said, in context, would necessarily be understood as a threat of false criminal charges and physical violence in violation of the Constitution. While King may have *subjectively* interpreted the officers' words to that effect, that is categorically not the standard that we must apply. . . In summary, even if the officers violated the Thirteenth and Fourteenth Amendments (and, as discussed earlier, we do not believe they did), those rights were not so clearly established that all objectively reasonable officers in their position would have known that what they said to King violated the Constitution's prohibition against involuntary servitude or its 'nebulous' doctrine of substantive due process.")

Anderson on behalf of MA v. Vazquez, 813 F. App'x 358, ___ (11th Cir. 2020) ("By the time of this incident in 2014, this Court had some precedent about the constitutionality of using a K-9 to apprehend a suspect. In *Preister v. City of Riviera Beach*, we concluded (without similar precedent) that an officer was unentitled to qualified immunity from a claim for excessive force when the officer had ordered his dog to attack a burglary suspect -- and allowed the dog to bite repeatedly the suspect for at least two minutes -- *after* the suspect had submitted immediately to the officers and complied with the officers' orders to get on the ground. . . In *Crenshaw v. Lister*, we concluded that an officer acted objectively reasonably when he used a K-9 to apprehend an armed robbery suspect who had fled violently from police, crashing his car into a marked police car and then ran into dense woods at night. . . Then, in *Edwards v. Stanley*, we determined that the initial use of a K-9 to track and to subdue a fleeing suspect who had committed 'a non-serious traffic offense' was constitutionally reasonable, but that permitting the K-9 to then attack the suspect for five to seven minutes constituted excessive force. . .While these cases provide some guidance about the unlawful use of K-9 force, the circumstances presented in this appeal are far

different from the circumstances involved in *Priester*, *Crenshaw*, and in *Edwards*. Most important -- unlike the circumstances in *Priester* and in *Edwards* that led to the conclusion that the officer's use of force was unconstitutionally excessive, nothing in this record evidences that Officer Vasquez permitted Ares to attack M.A. for an unduly prolonged period. To the contrary, the entire incident here lasted only thirty to forty seconds; and Officer Vasquez immediately issued the command for Ares to let go as soon as Officer Vasquez saw that M.A. had been caught. Plaintiff correctly concedes that no binding precedent existed in 2014 that involved circumstances factually similar to the pertinent circumstances presented in this case. Plaintiff contends, instead, that Officer Vasquez's conduct -- given the state of the law generally -- constituted an 'obvious' Fourth Amendment violation. We reject this argument. The Supreme Court has stressed repeatedly that the 'clearly established' standard requires a 'high degree of specificity.'. . Specificity is particularly important in Fourth Amendment cases, where -- given the many variables confronting an officer on the scene that must be considered -- it is often difficult for officers to predict on the spot how the pertinent legal doctrine (here, excessive force) will apply in the precise factual situation arising before them. . . We have recognized a rare 'narrow exception' to the general rule requiring particularized case law to establish clearly the law: the obvious violation. Still, facts and context dictate case outcomes: not general legal propositions. This 'narrow exception' applies in circumstances where an 'official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw.'. . For an official to lose protection under qualified immunity, in some way the 'pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances....'. . . The law beforehand must give genuine notice. Nothing about the pre-existing law tied to the Fourth Amendment's prohibitions, especially with the use of K-9s to apprehend suspects, came close to compelling the definite conclusion for every reasonable police officer that Officer Vasquez's use of force was constitutionally unreasonable under the circumstances presented to him in this case.")

Vielma v. Gruler, 808 F. App'x 872, ___ (11th Cir. 2020) ("Here, Plaintiffs claim that the injured and murdered victims' Fourteenth Amendment substantive due process rights were violated when, upon hearing the gunshots, Officer Gruler failed to immediately reenter the club to attempt to disarm or shoot Mateen. . . . As the district court correctly observed, Plaintiff's entire claim against Officer Gruler boils down to an argument that the Due Process Clause imposes an affirmative duty on police officers to protect individuals from private acts of violence. But that is precisely the argument that the Supreme Court rejected in *DeShaney v. Winnebago County Department of Social Services*, which held that, outside the custodial context, . . . 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . . Even were we today to announce, as a new principle, a rule holding that a police officer on a security detail outside a private establishment has a *constitutional* duty to forego other potential responses and that he must instead immediately enter the establishment in an effort to neutralize a shooter, Plaintiffs would still be unable to defeat Officer Gruler's qualified immunity defense. This is so because a police officer, like all individual state

actors, enjoys this immunity absent the existence of legal precedent that clearly alerts the officer to the constitutional requirement that the officer act in the way that the plaintiff alleges he should have behaved. A constitutional right is not clearly established unless existing precedent places the 'constitutional question beyond debate.'. . The most common way for a plaintiff to show that a right is clearly established is to 'point to a case with "materially similar" facts decided by the Supreme Court, the Court of Appeals, or the highest court of the relevant state.'. . Absent such a case, a plaintiff can rely on 'general statements of the law' only in an 'obvious case' where those general rules would have given officers 'fair and clear warning' of their constitutional duties in the specific situation at issue. . . Plaintiffs have failed to cite any case addressing materially similar facts that clearly establishes the existence of the duty that Plaintiffs assign to Officer Gruler. This is not surprising, given the holding by the Supreme Court in *DeShaney* that contradicts Plaintiffs' contention. Plaintiffs allege that Officer Gruler violated the victims' substantive due process rights by failing 'to enter the club immediately after the shooting began to neutralize [the] Shooter,' when he knew that the victims faced a serious risk of harm and 'were not lawfully permitted to be armed.' Yet, Plaintiffs have not identified any caselaw addressing active-shooter threats. Instead, they rely on two district court cases that they admit 'involved deliberate indifference to medical needs' rather than deliberate indifference to harm inflicted by a third party. Setting aside the fact that these district court cases are inapposite, . . . they are necessarily insufficient for Plaintiffs' purposes because only 'the binding precedent set forth in the decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state' can demonstrate a clearly established right. . . Because Plaintiffs failed to identify a clearly established constitutional right that would have required Officer Gruler to immediately reenter the nightclub to attempt to neutralize the shooter, the district court did not err in granting the officer qualified immunity and dismissing the claim against him.")

Alston v. Swarbrick, 954 F.3d 1312, 1319-21 (11th Cir. 2020) ("According to Alston, Swarbrick arrested him based merely on him refusing to answer questions and spouting obscenities while walking away. But by 2011, it was clearly established that words alone cannot support probable cause for disorderly conduct—including profanity regarding police officers. . . Under those facts, no reasonable officer in Swarbrick's position could have believed there was probable cause to arrest Alston under the Florida disorderly conduct statute. Therefore, the district court improperly concluded that Swarbrick was entitled to qualified immunity on that basis. . . .We conclude that, under Alston's version of the facts, Swarbrick did not possess arguable probable cause for arresting Alston under the resisting without violence statute. At the time of the arrest it was clearly established that, as with the disorderly conduct statute, 'mere words' would not suffice to provide probable cause for resisting without violence. . . And under Alston's version of the facts, he did not physically obstruct Swarbrick's path or otherwise prevent him from conducting his investigation as to Q.D.B. . . . Alston merely declined to cooperate or provide useful information. His failure to answer Officer Swarbrick's questions—and even his profanity-laced response—were not even arguably sufficient to support probable cause under § 843.02. . . Because Officer Swarbrick lacked arguable probable cause to arrest Alston under this (or any other) statute, Alston's false arrest claim must proceed. . . . Alston alleges a three-to-five minute period during which Officer Swarbrick continuously used pepper spray on his face while he lay on the ground

helplessly. Under this Circuit's caselaw, such a prolonged use of pepper spray on a non-resisting and handcuffed detainee would violate the detainee's clearly established Fourth Amendment rights. . . Of course, the finder of fact may ultimately disbelieve Alston's testimony and conclude that the alleged period of prolonged pepper spraying did not occur. Nonetheless, viewing the facts in the light most favorable to Alston, he has at least presented a genuine dispute of material fact regarding Swarbrick's use of force as to that period of pepper spraying, and thus, granting summary judgment in favor of Swarbrick was improper.")

Quinette v. Reed, 805 F. App'x 696, ___ (11th Cir. 2020) ("In this Circuit, '[t]he precise point at which a seizure ends (for purposes of the Fourth Amendment coverage) and at which pretrial detention begins (governed until conviction by the Fourteenth Amendment) is not settled.' *Hicks v. Moore*, 422 F.3d 1246, 1253 n.7 (11th Cir. 2005). We need not delineate that point now, because even though the district court concluded that the Fourteenth Amendment applied, Quinette has pled facts that support a violation of either the Fourth or the Fourteenth Amendment. In *Kingsley v. Hendrickson*, the Supreme Court clarified that to prove an excessive force claim in violation of the Fourteenth Amendment, a 'pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.'. . This objective reasonableness standard mirrors the standard an arrestee must meet to plead a violation of the Fourth Amendment. . . So we turn to the question of whether Reed's force was objectively reasonable. . . .Reed's application of a two-handed shove to a non-resistant detainee, with sufficient force to knock that detainee to the ground and to break his hip, constituted unreasonable force in violation of Quinette's constitutional right under the Fourth or Fourteenth Amendment. . . .We have said that law is clearly established for the purposes of qualified immunity where '"Y Conduct" is unconstitutional in "Z Circumstances."'. . *Hadley* established that a single blow—'Y Conduct' — is unconstitutional where a detainee is non-resistant— 'Z Circumstances.' Here, too, there was a single blow to a non-resistant detainee. Given this clearly established law, no objectively reasonable officer in Reed's position would think it lawful to shove a non-resisting detainee to the ground. Because we conclude that *Hadley* and *Danley* put Reed on notice that his conduct violated Quinette's constitutional right, it is unnecessary for us to explore whether the conduct was egregious enough to fall within the parameters of the 'obvious clarity rule.'")

VI. Post-*Brosseau* Case Law

SUPREME COURT

NOTE: While not a qualified immunity decision, the Court's decision in *Mendez* should be noted.

County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1543-49 & n.* (2017) ("If law enforcement officers make a 'seizure' of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth

Amendment violation that contributed to their need to use force? The Ninth Circuit has adopted a 'provocation rule' that imposes liability in such a situation. We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure. . . . The Court of Appeals did not disagree with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law. . . The Court of Appeals also adopted an alternative rationale for its judgment. It held that 'basic notions of proximate cause' would support liability even without the provocation rule because it was 'reasonably foreseeable' that the officers would meet an armed homeowner when they 'barged into the shack unannounced.'. . .The provocation rule, which has been 'sharply questioned' outside the Ninth Circuit, *City and County of San Francisco v. Sheehan*, 575 U.S. ——, ——, n. 4, 135 S.Ct. 1765, 1776, n. 4, 191 L.Ed.2d 856 (2015), is incompatible with our excessive force jurisprudence. The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. . . .When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. The basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim. . . This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry. By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. . . . *The* framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.[*] . . . Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the 'totality of the circumstances.'. . On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. . . We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand. . . .The Ninth Circuit's efforts to

cabin the provocation rule only undermine it further. The Ninth Circuit appears to recognize that it would be going entirely too far to suggest that *any* Fourth Amendment violation that is connected to a reasonable use of force should create a valid excessive force claim. . . Instead, that court has endeavored to limit the rule to only those distinct Fourth Amendment violations that in some sense 'provoked' the need to use force. The concept of provocation, in turn, has been defined using a two-prong test. First, the separate constitutional violation must 'creat[e] a situation which led to' the use of force; second, the separate constitutional violation must be committed recklessly or intentionally. . . Neither of these limitations solves the fundamental problem of the provocation rule: namely, that it is an unwarranted and illogical expansion of *Graham*. But in addition, each of the limitations creates problems of its own. First, the rule includes a vague causal standard. It applies when a prior constitutional violation 'created a situation which led to' the use of force. The rule does not incorporate the familiar proximate cause standard. Indeed, it is not clear what causal standard is being applied. Second, while the reasonableness of a search or seizure is almost always based on objective factors, . . . the provocation rule looks to the subjective intent of the officers who carried out the seizure. As noted, under the Ninth Circuit's rule, a prior Fourth Amendment violation may be held to have provoked a later, reasonable use of force only if the prior violation was intentional or reckless. . . . [B]oth parties accept the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation. . . .Thus, there is no need to dress up every Fourth Amendment claim as an excessive force claim. For example, if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*. The harm proximately caused by these two torts may overlap, but the two claims should not be confused. . . . The Court of Appeals also held that 'even without relying on [the] provocation theory, the deputies are liable for the shooting under basic notions of proximate cause.'. . In other words, the court apparently concluded that the shooting was proximately caused by the deputies' warrantless entry of the shack. Proper analysis of this proximate cause question required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and required the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'. . Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a 'startling entry' by 'barg [ing] into' a home 'unannounced,' it is reasonably foreseeable that violence may result. . . But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies'

failure to secure a warrant at the outset. . . .For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.")

On remand, the Ninth Circuit held that "unlawful entry into a residence by two sheriff's deputies, without a warrant, consent, or exigent circumstances, was the proximate cause of the subsequent shooting and injuries to the plaintiffs." Thus, a claim under § 1983 was permitted. ***Mendez v. County of Los Angeles***, 897 F.3d 1067, 1071 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1292 (2019). *See also id*. at 1078 ("Here, both the entry and the failure to knock and announce were proximate causes of the Mendezes' injuries. Officers cannot properly escape liability when they breach two duties, each breach being necessary for the harm to occur, just because one of the duties was subject to qualified immunity. That would lead to the absurd result that an officer who breaches only one duty is liable, but that an officer who breaches multiple duties is not.").

See also ***Bond v. City of Tahlequah, Oklahoma***, 981 F.3d 808, 818, 823-24 (10th Cir. 2020), *pet. for cert. filed*, No. 20-1668 (U.S. May 27, 2021) ("*Allen*, *Ceballos*, and *Hastings* teach that the totality of the facts to be considered in determining whether the level of force was reasonable includes any immediately connected actions by the officers that escalated a non-lethal situation to a lethal one. Accordingly, the totality of the circumstances includes application of the *Graham* and *Estate of Larsen* factors to the full encounter, from its inception through the moment the officers employed force. . . . As in *Allen* and *Estate of Ceballos*, the officers here advanced upon an impaired individual, likely escalating the tension and fear. . . And like the officers in *Hastings*, the officers here followed Dominic into an enclosed space and blocked the exit, resulting in Dominic picking up a handy implement to defend himself. . . The officers in both cases drew their weapons in response to the individual grabbing a weapon and fired only after the individual made what the officers perceived as an offensive movement. But the arming and perceived offensive movements were in direct response to the officers' conduct. . . Thus, a jury could reasonably determine that the officers here, like those in *Estate of Ceballos*, *Allen*, and *Hastings*, unreasonably escalated a non-lethal situation into a lethal one through their own deliberate or reckless conduct. . .Our analysis of the *Graham* factors at the moment the officers used deadly force was inconclusive, but instructive. We determined a reasonable jury could conclude Dominic's movement was purely defensive, but we reached no conclusion as to whether a misperception would be reasonable. This is because any analysis of whether a reasonable jury could find that the use of force here was not justified, must include the fact that an intoxicated and unarmed Dominic was backed into the garage by three armed officers, at which point Dominic armed himself with the hammer. The application of *Allen*, *Hastings*, and *Estate of Ceballos* shows that the officers' role in causing this essential set of facts is not only relevant, but determinative here. When the officers first made contact with Dominic, the *Graham* analysis would likely not have justified any force, let alone deadly force. A jury could find that the officers recklessly created a lethal situation by driving Dominic into the garage and cornering him with his tools in reach. When Dominic grabbed the hammer, the officers drew firearms and began shouting. A reasonable jury could find that the officers' reckless conduct unreasonably created the situation that ended Dominic's life. . . . Viewing the facts in the light most favorable to the Estate, including the actions

of the police officers that may have recklessly escalated the situation, a reasonable jury could find that Officers Girdner and Vick violated Dominic's Fourth Amendment right to be free from unreasonable seizure."); ***Ferreira v. City of Binghamton***, 975F.3d 255, 280 (2d Cir. 2020) ("Far from supporting the City's argument, *Mendez* clarifies that even where there is no viable constitutional claim of excessive force, an officer's use of force may give rise to damages where it was proximately caused by other tortious conduct. The problem with the provocation rule, then—like the problem with the plaintiff's theory in *Salim*—was that it impermissibly expanded the relevant time frame *for the excessive force inquiry*, and thus 'dressed up' a different (permissible) claim as a claim of excessive force. Here, Ferreira's negligent planning claim is separate from his claim of excessive force, and, as *Mendez* makes clear, is not dependent on a conclusion that Miller engaged in excessive force."); ***Orn v. City of Tacoma***, 949 F.3d 1167, 1176 n.1 (9th Cir. 2020) ("We need not decide whether a jury could find Clark's use of deadly force unreasonable based in part on his decision to move from the grassy area where he had been standing (a position of relative safety) to take up a more dangerous position behind the rear bumper of his SUV as Orn's vehicle approached. The reasonableness of an officer's use of force must be judged by considering 'the totality of the circumstances,'. . . and several circuits have held that '[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.' *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008); *accord Thomas v. Durastanti*, 607 F.3d 655, 667 (10th Cir. 2010); *Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993). In *County of Los Angeles v. Mendez*, —— U.S. ——, 137 S. Ct. 1539, 198 L.Ed.2d 52 (2017), the Supreme Court did not foreclose this theory of liability, even as it rejected our circuit's former 'provocation rule.' *See id.* at 1547 n.*"); ***Estate of Ceballos v. Husk***, 919 F.3d 1204, 1214 n.2 (10th Cir. 2019) ("We recently reaffirmed this longstanding Tenth Circuit law, notwithstanding *County of Los Angeles v. Mendez*, —— U.S. ——, 137 S.Ct. 1539, 1547 n.8, 198 L.Ed.2d 52 (2017). *See Pauly v. White*, 874 F.3d 1197, 1219 n.7 (10th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 2650, 201 L.Ed.2d 1063 (2018); *see also Clark v. Colbert*, 895 F.3d 1258, 1264 (10th Cir. 2018) ("[P]olice officers can incur liability for 'reckless' conduct that begets a deadly confrontation," citing *Allen*, 119 F.3d at 841); *Pauly*, 874 F.3d at 1219-20 ("Our precedent recognizes that '[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own "reckless or deliberate conduct during the seizure unreasonably created the need to use such force."'" (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004) (quoting *Sevier*, 60 F.3d at 699))."); ***Estate of Rahim by Rahim v. United States***, No. 1:18-CV-11152-IT, 2020 WL 7055971, at *8 (D. Mass. Dec. 2, 2020) ("Defendants argue that *St. Hilaire* is no longer good law after *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546-47 (2019), which they contend stands for the proposition that the reasonableness inquiry is focused on an officer's actions at the precise moment deadly force was used. But the Supreme Court's holding in *Mendez* was limited to rejecting the Ninth Circuit's so-called 'provocation rule' which allowed inquiry into a *separate* constitutional violation when considering the use of force: 'All we hold today is that *once* a use of force is deemed reasonable under *Graham*, . . . it may not be found unreasonable by reference to some separate constitutional violation.'. . As another district court has summarized, the Supreme Court did not decide the

propriety of considering 'unreasonable police conduct prior to the use of force that foreseeably created the need to use it.' *Arnold v. City of Olathe, Kansas*, 413 F. Supp. 3d 1087, 1106 (D. Kan. 2019)."); ***Smith v. Ford***, No. 5:19-CV-00312-TES, 2020 WL 5647484, at *9-*10 & n.9 (M.D. Ga. Sept. 22, 2020) ("The undisputed facts support Defendants' argument that the SWAT Team officers' use of force against Smith was reasonable. An objectively reasonable officer, upon having a shotgun fired at him or her in close quarters, would perceive the shooter to pose an imminent and serious threat to him and his fellow officers at the time of the shooting. While the officers had no specific or particular knowledge of Smith being armed or dangerous before entering Smith's home, that changed when Smith fired his shotgun. At that point, the officers were in a life-threatening situation and a reasonable officer in the Defendants' position would conclude that deadly force was necessary in that situation to preserve his or her own life. Accordingly, the Defendants did not use excessive force in this particular case and thus, did not violate the Fourth Amendment. Plaintiffs argue that Defendants' conduct leading up to the moment when they shot Smith caused the danger that made the use of force necessary. . . Specifically, Plaintiffs argue that 'to the extent Defendants claim that someone can be arrested for their response to being unlawfully arrested or assaulted, it is established law [that] Defendants cannot initiate conduct to cause or precipitate the need for an arrest, and then claim immunity from civil liability.'. . Plaintiffs cite to *Perkins v. Thrasher*, 701 F. App'x 887, 890 (11th Cir. 2017), where officers were denied qualified immunity when they provoked the plaintiff into obstructing arrest necessitating the use of force. . . Plaintiffs argue that this is a similar situation, because 'Rainer Smith was responding to an unlawful entry into his home by heavily armed intruders who did not announce who they were.' Plaintiffs' argument reminds the Court of the old 'provocation rule' that was considered by the Supreme Court of the United States in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1543-44 (2017). The 'provocation rule' provided that '[i]f law enforcement officers make a seizure of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, [ ]the officers nevertheless [may] be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force.'. . The Supreme Court held that 'the Fourth Amendment provides no basis for such a rule.'. . Accordingly, a 'different Fourth Amendment violation,' which here is an unlawful entry into Smith's residence as explained above, 'cannot transform a later, reasonable use of force into an unreasonable seizure.'. .In sum, applying the objective reasonableness test shows that the use of deadly force on Smith was reasonable at the moment the force was used, and the officers' unlawful entry does not change that.[9] **[fn. 9:** Plaintiffs' unlawful entry claim survives summary judgment, and Plaintiffs' excessive force claim does not. 'Although § 1983 addresses only constitutional torts, § 1983 defendants are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions.'. . 'For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue.'. . So, while Defendants are not liable for the 'excessive force' claim, they are liable for any and all reasonably foreseeable damages caused by their unlawful entry violation that may ultimately be proven at trial."); ***Estate of Hollstein v. City of Zion***, No. 17 C 00112, 2019 WL 1619976, at *5–6 (N.D. Ill.

Apr. 16, 2019) ("In *County of Los Angeles, California v. Mendez*, the Supreme Court rejected the Ninth Circuit's 'provocation rule.'. . *Mendez* held that, so long as an officer's use of force was reasonable at the time of the seizure, the officer's *pre*-seizure violation of the Fourth Amendment cannot be the basis for liability for the seizure itself. . . But the opinion left open two other inquiries in which an officer's pre-seizure conduct might still be relevant. First, if an earlier violation of the Fourth Amendment was the proximate cause of the harm arising from the use of force applied at the time of the seizure, then the victim could recover (subject to qualified immunity) damages that are proximately caused by the earlier Fourth Amendment violation. . . But here, the Estate has not argued that the officers' allegedly improper initial stop or attempt at the arrest *proximately caused* Hollstein's death. The argument does not show up in the Plaintiff's summary judgment briefing, nor does the First Amended Complaint describe the officers' initial attempt to arrest Hollstein as a cause of the fatal shooting. . . In any event, the argument would likely have fallen short, because the struggle between Hollstein and the officers—including Hollstein's attempt to reach for Hucker's gun—would almost surely have been deemed an intervening event that broke the chain of proximate cause between the attempted arrest and the firing of the shots. And again, at the very least, qualified immunity would apply in this factual setting. *Mendez* also leaves open the possibility that an initial Fourth Amendment violation could be considered as part of the totality of the circumstances that might render an officer's use of force excessive. . . In any event, the officer's initial stop—even if there was no basis for it—did not foreseeably create the need to use excessive force. Nothing about the *way* the officers conducted the flawed stop and arrest would *foreseeably* lead to Hollstein wrestling with the officers and reaching for Hucker's gun. To illustrate this point, consider a very different example. Imagine that a police officer encounters a man who is crossing a street outside of the marked crosswalk, and jay-walking is a crime. The officer instructs the jay-walker to stop, *and* the officer draws and points his gun right at the jay-walker. In response, the pedestrian tries to grab the officer's gun, which then prompts the officer to shoot the man. It is arguably foreseeable that the pedestrian, reacting to this life-threatening scenario, would try to grab the officer's gun. On those facts, the officer's abrupt, unnecessary, and life-threatening escalation of the encounter would make it much more likely (that is, foreseeable) that the officer's own conduct *before* shooting the pedestrian created the need to use deadly force, even though at the *moment* of the shooting, the pedestrian was grabbing for the officer's gun. Here, the situation is much different: the officers drove up to Hollstein and began questioning him. Nothing they did, even attempting to arrest him on an allegedly mistaken view that Hollstein had to provide identification, would foreseeably create the struggle, Hollstein's attempt to grab the gun, and the ensuing shooting. Qualified immunity must apply here because the officers did not violate clearly established law.")

D.C. CIRCUIT

Fenwick v. Pudimott, 778 F.3d 133, 137-40 (D.C. Cir. 2015) ("Our concurring colleague would have us decide this case at the first step and hold that, pursuant to *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014), the deputies' actions plainly complied with the Fourth Amendment. In our view, however, the constitutional question is hardly clear, and *Plumhoff*—a case in which the fleeing

suspect led police on a protracted high-speed chase, . . .—has little to say about the quite different situation the deputies faced here. The officers in *Plumhoff* resorted to deadly force only after the suspect placed in peril the lives of dozens of innocent civilians during his 100 mile-per-hour flight and only after they sought to end the chase through non-lethal means. . . In this case, by contrast, although the deputies opened fire after Fenwick clipped Officer Pudimott with the car's side-view mirror, Fenwick posed no immediate threat to either officers or bystanders at the time of the shooting. . . Given these significant differences between this case and *Plumhoff,* we think the constitutional question is 'far from obvious,'. . . and that this case is therefore best resolved at the second step. We thus proceed directly to consider whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting. . . . This case features an 'added wrinkle': a videotape capturing the incident in question. . . . But in contrast to the videotape in *Scott,* which 'quite clearly' portrayed the events at issue, . . . the surveillance footage here does no such thing. . . .The videotape thus provides no 'ready answers to the factual dispute' and does little to affect our analysis. . . But other important wrinkles—namely, the *Heck* bar and collateral estoppel—constrain how we view the facts. As the district court explained, the Superior Court Judge, in finding that Fenwick committed felony assault on Pudimott, 'necessarily determined that [Fenwick] created "a grave risk of causing significant bodily injury" to Deputy Pudimott when, "without justifiable [and] excusable cause," he drove the car forward in a manner that put the deputy in danger of being hit.'. . . Although Fenwick urges us to ignore these 'bad facts,'. . . we are bound by *Heck v. Humphrey* and the Supreme Court's admonishment that 'a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'. . . That said, several facts weigh in Fenwick's favor, including (1) the deputies' concession in this court that Pudimott and Fischer fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path, . . . (2) the Superior Court's findings that Fenwick did nothing to endanger Mickle or Fischer during his flight, . . .and (3) the surveillance footage showing no bystanders in the path of Fenwick's car. Thus distilled the record reveals, on the one hand, that the deputies confronted a fleeing motorist who posed no immediate threat to either officers or bystanders when they opened fire, and on the other hand, that the deputies had observed pedestrians and vehicles close by in the minutes leading up to the shooting and, just moments before firing, had seen the fleeing suspect 'create [ ] a grave risk of causing significant bodily injury to [an] officer.'. . With 'the specific context of th[is] case' now in mind, . . . we turn to the officers' claim that their use of deadly force to apprehend Fenwick 'to protect one or more of the deputies or members of the general public from harm,'. . . violated no clearly established law. . . . We agree with the deputies that our inquiry begins and ends with Supreme Court precedent—in particular, *Brosseau v. Haugen,* 543 U.S. 194 (2004). . . .Reviewing these facts and relevant precedent, the Supreme Court 'express[ed] no view' on the Fourth Amendment question, but determined that the officer was entitled to qualified immunity as her actions 'fell in the hazy border between excessive and acceptable force.'. . For us to reach a different conclusion about qualified immunity in this case, Fenwick must show either that the deputies' conduct was 'materially different from the conduct in *Brosseau*' or that between the incident in *Brosseau* and January 2007—when Fenwick was shot—there 'emerged either controlling authority or a robust consensus of cases of persuasive authority that would alter our

analysis.'. . Fenwick has done neither. He has made no attempt to distinguish *Brosseau,* and we doubt he could do so in a meaningful way. . . . Nor has Fenwick shown that *Brosseau's* analysis had become obsolete at the time the deputies shot him. . . For these reasons, unlike the district court, we see no genuine issue of material fact that precludes summary judgment for the deputies based on qualified immunity. Whether the deputies shot Fenwick while Pudimott was still in danger from Fenwick's car, or whether they shot him in the seconds after that danger had passed, *Brosseau* makes clear that the deputies' use of deadly force violated no law that was clearly established at the time of the shooting. In reaching this conclusion, we emphasize that nothing in this opinion should be read to suggest that qualified immunity will shield from liability every law enforcement officer in this circuit who fires on a fleeing motorist out of asserted concern for other officers and bystanders. Outside the context of a 'dangerous high-speed car chase,'. . . deadly force, as the Supreme Court made clear in *Garner,* . . . ordinarily may not be used to apprehend a fleeing suspect who poses no immediate threat to others—whether or not the suspect is behind the wheel. . . . Because Fenwick operated his car in a way that endangered an officer, in an area recently traversed by pedestrians and other vehicles no less, it was not clearly established that the deputies violated the Fourth Amendment by using deadly force to prevent his flight. Accordingly, we cannot say that Pudimott and Fischer had 'fair notice that [their] conduct was unlawful.'. . The deputies are therefore entitled to qualified immunity.")

Fenwick v. Pudimott, 778 F.3d 133, 140-42 (D.C. Cir. 2015) (Karen LeCraft Henderson, J., concurring in the judgment) ("I agree with my colleagues that the deputies are plainly entitled to qualified immunity. . . I further agree that our inquiry starts and ends with United States Supreme Court precedent. . . But in my view, it is the Supreme Court's more recent opinion in *Plumhoff v. Rickard,* 134 S.Ct. 2012 (2014), that controls Fenwick's case. And, in contrast with *Brosseau v. Haugen,* 543 U.S. 194 (2004), which speaks only to the second qualified-immunity—inquiry—'whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting,' Maj. Op. 7—*Plumhoff* establishes that the deputies' actions were 'objectively reasonable in light of the facts and circumstances confronting them.'. . Accordingly, their actions did not violate Fenwick's Fourth Amendment rights at all. . . .Although Fenwick's case lacks the drama of the highspeed chase in *Plumhoff,* the factual differences between *Plumhoff* and Fenwick's case do not make the former inapposite. Rather, the principle animating *Plumhoff* is dispositive here. As the district court, in summarizing the relevant portion of the superior court's findings, put it, Fenwick 'created a grave risk of causing significant bodily injury to Deputy Pudimott when, without justifiable or excusable cause, he drove the car forward in a manner that put the deputy in danger of being hit.'. . Based on the 'grave public safety risk' that Fenwick created, *Plumhoff* establishes that the deputies 'acted reasonably in using deadly force.'. .My colleagues consider 'the constitutional question' in this case to be 'close.'. . But the 'facts [that] weigh in Fenwick's favor' are largely immaterial. . . My colleagues also find significant 'the deputies' concession' that they 'fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path.'. . But under *Plumhoff,* once Fenwick threatened bodily injury to Pudimott, the deputies were not obligated to stop firing 'until the threat ha [d] ended.'. . And nothing in the record demonstrates that a reasonable officer would have concluded, in the few seconds that passed after

Fenwick's car struck Pudimott, that Fenwick was no longer dangerous. . . . Here, the deputies had every reason to believe that civilians 'might' be in harm's way if the deputies did not neutralize the threat Fenwick's reckless behavior posed. . . As my colleagues recognize, the deputies 'observed pedestrians and vehicles close by in the minutes leading up to the shooting.'. . . On these facts, the deputies' actions were 'objectively reasonable in light of the facts and circumstances confronting them,'. . . and I would hold that they are entitled to qualified immunity because they did not violate the Fourth Amendment.")

FIRST CIRCUIT

Fagre v. Parks, 985 F.3d 16, 23-24 (1st Cir. 2021) ("No reasonable jury could conclude that it was unreasonable for Trooper Parks to believe that the driver posed an immediate threat. When Trooper Parks fired into the Durango, the suspect was attempting to ram Trooper Parks and his cruiser at full speed. . . That Trooper Parks climbed a snowbank did not remove the oncoming danger to him from the Durango or from his own cruiser once rammed by the Durango. The Durango passed within a few feet of Trooper Parks before hitting his police cruiser. It was travelling fast enough that, when it did hit his cruiser, the Durango pushed it fifty feet down the road. Had the driver changed course even slightly, he could have rammed into Trooper Parks instead of the police cruiser or rammed the police cruiser into the snowbank where Trooper Parks was. Fagre's argument that Trooper Parks was not in immediate danger because the Durango did not hit him and appeared to turn slightly away from him before hitting the cruiser is not persuasive. It relies on the '20/20 vision of hindsight,' not the 'perspective of a reasonable officer on the scene.'. .Trooper Parks also knew that the suspect had a gun. The driver, who had, moments earlier, fired his gun at another police officer and was now accelerating at full speed toward Trooper Parks, could have shot at Trooper Parks from the Durango. The Durango came close enough to Trooper Parks for the armed driver to pose an immediate threat. In the aftermath of the crash, the armed driver would also pose a risk to Trooper Parks or other officers at the scene. No reasonable jury could have concluded that Trooper Parks did not reasonably believe his life was in danger. There was no Fourth Amendment violation and summary judgment on Fagre's § 1983 claim was warranted. Trooper Parks was also entitled to qualified immunity. . . . Trooper Parks did not violate a federal statutory or constitutional right. Further, on these facts, we cannot say that every reasonable officer would have concluded that his life was not in danger. The Supreme Court has 'stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.'. . The case law does not clearly establish that it is unreasonable for an officer to conclude his life is in danger and to use potentially deadly force under circumstances like these.")

FOURTH CIRCUIT

Estate of Jones by Jones v. City of Martinsburg, W. Virginia, 961 F.3d 661, 667-73 (4th Cir. 2020) ("For the first time, we consider whether the five officers who shot and killed Jones as he lay on the ground are protected by qualified immunity. We review the district court's grant of

summary judgment de novo. . . Awarding the officers summary judgment on qualified immunity grounds is only appropriate if they demonstrate 'that there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law.'. . We view the evidence in the light most favorable to the Estate and draw any reasonable inferences in its favor. . . . Because this appeal arises from a summary judgment, and because we previously held that a jury could find that the officers violated Jones's Fourth Amendment right to be free from excessive force, *Estate of Jones*, 726 F. App'x at 179, this appeal turns on whether Jones's right was clearly established. . . . In the context of an ongoing police encounter such as this one, we 'focus on the moment that the force is employed.'. . Here, there are two distinct facts that separately define Jones's right to be free from excessive force at an appropriate level of specificity: (1) Jones, although armed, had been secured by the officers immediately before he was released and shot; and (2) Jones, although armed, was incapacitated at the time he was shot. Because it was clearly established that officers may not shoot a secured or incapacitated person, the officers are not entitled to qualified immunity. . . . Concededly, as deemed admitted and unlike the suspects in *Meyers* and *Kane*, Jones was armed with a knife, which was tucked into his sleeve, and yet which he somehow used to stab an officer. Although problematic for the Estate, these admitted facts do not preclude a jury from finding that he was secured. It was already established that armed suspects can be secured even before an officer disarms them. . . Given the relatively inaccessible location of the knife, and the physical inability to wield it given his position on the ground, the number of officers on Jones, and Jones's physical state by this time, it would be particularly reasonable to find that Jones was secured while still armed. The obvious retort is that a suspect who stabs an officer is not secured. But even given that admission, there remains a genuine question of fact as to whether Jones was secured at any point after Staub felt the knife, and before the officers simultaneously backed away. Staub called out multiple times that Jones had a knife, and another officer yelled to get back, all before the officers retreated. . .To be sure, the incident moved quickly. But during all of this, Jones was still on the ground, with five officers on him. A jury could reasonably find that Jones was secured before the officers backed away, and that the officers could have disarmed Jones and handcuffed him, rather than simultaneously release him. If Jones was secured, then police officers could not constitutionally release him, back away, and shoot him. To do so violated Jones's constitutional right to be free from deadly force under clearly established law. . . .Second, and even were it to find that Jones was not secured, a jury could still reasonably find that he was incapacitated by the time of the shooting. Jones had been tased four times, hit in the brachial plexus, kicked, and placed in a choke hold, at which point gurgling can be heard in the video. A jury could reasonably infer that Jones was struggling to breathe. He lay on his side and stomach on the concrete with five officers on him. And when the officers got up and backed away, viewing the evidence in the light most favorable to the Estate, the officers saw his left arm fall limply to his body. Unsurprisingly, it was clearly established in 2013 that officers may not use force against an incapacitated suspect. . . . [I]t was also clearly established at the time of Jones's death that simply being armed is insufficient to justify deadly force. . . And, viewing the evidence in the light most favorable to the Estate, Jones was not even wielding the knife when the officers shot him; it was pinned under the right side of his body, which was on the ground, and tucked into his sleeve. . . . By shooting an incapacitated, injured person who was not moving, and who was laying on his knife, the police

officers crossed a 'bright line' and can be held liable. . . .Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept. The district court's grant of summary judgment on qualified immunity grounds is reversed, and the dismissal of that claim is hereby vacated.")

FIFTH CIRCUIT

Peña v. City of Rio Grande City, Texas, No. 19-40217, 2020 WL 3053964, at *6–9 (5th Cir. June 8, 2020) (not reported) ("If Peña's allegations are accepted by the trier of fact as true, the incident involved an unarmed, teenage girl who neither threatened the officers, herself, nor anyone else, nor was a suspect in a crime or had any criminal record. She was driven to the police department by her parents after she failed to come home the night before. Upon arriving on the scene, Vela immediately threatened to tase Peña for not getting out of her parents' car and attempted to place her in handcuffs for reasons unknown to her. Vela admits he did not have probable cause to arrest Peña at this point. According to Peña, she hid her hands out of fear and attempted to run because she was 'really scared.' Peña was not given any other commands other than to get out of her parents' car. Peña was not told that she was under arrest or why she was being ordered out of the car. Once Peña was running, the officers did not order her to stop or warn her that she would then be tased. Solis, Salinas' supervisor and highest ranking officer at the scene, commanded Salinas three times to tase Peña. Salinas acknowledged that she is instructed to follow her supervisor's directives and that Solis was the one who made the decision to tase Peña. While running behind Peña and without stopping to aim, Salinas tased Peña. . . . Here, without warning or ordering her to stop, Salinas deployed her taser, which according to one report occurred within 19 seconds of Vela's call for assistance. In determining the objective reasonableness of the officer's use of force, it is also relevant that Peña was seventeen years old and five feet two inches tall. . . . Our prior decisions, despite factual differences, provide sufficiently specific guidance to put the officers on notice that their conduct was unlawful. If Peña's version of the events is true, no reasonable officer under the circumstances Salinas and Solis confronted would have believed it was reasonable to tase Peña—a juvenile girl who was not suspected of a crime, posed no objective threat to the safety of the officers' or others, and was not actively resisting arrest—without warning and without attempting to use any intermediate measures of force. . . Given the material factual disputes in this case, we cannot resolve the qualified immunity question in the officers' favor at summary judgment. . . It is not the law that is not clearly established, rather in this case the facts are not clearly established. However, viewing the facts in the light most favorable to Peña at the summary

judgment stage, the officers' conduct was objectively unreasonable in light of clearly established law at the time of the incident. Accordingly, the district court erred in granting summary judgment on qualified immunity grounds.")

Malbrough v. Stelly, 814 F. App'x 798, ___ (5th Cir. 2020) ("[T]he law of the Fifth Circuit—not the Tenth—applies. And we have rejected the idea that a police officer uses excessive force simply because he has 'manufactured the circumstances that gave rise to the fatal shooting.'. . In the Fifth Circuit, the excessive force inquiry zeros in on whether officers or others were 'in danger *at the moment of the threat* that resulted in the officer's use of deadly force.'. . Moreover, even if the Fifth Circuit did recognize something like the Tenth Circuit's state-created-need theory, Defendants would still not be liable. We must draw all reasonable factual inferences in favor of the non-moving party. . . And we may not make credibility determinations. But we need not credit evidence that is 'blatantly contradicted by the record,' especially by video or photographic evidence. . . Here, Malbrough offers testimony taken six years after the event that most of the officers were not in uniform. . . But Malbrough's own stipulated photographic evidence contradicts this testimony. . . . We do draw all *reasonable* factual inferences in favor of the non-movant. . . But considering the photographic evidence, Malbrough's story—based on three depositions taken six years after the event—is wholly contradicted by the record, and no reasonable jury could believe it. Thus, the district court was correct to find that the officers were in uniform. And it was reasonable for the officers to expect Campbell to recognize them as law enforcement and comply with their commands. Moreover, even if we accepted Malbrough's contradicted assertions at face value, our inquiry focusses on the officers' conduct at the *moment of the threat*—not the manner of their arrival. So even if the officers negligently spooked Campbell, the officers did not act unreasonably if they reasonably believed that Campbell posed an immediate threat to officers or others. The reasonableness of that assessment—whether Campbell posed a threat—is where we turn next. . . Having disposed of Malbrough's state-created-need theory, we must determine whether it was reasonable for the officers to believe that Campbell posed a threat to the officers near the Yukon or the civilians on the street. The district court answered 'yes.' And we agree. . . . It is tragic that Campbell was so severely injured. But we are obligated, in circumstances such as these—'tense, uncertain, and rapidly evolving'—to give allowance 'for the fact that police officers are often forced to make split-second judgments' about the amount of force needed to confront a dangerous situation. . . We cannot allow the 'theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.'. . Because the officers here reasonably believed that Campbell posed an immediate threat to officers and others, the officers did not use excessive force in violation of the Fourth Amendment.")

Garza v. Briones, 943 F.3d 740, 748 (5th Cir. 2019) ("[P]laintiff avers 'that the sheer number of shots fired' and 'the number of times that Garza was hit by gun fire' are enough, by themselves, to render defendants' use of deadly force objectively unreasonable. Plaintiff suggests that '[n]o reasonable officer in the same circumstances as Defendants[ ] could have believed that it was lawful to fire such a high number of shots.' Plaintiff's position is wholly undercut by *Plumhoff*. In *Plumhoff*, . . . police officers fired fifteen shots in ten seconds to prevent a suspect from fleeing

in his car. The petitioner contended that the sheer number of shots rendered the force used excessive. . . The Supreme Court rejected that position, instead stating that 'if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.'. . Defendants stopped firing when Garza fell to the ground and was no longer a threat. That they fired sixty-one shots in eight seconds, standing alone, does not render their use of force objectively unreasonable.")

SIXTH CIRCUIT

Jordan v. Howard, 987 F.3d 537, 543-44, 547-48 (6th Cir. 2021) ("The record here demonstrates the defendant officers' use of deadly force was objectively reasonable. Three of the four officers surrounding McShann's vehicle testified that when McShann woke, he was compliant or mostly compliant with their order that he put his hands up. (Officer O'Neal testified that he was not sure whether McShann put his hands up.) But then, after looking back and forth at the officers surrounding the vehicle for a few seconds, all four officers testified that McShann grabbed his gun. At this point, Officer Howard perceived a serious and deadly threat to himself and his fellow officers and took aim at McShann's 'center mass'—necessarily taking his vision away from the gun itself. While that process was playing out, the other three officers agree that McShann 'swung' the gun towards Officer Knight at the driver-side window. Officer Knight testified that he feared for his safety once McShann swung the gun towards him. At that point, both Officers Knight and Howard used deadly force. Given these unrebutted facts, we conclude that both Officers Howard and Knight acted reasonably to stop a serious threat of deadly force, and the district court correctly granted them qualified immunity. In other words, when an initially compliant suspect stops following officer commands and instead grabs a readily accessible firearm, an officer 'need not wait for [the] suspect to open fire on him ... before the officer may fire back.'. . .' Time and time again, we have rejected Fourth Amendment claims ... when the officers used deadly force only after the suspects had aimed their guns at the officers or others.' *Presnall*, 657 F. App'x at 512 (collecting cases). The uncontroverted evidence here leads to the same result.")

Jordan v. Howard, 987 F.3d 537, 548, 553, 555 (6th Cir. 2021) (Clay, J., dissenting) ("Plaintiff Sabrina Jordan's expert report, in conjunction with the officers' testimony and the autopsy report, established a genuine dispute of material fact regarding whether Jamarco Dewayne McShann held or pointed a firearm at the officers at the time that the officers shot him. When officers use deadly force against an individual, they are only entitled to qualified immunity where there is no genuine dispute of material fact that the officers had probable cause to believe that the individual posed 'a threat of serious physical harm.'. . In the present case, there is a genuine dispute of material fact regarding whether McShann posed a serious threat of physical harm to the officers: the mere presence of a firearm next to McShann in an open carry state while he was in a locked vehicle would not pose an immediate threat of safety to the officers—who surrounded McShann's vehicle while holding firearms and a ballistic shield. In view of the conflicting testimony and credibility issues, the district court erred when it found no genuine dispute of material fact as to whether McShann held or pointed a gun at the officers and determined that Defendants were entitled to

summary judgment based on qualified immunity. I would reverse the district court's grant of summary judgment and remand the case for further proceedings. . . . The district court also erred by finding that the officers were entitled to qualified immunity for their use of deadly force in this case. . . .For purposes of the present case, *Garner* clearly established that the use of deadly force without probable cause to believe that the individual posed a threat of serious physical harm is constitutionally unreasonable. . . And in *King*, we stated that '[i]t has been clearly established in this circuit for some time that "individuals have a right not to be shot unless they are perceived as posing a threat to officers or others.". .' 694 F.3d at 664 (quoting *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006)). In that case, we held that the district court erred in granting summary judgment based on qualified immunity because there was a genuine dispute of material fact as to whether the defendant pointed a gun at the officers before being shot. . . We reasoned that if he had not pointed the gun at the officers, then his clearly established right to be free of deadly force would have been violated. . . We also determined in *Bletz v. Gribble* that 'if genuine issues of material fact exist as to whether the officer committed acts that would violate a clearly established right, then summary judgment is improper.'. . Similarly, in the present case, assuming that McShann did not hold or point the gun at the officers, Howard and Knight violated McShann's clearly established right to be free from deadly force—McShann not having posed a threat of physical harm to the officers based on the officers' reasonable belief. For the foregoing reasons, I respectfully dissent and would reverse the district court's grant of summary judgment to Defendants and remand the case for further proceedings.")

Whitehead v. Washington County, Tennessee, No. 19-6246, 2020 WL 6386592, at *1 (6th Cir. Oct. 29, 2020) (not reported) ("Fourth Amendment excessive force claims are analyzed under the objective reasonableness standard, which asks whether the seizure was justified under the totality of the circumstances. . . Courts consider '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.'. . They examine the propriety of the use of force 'from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.'. .The court does not consider whether poor planning or bad tactics created circumstances that led to the use of force. *Reich v. City of Elizabethtown*, 945 F.3d 968, 978 (6th Cir. 2019), [*cert. denied*, 141 S. Ct. 359 (2020)]. The focus is on the moments just before the use of force.")

Hicks v. Scott, 958 F.3d 421, 435-37 (6th Cir. 2020) ("Because Scott's use of deadly force was an objectively reasonable response to having a rifle pointed at her face from five feet away, we affirm the district court's grant of qualified immunity to Scott. . . . Here, there is no genuine dispute that Quandavier pointed his rifle directly at Scott in the moments before he was shot. . . .Here, the longest estimation of the *entire* encounter was '[t]wo to three seconds, at most.'. . Thus, even if Quandavier had been disarmed at some point during the encounter, it would still have been reasonable for Scott to act on her initial perception of a threat. Finally, Hicks argues that Scott's use of deadly force was unreasonable because she placed herself in harm's way and then failed to warn Quandavier before firing. Hicks has a point: Scott may have been negligent or worse in

creating the situation when she entered the apartment and failed to announce herself. Under the 'segmented analysis' employed by this court, however, '[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances.'. . Instead, the only inquiry that matters is whether, in the 'moment' before using deadly force, an officer reasonably perceived an immediate threat to her safety. . . Here, as already discussed, Scott reasonably perceived such a threat. And it is for this same reason that Scott was not required to give a warning. When the 'hesitation involved in giving a warning could readily cause such a warning to be [the officer's] last,' then a warning is not feasible. . . It was not feasible for Scott—unexpectedly confronted with the barrel of a rifle from five feet away—to give a warning before firing her weapon. . . Accordingly, because the district court properly found that Scott's use of deadly force was objectively reasonable, we affirm the court's grant of qualified immunity to Scott.")

Reich v. City of Elizabethtown, Kentucky, 945 F.3d 968, 978-80, 982 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 359 (2020) ("Our precedents . . . refine our view by requiring that we analyze excessive force claims in segments. . . This approach requires us to evaluate the use of force by focusing 'on the "split-second judgment" made immediately before the officer used allegedly excessive force,' not on the poor planning or bad tactics that might have 'created the circumstances' that led to the use of force. . . We thus need not engage Reich's argument that the officers created the need to use deadly force by pursuing and initiating contact with Blough despite his mental illness. Even were we to consider that argument, Supreme Court precedent suggests that it should not change our answer. . . Nor do we find persuasive Reich's citation to *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004), for the proposition that we should consider a person's mental illness when determining whether an officer used reasonable force. That case actually says that '[t]he diminished capacity of an *unarmed* detainee must be taken into account when assessing the amount of force exerted.'. . Wielding a knife until the moment officers shot him obviates *Champion* here. And Reich points to 'no case law restricting an officer's ability to use deadly force when she has probable cause to believe that a mentally ill person poses an imminent threat of serious physical harm to her person[.]'. . With that foundation, our analysis focuses on the officers' final encounter with Blough. We construe the evidence and draw all reasonable inferences in Reich's favor but, because this case concerns qualified immunity, consider 'only the facts that were knowable to the defendant officers.'. . That means we put aside the numerous 911 calls from neighborhood residents describing Blough's alarming behavior and the steps each took to secure their homes and families. . . Here, applying the *Graham* factors, the totality of the circumstances gave the officers probable cause to believe that Blough posed a threat of serious physical harm to them and others. . .The undisputed facts show that both officers saw Blough wielding a knife, shirtless, pacing back and forth between houses in the neighborhood. . . They both knew that he had severe schizophrenia, had not been taking his medication, disliked the police, and thought 'everybody [was] out to get him.' After the officers exited their vehicles, Blough walked at a fast pace toward the officers with the knife in his right hand and refused Reich's pleas to drop the knife and return to her vehicle. Both officers stayed near their vehicles, never moving toward Blough. When both officers then commanded—at least once each—that Blough drop the knife, he again did not. Instead, Blough 'took a step forward toward' Richardson with his

knife raised in his right hand in a stabbing position and said, 'you're gonna have to kill me mother * * * *er.' That prompted officers to fire three rapid shots in a single volley—the first two by Richardson, the last by McMillen—with Blough having advanced within six to twelve feet of Officer Richardson. Reich claims that Blough 'turned around' and took 'one or two steps' before the officers fired, and thus posed no threat to anyone at the time the officers fired. Absent Blough's step away, our precedents provide a clear answer. . . . But even including Reich's view that Blough 'step[ped] away' in the story, the officers' conduct was still objectively reasonable—Blough had just told Officer Richardson 'you're going to have to kill me mother * * * *er,' refused repeated commands to drop his weapon, and advanced within six to twelve feet of Richardson with the knife raised in a stabbing position. . .Yes, in addition to the bullet that grazed Blough's forearm and entered his 'lower right chest,' one bullet entered Blough's 'upper right back.' But the officers fired from different spots, and Blough approached Officer Richardson 'at a slight angle' with his body 'bladed a little bit,' not with his shoulders square to the officers. . . Taken as a whole, this record cannot support the inference Reich wishes us to draw—that the officers shot despite Blough posing no imminent threat at the time. . . . Reading *Sova* and *Studdard* would not impress upon every reasonable officer the clear understanding that it is illegal to shoot someone behaving like Blough if that person is twenty-five feet away from one officer and thirty-six feet away from another. In the 'tense, uncertain, and rapidly evolving' circumstances of Blough's encounter with Officers Richardson and McMillen, reasonable minds could deny that twenty feet made the difference between a legal use of deadly force and an illegal one. . . Thus, for the same reasons the officers did not violate constitutional law by shooting Blough if he was five feet away, they did not violate *clear* constitutional law by shooting Blough if he was twenty-five to thirty-six feet away. No legal principle 'clearly prohibit[ed]' the use of deadly force 'in the particular circumstances before [the officers].'. . And it was not 'plainly incompetent' for the officers to consider Blough a threat.")

Reich v. City of Elizabethtown, Kentucky, 945 F.3d 968, 984, 990-91 (6th Cir. 2019) (Moore, J., dissenting), *cert. denied,* 141 S. Ct. 359 (2020) ("The majority paints a distressing picture, one in which Officers Richardson and McMillen shot and killed Joshua Blough because he was a 'knife-wielding belligerent' 'advanc[ing] toward them with his knife hand raised in a stabbing position,' and screaming obscenities like 'you're gonna have to kill me mother * * * *er.'. . If the record supported that picture—and that picture alone—I might agree with my colleagues that the officers are entitled to qualified immunity. The problem, however, is that the record is not amenable to such a one-sided rendering. Rather, as I see it, there are two sides to this story: the officers' view—which the majority details with great care—and Elizabeth Reich's view—which the majority sweeps under the rug. And, as Reich tells it, Officers Richardson and McMillen shot and killed her fiancée, Blough, right in front of her, (a) while Blough was standing *20 to 30 feet away* from the officers and Reich, and (b) while Blough was *turning to run away from the officers*. Accepting Reich's narrative as true, as we must at this stage of litigation, any reasonable police officer should have known that shooting Blough violated clearly established Sixth Circuit law. *See Studdard v. Shelby County*, 934 F.3d 478 (6th Cir. 2019); *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). Accordingly, in my view, qualified immunity does not protect Officers Richardson and

McMillen; this case should be going to trial. . . . Even acknowledging the 'tense, uncertain, and rapidly evolving' nature of Defendants' encounter with Blough, and the challenges of evaluating police conduct with 'the 20/20 vision of hindsight,'. . . if there was a genuine dispute of material fact in *Sova* and *Studdard* as to whether the suicidal, knife-wielding decedent posed a 'threat of serious physical harm' to the surrounding public, such that deadly force was justified, surely there is a triable dispute here. If anything, Reich's testimony that Defendants essentially shot Blough in the back, as he turned to run away, makes the officers' actions even *more* unreasonable than the actions at issue in *Sova* and *Studdard*. . . This brings me to the second prong of the qualified-immunity analysis—clearly established law. As the majority observes, this is a tough standard, meant to protect 'all but the plainly incompetent or those who knowingly violate the law.'. . But it is not insurmountable. . . In my view, then, the correct question to ask for purposes of this second prong is whether, as of July 6, 2015, our law clearly established that it was unconstitutional for a police officer to shoot a non-compliant, mentally unstable person with a knife, *if* that person was *not* advancing toward another individual in the immediate area. The answer to the question is yes. In 1998—almost two decades before the shooting—*Sova* established that reasonable police officers do *not* shoot non-compliant persons brandishing knifes when they are *not* advancing toward another individual in the immediate area, even if the person is mentally ill, suicidal, and/or yelling threats to the officers. . . Consequently, because a reasonable juror could find that Defendants violated this clearly established law when they shot Blough, Reich has met her burden under prong two. In response, the majority claims I am trying to create a black-and-white 'strike zone rule,' where the viability of a Fourth Amendment claim rise and falls solely on the precise number of feet the decedent stood from the police at the time of the shooting. . . I am not. I am simply noting that, when confronted with a materially similar set of facts twenty years ago, we held that qualified immunity did not lie, and that, therefore, Officers Richardson and McMillen were on fair notice that qualified immunity would not protect them here either. . . Indeed, to hold otherwise is to hold Reich, and other Fourth Amendment plaintiffs like her, to an impossibly high standard, where they must dredge up a mirror-image case (that happened to arise in this circuit, and happened to result in a decision by this court) to have any hopes of surviving a qualified-immunity challenge at summary judgment. But, because history rhymes far more often than it repeats exactly, we cannot, and should not, condition a Fourth Amendment plaintiff's access to a jury trial on their meeting such an onerous burden. The majority seeing it differently, I respectfully dissent.")

SEVENTH CIRCUIT

Turner v. City of Champaign, 979 F.3d 563, 567-71 (7th Cir. 2020) ("The estate's Fourth Amendment claims fail because the officers did not use excessive force. A claim for excessive force under § 1983 invokes the Fourth Amendment's protection against unreasonable seizures. . . . We are not saying that Officer Wilson and Young's decision to chase Mr. Turner down the alley exhibited best police practices. The estate argues that Mr. Turner's death might have been avoided if the officers had instead continued to monitor him from a distance and waited until the ambulance arrived, as they had on prior occasions. The Champaign Police Department's own policies train

officers responding to calls involving persons with mental illnesses to 'consider[ ] first the least restrictive environment possible to meet the needs of the individual and the community.'. . This approach can include 'officer intervention as a calm third party, to reduce tension and hostility, and to restore order without unnecessary force.'. .With the benefit of hindsight, one can say that perhaps such an approach might have saved Mr. Turner's life. But police training policies and best practices, while relevant, do not define what is reasonable under the Fourth Amendment. . . . Officer Wilson did not violate the Fourth Amendment when he caught up with Mr. Turner and grabbed his shoulder to stop his flight. Since Mr. Turner never submitted to the authority of spoken police commands, this physical contact was the moment police first seized him. . . . The undisputed facts show that he resisted the officers actively and continually. He was not offering merely passive resistance to lawful detention; in such cases significant force can violate the Fourth Amendment. Unlike when someone is passively refusing to move or follow lawful commands, the police may use significant force to subdue someone who is actively resisting lawful detention. . . . The undisputed facts show that Mr. Turner's behavior qualified as active resistance. When Officer Wilson grabbed his shoulder, Mr. Turner shoved Officer Wilson and began grabbing at Officer Young. The officers then took Mr. Turner to the ground, where Mr. Turner kept resisting and trying to pry himself away from the officers. The officers all testified that this resistance continued throughout the encounter. Even after Mr. Turner was handcuffed, they needed a hobble because he kept kicking his legs. The hobble had to be attached twice because Mr. Turner's flailing legs broke free on the first attempt. In this respect, as the district court recognized, the facts closely resemble *Estate of Phillips*, where we found no excessive force. . . . Here too, the escalating force against Mr. Turner was a constitutionally permissible response to his continued resistance. As in *Estate of Phillips*, officers placed Mr. Turner in a prone position, pinned down his shoulder, handcuffed him, and hobbled him. And just as in *Estate of Phillips*, each of these actions was reasonable under the Fourth Amendment. After Mr. Turner shoved Officer Wilson and continued resisting, it was reasonable to place him in a prone position to handcuff him. Placing a knee on Mr. Turner's shoulder was also not excessive given the undisputed evidence of his continued resistance on the ground. Finally, pinning down Mr. Turner's legs and attaching a hobble were reasonable given the undisputed testimony that he kept kicking and that he maneuvered out of the hobble when it was first applied. Unfortunately, also as in *Estate of Phillips*, '[t]hat force, it turned out, when combined with Mr. [Turner's] other health problems, resulted in [his] death.'. . But legally, it was not 'deadly force' because it did not "carry a substantial risk of causing death or serious bodily harm.'. . Rather, at each step of the encounter, the undisputed facts show that the officers used a reasonable amount of force. Critically, Mr. Turner's body showed no signs of suffocation or trauma from the officers' force. The officers 'did not hogtie, choke or transport Mr. [Turner]. Nor were his medical conditions,' including his enlarged heart, 'observable to the untrained eye.'. . In situations like this, where an officer's force causes unexpectedly severe injuries due to a hidden condition, reasonableness is assessed objectively based only on what the officer knew at the time force was applied. . . The same principle applies when an officer reasonably mistakes medical symptoms as resistance. . . . On the other hand, when officers observe medical symptoms that cannot reasonably be mistaken as resistance, they may not respond with force. . . . Here, the estate argues that Mr. Turner was not resisting the officers but only struggling

to breathe. The estate, however, has offered no evidence supporting this theory, and the autopsy results contradict it. Nor is there any evidence showing that, even if this were true, the officers were aware of it before Sergeant Frost asked if Mr. Turner was breathing. The estate therefore lacks the kind of evidence that raised a genuine issue of fact in *McAllister*. Without such evidence, we must conclude that the officers here—like the officers in *Smith*—reasonably interpreted Mr. Turner's movements as resistance. The district court properly granted summary judgment for the defendants on the estate's excessive force claims against Officers Wilson, Young, and Talbott.")

Estate of Biegert by Biegert v. Molitor, 968 F.3d 693, 698-701 (7th Cir. 2020) ("The estate contends that the officers acted unreasonably by creating the conditions that precipitated the violent encounter. As the estate sees it, the officers created the situation that ultimately led to Biegert's death by failing to make a plan for the encounter, failing to secure the knife block in the kitchen, and questioning Biegert aggressively. But none of these actions rendered the officers' subsequent use of force unreasonable, nor did the officers' creation of a dangerous situation constitute an independent violation of Biegert's constitutional rights. The officers might have made mistakes, and those mistakes might have provoked Biegert's violent resistance. Even if so, however, it does not follow that their actions violated the Fourth Amendment. . . Only in narrow circumstances have we concluded that an officer acted unreasonably because he created a situation where deadly force became essentially inevitable. [discussing *Starks v. Enyart* and *Sledd v. Lindsay*] . . . . In *Starks* and *Sledd*, the officers acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of the officers' actions. That's not true in this case. Even if the defendants' actions exacerbated the danger, Biegert's actions were an intervening cause of the deadly force. Dunn and Krueger escalated the force that they applied in response to the force with which Biegert resisted; the situation requiring them to use deadly force was not primarily of their own making. . . . We emphasize that someone does not pose 'an immediate threat of serious harm' solely because he is armed. We made that point in *Weinmann v. McClone*, which involved an officer performing a wellness check on a man who had locked himself in the garage with a shotgun on his lap. . . Without making any attempt to communicate with the man, the officer barged into the garage and shot him. . . We held that the case turned on whether the man had threatened the officer with the shotgun—if he hadn't, it was unreasonable for the officer to shoot him. . . Having a weapon is not the same thing as threatening to use a weapon. . . Here, though, Biegert not only threatened to use the knife—he actually used it. By the time Biegert was shot, he had already stabbed Dunn multiple times. The officers, therefore, indisputably faced an immediate threat to their physical safety. And as in *Henning*, *King*, and *Sanzone*, the imminent threat of deadly harm posed by an aggressive, armed assailant justified the defendants' use of lethal force. We also note that the officers did not resort to deadly force as their first line of defense to Biegert's resistance. Rather, the officers applied only mild physical force to restrain Biegert during the pat down and increased the force only as Biegert increased his physical resistance. When Biegert dragged the officers to the kitchen and onto the floor, Dunn and Krueger resorted to punches and Tasers. And when the Tasers proved ineffective, the officers continued to employ less lethal methods—fists, batons, and bodyweight—in their attempts to restrain Biegert. Only after Dunn yelled that he had been stabbed and Biegert advanced toward Krueger with a knife did the

officers employ lethal force. We must evaluate the reasonableness of the officers' actions with the understanding that the situation they faced was 'tense, uncertain, and rapidly evolving' and required them to 'make split second judgements' about how much force to apply to counter the danger Biegert posed. . . As in *Henning*, the officers first attempted less lethal methods in response to Biegert's resistance. And, as in *King*, Biegert posed an imminent threat to the officers once he had armed himself with a knife, attacked Dunn, and advanced toward Krueger. At this point, the officers reasonably resorted to firing at Biegert in response to the imminent threat he posed. . . . The officers did not violate the Fourth Amendment by shooting Biegert. Nor did their actions preceding the shooting render their use of force unreasonable. Because we conclude that no constitutional violation occurred, we need not determine whether the officers are entitled to qualified immunity.")

Gysan v. Francisko, 965 F.3d 567, 570 (7th Cir. 2020) ("Gysan does not doubt that police may use deadly force to protect themselves. Instead she contends that Cataline was not a danger to them. Yet he had violated an order to turn off the engine; then he turned the van around, began to drive the wrong way on an expressway, and turned again to hit a police cruiser. All of that is undisputed. Gysan suggests that, after smashing into Kuehl's car, Cataline may have put up his hands in surrender. That's conceivable, though we do not see how it could be proved; as in *King*, the only person in a good position to offer evidence contradicting the police account is dead. Francisko and Kuehl both testified that Kuehl was wedged behind the door and at continuing risk; again Gysan lacks contrary evidence. What objective evidence we have supports the officers: the van's engine continued to run at high speed until Francisko shot Cataline, which is inconsistent with his desisting from the attack and surrendering. Kuehl appears in the video to walk with a limp after the events, and Gysan does not deny that the voice heard screaming was Kuehl's; this supports the officers' contention that Kuehl's life was at stake. Francisko is entitled to qualified immunity.")

Ybarra v. City of Chicago, 946 F.3d 975, 979-80 (7th Cir. 2020) ("Cruz was not merely an impaired driver or someone driving away from a traffic ticket. After someone in his Tahoe fired multiple shots at another vehicle, Cruz sped away through city streets at roughly twice the speed limit, driving for a mile before crashing into multiple cars. First, he careened into a parked car with such force that it pushed the car forward into a second car parked a full car-length in front of it, which then rolled into a third. Despite the severity of that initial collision, Cruz did not stop. Cruz kept driving and crashed into a fourth car parked on the opposite side of the street. Then, when Valadez parked behind Cruz's Tahoe, Cruz drove backward directly into the same car door from which Valadez was attempting to exit. Cruz's Tahoe crashed into the unmarked police car with enough force that it slammed Valadez's door shut, caused the 'whole car' to 'rock[ ],' and led Reyes to believe that Valadez may have been seriously injured. During the encounter in the parking lot moments later, the officers reasonably believed that there was still at least one gun in Cruz's Tahoe, that Cruz could access it, and that all of the suspects in the Tahoe might have been armed and dangerous. . . The situation was particularly difficult given that the officers could not see into the Tahoe to determine which occupant had the gun because the Tahoe had dark, tinted

windows. . . Moreover, only sixteen seconds elapsed from when Valadez entered the parking lot (with Reyes trailing by a few seconds) until the Tahoe exited the parking lot, at which time Cruz had already been shot. Within that sixteen-second window, the officers had mere seconds to determine how to respond, and that determination was informed by the violent acts the officers had witnessed less than ninety seconds previously. . . .Even though the encounter occurred during the very early hours of the morning, surveil-lance footage shows other pedestrians, cyclists, and motorists in the area around the time of the shooting. Regardless of whether the officers reasonably believed that Cruz presented a direct threat to the officers' own safety—whether by driving toward or shooting at them—there is no genuine dispute of material fact that the officers acted reasonably in using deadly force against Cruz to prevent his escape to protect others in the immediate vicinity. . . Their use of deadly force to prevent escape continued to be reasonable even as Cruz drove past the officers.")

Ybarra v. City of Chicago, 946 F.3d 975, 981-83 (7th Cir. 2020) (Hamilton, J., concurring in the judgment) ("I would affirm summary judgment on the narrower ground of qualified immunity on plaintiff's Fourth Amendment claim. In briefing in this court, plaintiff effectively conceded that qualified immunity is appropriate. She described this case as straddling the 'hazy border' between reasonable and unreasonable force. . . I would not make my colleagues' further finding that the officers did not violate the Fourth Amendment, particularly in light of the officers' use of deadly force while driving an unmarked vehicle and wearing plain clothes. . . . The extensive case law concerning police use of force, and especially deadly force in police chases, almost always involves uniformed police officers and clearly marked police vehicles. Courts expect civilians to comply with police commands and warnings and to respect the authority of the police. Those expectations do not necessarily apply to police officers who are out of uniform in unmarked vehicles, however effective those tactics may be for particular police purposes. The officers here were in plain clothes, not in uniform, and they were driving an unmarked car. Never in the ninety-second episode did the officers use the car's hidden emergency lights or sirens. In reviewing a grant of summary judgment, we cannot assume Cruz knew he was being pursued by police officers during the chase or even during the fatal confrontation in the church parking lot. One passenger in Cruz's car recognized from their gear that the people on foot in the parking lot were in fact police officers. Cruz and others may not have. The evidence of shouted warnings did not show beyond reasonable dispute that the officers could reasonably have expected the Tahoe's driver to have heard them. We explained in *Doornbos v. City of Chicago*, 868 F.3d 572, 585 (7th Cir. 2017), that with only rare exceptions, plainclothes officers may not initiate Fourth Amendment seizures without identifying themselves as police . . . . In *Doornbos*, we also summarized the special dangers posed by the use of force by plainclothes officers as reported in the U.S. Department of Justice's investigations of the police departments in Chicago and other cities, highlighting Chicago's 'aggressive plainclothes policing practices that result in needless injuries.'. . There have been too many tragedies around the nation in which police officers have used deadly force against their own colleagues in plain clothes, often officers of color, in circumstances that were 'tense, uncertain, and rapidly evolving,' to quote *Graham v. Connor*[.] . . Nevertheless, despite some factual disputes bearing on the ultimate reasonableness of the officers' actions in this case, I would

affirm summary judgment for the officers based on the doctrine of qualified immunity. As noted, plaintiff concedes that the officers' conduct falls somewhere on the 'hazy' borderline separating excessive and appropriate force. . . And even if that were not so, plaintiff's briefs failed to identify 'a body of relevant case law' rendering the officers' conduct clearly unconstitutional on the facts construed most favorably to her, and failed as well to persuade that this is an 'obvious' case controlled directly by *Garner* and *Graham*. . . We should take the more conservative decisional route here by limiting our holding to the qualified immunity defense.")

EIGHTH CIRCUIT

McElree v. City of Cedar Rapids, 983 F.3d 1009, 1017-18 (8th Cir. 2020) ("The family advances two primary arguments as to why it was unreasonable for the officers to shoot Gossman. They first emphasize that Garringer mistakenly believed Gossman fired his gun. They also argue the officers should have warned Gossman before firing. Neither argument has merit considering the totality of the circumstances. First, we need not resolve whether Garringer's mistaken belief was reasonable here since deadly force was authorized because Gossman pulled a gun and thus the officers were 'faced with an apparently loaded weapon.'. . Second, Gossman's family is correct that a warning should be given if it is feasible. . . But where the decision to shoot must be made in a 'split-second,' as here, it is reasonable to forgo a warning. . . In light of the above, we hold the use of deadly force did not violate the Fourth Amendment.")

Liggins v. Cohen, 971 F.3d 798, 800-802 (8th Cir. 2020) ("The district court thought there were genuine disputes of fact about whether a reasonable officer in Cohen's position 'would have perceived' that B.C. was running toward the officer before he fired and whether it was feasible for the officer to give a warning before shooting. The implication is that if Cohen reasonably perceived that B.C. was running toward him, and a warning was not feasible, then it may have been reasonable to discharge the firearm. We agree that these are important questions, but they are not questions of fact for a jury. Once the court has assumed a particular set of facts about where and how B.C. was running in relation to Cohen's position, whether B.C.'s actions rose to a level warranting Cohen's use of force is a question of law for the court, not a question of fact. *Scott v. Harris*, 550 U.S. 372, 381 n.8, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The undisputed facts are that B.C. had run through the breezeway to the back of the building. The evidence shows that he was positioned to the right of the sidewalk that led straight out from the breezeway, and was moving toward the back of the property. Cohen was to the left of the sidewalk in the parking lot. But Cohen was still in front of B.C. at an acute angle to the left, so B.C. was running in Cohen's general direction, even if not directly at him. B.C. was carrying in his right hand a gun that moved while he ran. The officers were investigating a report of a stolen firearm, and B.C. was fleeing from police who had arrived at the front of the building. Under those circumstances, we conclude that a reasonable officer was justified in discharging his firearm. With only a second or two to react as he rounded the parked truck, Cohen had reasonable grounds to believe that the fleeing subject who was running toward the back of the property could raise the gun and shoot. It would take only an instant to do so if the person were ready to fire. The young man was fleeing with gun

in hand, and the officers presented an obstacle to his escape. This was a split-second decision for the officer. It was not practical in that moment for Cohen to discern whether B.C. was carrying the gun in an unusual manner or to shout a warning and wait for him to react. There was simply no time. 'When the hesitation involved in giving a warning could readily cause such a warning to be the officer's last, then a warning is not feasible.'. . In dangerous situations where an officer has reasonable grounds to believe that there is an imminent threat of serious harm, the officer may be justified in using a firearm before a subject actually points a weapon at the officer or others. . . Given the convergence of events, it was not unreasonable for the officer to use force as he did. We do not accept the appellees' suggestion that Cohen acted unreasonably because he created the danger. It is true that the officers anticipated that a subject might flee to the rear of the building if he encountered police in the front. But police officers investigating a stolen firearm reasonably may position themselves in a way that facilitates apprehension of a suspect. If, as B.C. asserts, he took the stolen gun from his brother with the intention of returning it to the owner, then the outcome is all the more tragic. But B.C. chose to remove the firearm from the bag and flee, rather than carry it away in the bag, stay put and say nothing, or surrender the firearm to police with an explanation. The officer had no way to know B.C.'s subjective intentions, and our analysis must consider only what a reasonable officer on the scene would have perceived. . . The appellees also suggest that the crime under investigation was not serious, but it involved a dangerous weapon, and it is well known that stolen firearms 'are used disproportionately in the commission of crimes.'. .This situation is not comparable to *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009), which held it unreasonable for officers, without identifying themselves as police, to shoot without warning a twelve-year-old boy who had a toy gun tucked into his waistband while he was trying to comply with an order to get on the ground. Nor is it like *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005), where a police officer encountered an assault victim struggling with a perpetrator over a gun that was pointed in the air, and without warning fired a shotgun blast that killed the innocent victim. Also distinguishable is *Wealot v. Brooks*, 865 F.3d 1119 (8th Cir. 2017), where police allegedly shot a man who was unarmed and turning around with his hands up to surrender. The confluence of circumstances here—the stolen firearm, the fleeing suspect with a gun moving in his hand, and the need for an officer at an acute angle in front of the subject to make an instant decision about using force—does not match any of our prior decisions. Allowing, as we must, 'for the fact that police officers are often forced to make split-second judgments ... in circumstances that are tense, uncertain, and rapidly evolving,'. . . we conclude that the force used in this particular situation was not unconstitutional.")

Birkeland as Trustee for Birkeland v. Jorgensen, 971 F.3d 787, 791-92 (8th Cir. 2020) ("Regardless of whether Birkeland's movement toward the officers was voluntary, in light of the close proximity between the officers and Birkeland's location in the closet, Birkeland's failure to comply with Officer Jorgensen's commands to drop the knife, and Birkeland's stabbing of the police dog in the face with a knife, Birkeland posed a threat of serious physical harm to the officers and we cannot say that their 'use of deadly force, even if just over the line of reasonableness, violated a clearly established right.'. . The district court erred in denying the officers qualified immunity on the deadly force claim.")

Birkeland as Trustee for Birkeland v. Jorgensen, 971 F.3d 787, 792-93 (8th Cir. 2020) (Kelly, J., concurring in part and dissenting in part) ("The court concludes the defendant officers did not violate Birkeland's clearly established rights when they shot and killed him in his home after they arrived for a welfare check. Because I believe questions of fact preclude our drawing this conclusion, I respectfully dissent. . . The officers argue they reasonably feared for their safety after Birkeland stabbed Otis, the police K9. 'The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene.'. . There is 'extensive case law setting forth the requirement that an officer must have probable cause to believe the suspect poses a threat of serious physical harm before using deadly force.'. . We view the facts in the light most favorable to the Trustee. . . When Jorgensen slid open the closet door, he saw Birkeland crouched on the ground. The closet was full of clothes, boxes, and other belongings. Birkeland did not come out of the closet when ordered, and Jorgensen saw him move his hand behind his back. Jorgensen said he was concerned that Birkeland might be reaching for a weapon. Jorgensen then sent Otis 'to make a physical apprehension,' in other words, 'to bite.' Otis bit Birkeland: the autopsy shows Birkeland suffered a wound deep enough to expose the bone. In response, Birkeland stabbed Otis with a knife. Jorgensen looked at Otis and saw no visible injuries. Jorgensen yelled at Birkeland to 'let go' or 'put down' the knife. As the court acknowledges, '[t]he parties dispute, and the video does not show, whether Birkeland [then] started to come out of the closet on his own accord or because he was being pulled out by Otis.'. . The district court found that Otis was between the officers and Birkeland when the officers fired their shots. Eckert testified that he only fired one shot in part because he did not want to hit Otis. These facts present a jury question as to whether the officers' stated fear for their safety was reasonable. Because 'the parties dispute, and the video does not show' crucial moments before the officers killed Birkeland, a jury must determine the facts and weigh the officers' credibility. Birkeland was not suspected of a crime and had made no effort to actively resist arrest or flee the apartment; in fact, he had closed himself in his closet with no other exit. . . Although Birkeland had a knife, he was crouched in a closet and separated from the officers by a re-engaging police dog. A reasonable jury could question whether it was reasonable for an officer at the scene to believe 'the totality of the circumstances justifie[d]' shooting and killing Birkeland in his closet. . . I agree with the district court that 'fact issues preclude a determination that, as a matter of law, the use of deadly force was reasonable' and so I respectfully dissent.")

Kong v. City of Burnsville, 960 F.3d 985, 992-95 (8th Cir. 2020), *cert. denied*, 141 S. Ct. ___ (2021) ("Two years after Kong's 2016 shooting, the Supreme Court held that its case law did not clearly establish that officers acted unreasonably by shooting a woman who stood calmly with a kitchen knife by her side six feet from a bystander. . . Although the Burnsville defendants could not rely on *Kisela* for guidance, the Court's analysis of its own pre-2016 precedent is instructive. Like Kong, the woman shot in *Kisela* was not suspected of any felony, and police responded to a report she was 'acting erratically' with a knife. . . During the encounter, she did not raise the knife toward the police or others. . . Like Kong, she did not acknowledge the officers' presence or obey their commands to drop the knife. . . Holding that *Kisela* was 'far from an obvious case in which

any competent officer would have known that shooting' the woman would violate her rights, the Court relied only on cases decided before March 2016, when Kong was shot. . . The Court also held that case law of the relevant circuit did not clearly establish the right. . . . Similarly, this court's case law at the time of Kong's shooting did not place the question of his right beyond debate. The Trustee argues the officers should have known that shooting Kong was an unreasonable seizure under the *Ludwig* case. *See Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (denying qualified immunity to officers who fatally shot Ludwig as he fled with a knife). Ludwig may have been running away from bystanders when shot, with the nearest bystander 150 feet away. . . This court also assumed Ludwig did not physically threaten a police officer. . . . Shot at a distance when posing no threat to officers or citizens, Ludwig was like the unarmed man shot in *Harris*, which the Supreme Court rejected as distinct from the woman in *Kisela* standing calmly with a knife near a bystander. . . In contrast to Ludwig, Kong ran toward bystanders, including a woman driving only 30 feet away. . . Other cars were parked in the McDonald's lot, with at least one pedestrian visible among them on the body-camera footage. The steady flow of vehicles through the parking lot meant that citizens might quickly approach or step out of their vehicles. And, a few cars passed by along on the frontage road, only 100 feet away, with steady traffic on the highway beyond. . . While pointing their handguns at Kong's car, the officers continually warned each other about "crossfire" hitting an officer or citizen, in or out of a vehicle, by firing at the wrong angle. If the officers waited, a car might block their line of fire or bystanders get too close for them to fire. In fact, a bullet that missed Kong lodged in the bumper of a vehicle pulling out of the parking lot 30 feet away. . . When Kong began running through the occupied parking lot, toward the frontage road and highway, the officers 'were forced to make a split-second judgment in circumstances that were tense, uncertain, and rapidly evolving.'. . Although Kong may not have threatened an officer with his knife, he posed a threat to citizens. This situation differs from *Ludwig*, where this court did not mention nearby traffic or 'citizens who *might* be in the area' and endangered by crossfire. . . A reasonable officer could miss the connection between the situation confronting officers in *Ludwig* in the woods and the situation with Kong in the McDonald's parking lot. Cases decided by this court after *Ludwig* make clear that, at the time of Kong's shooting, officers could use deadly force to stop a person armed with a bladed weapon if they reasonably believed the person could kill or seriously injure others. . . . Even if the officers caused Kong to leave his car by confronting him, they would reasonably believe the law allowed them to shoot him if he posed an immediate and significant threat. Even if officers 'created the need to use' deadly force by trying to disarm a mentally ill person, the reasonableness of force depends on the threat the person poses during the shooting. . . . Based on *Schulz*, *Hayek*, and *Hassan*, a reasonable officer would have believed the law permitted shooting Kong. Like the officers in *Schulz* and *Hayek*, the Burnsville officers tried to disarm Kong to prevent him from causing harm, even if he initially posed no immediate threat to others. . . When Kong left his car, the threat he posed justified lethal force, even if officers caused him to leave his car. . . Like the man in *Hassan*, Kong's unpredictable behavior with his weapon made him dangerous even if he had not yet harmed anyone. . . Just as in *Hassan*, repeated commands and tasing did not cause Kong to drop his knife. . . The encounter occurred in a McDonald's parking lot with citizens in the vicinity, like the strip mall parking lot in *Hassan*. . . While *Hassan* involved pedestrians, the

McDonald's parking lot had at least one pedestrian and several citizens in cars. . . .Existing precedent of the Supreme Court and this circuit did not provide fair warning to the Burnsville officers that shooting Kong under these circumstances was unreasonable. The district court erred in denying the officers qualified immunity.")

Kong v. City of Burnsville, 960 F.3d 985, 997-1000 (8th Cir. 2020), *cert. denied,* 141 S. Ct. ___ (2021) (Kelly, J., dissenting) ("In my view, the district court correctly denied defendants' motion for summary judgment after viewing the evidence in the light most favorable to the Trustee and deciding that a reasonable jury could find defendants violated Kong's clearly established right to be free from excessive force. . . . Kong was non-confrontational during the entire encounter. Indeed, he was running away from the officers and other pedestrians when he was shot. And while Kong carried a knife, a reasonable officer would have known he did not pose a significant and immediate threat to anyone else in the vicinity because those people were driving inside their cars. Kong was moving away from the officers and was unlikely to confront, much less harm, any other person. In sum, viewing the record in the light most favorable to the Trustee—as we must on summary judgment—a reasonable officer would not have believed Kong posed a significant and immediate threat of serious physical harm to the officers or the public. Thus, the use of deadly force was objectively unreasonable under the circumstances and amounted to excessive force. . . . Like the district court, I believe defendants violated Kong's clearly established right to be free from excessive force, as set out in *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995). . . .The court today concludes that our decision in *Ludwig* did not fairly warn defendants that their actions violated the Constitution because, unlike Ludwig, 'Kong ran toward bystanders, including a woman driving only 30 feet away.'. . But officers shot Ludwig as he ran towards a street where the officers 'could see pedestrians.'. . While Ludwig might not have been running directly towards the pedestrians when he was shot, the officers feared he would 'attempt[ ] to get across the street, which he would then be in contact with other citizens,' who were between 50 and 150 feet away. . . Although 'clearly established law should not be defined at a high level of generality[,] it is not necessary ... that the very action in question has previously been held unlawful,' so long as precedent evinces 'a fair and clear warning of what the Constitution requires.'. . In my view, *Ludwig* clearly established that it is objectively unreasonable to use deadly force against a fleeing person who is likely experiencing a mental-health crisis and holding a knife if that person has not committed a violent felony, is moving away from officers, and does not pose a significant and immediate risk of serious harm. Because a reasonable jury could decide the officers violated this clearly established right when they shot Kong, I would affirm the district court's denial of qualified immunity.")

See also ***Kong v. City of Burnsville***, 966 F.3d 889, 890-91 (8th Cir. 2020), (Grasz, J., with whom Erickson, J., joins, dissenting from the denial of rehearing en banc) ("I respectfully dissent from the court's refusal to rehear this case en banc. In my view, this case deserves reconsideration for three reasons. First and foremost, we must ensure the consistent application of settled precedent, particularly with respect to how we review denials of qualified immunity at the summary judgment stage. In such circumstances, we must accept the ' "district court's findings of fact to the extent

they are not blatantly contradicted by the record," and if the district court fails to make a finding necessary for our legal review, "we determine what facts the district court, in nonmoving party, *likely* assumed."'. . I do not believe this standard was properly applied here. The panel distinguished this case from *Ludwig v. Anderson* . . . by claiming Mr. Kong 'posed a threat to citizens.'. . From where was this fact derived? Not from the district court, which found 'a genuine dispute of material fact ... as to whether Mr. Kong posed a significant and immediate threat of serious injury or death to the surrounding public.'. . Did the record blatantly contradict the district court's finding? The opinion does not say, though the evidence of Mr. Kong's frightened flight '*away* from pedestrians and the officers' cuts against such a conclusion. . . And as Judge Kelly pointed out in her dissent, a jury could presumably reject as unreasonable the officers' belief that Mr. Kong posed such a threat. . . The court should reexamine this case to prevent the steady erosion of our summary judgment standard. Second, we ought to rehear this case to further consider what constitutes an 'immediate threat.' Has the panel opinion broadened 'immediate threat' to include all situations in which someone flees with a knife when occupied vehicles are in the general vicinity? Answering this question seems important, given the similar facts in *Ludwig*, in which we denied qualified immunity to officers who shot a man as he fled with a knife. . . It is hard to justify expanding our definition of 'immediate threat' in a situation where our analysis directly turns on how we have resolved prior, similar cases (e.g., when determining whether a right has been 'clearly established'). . . Finally, the en banc court should address the first prong of the qualified immunity analysis. That is, we should determine whether the officers violated the Fourth Amendment when they shot the fleeing Mr. Kong fifteen times in the back and side when no pedestrians were nearby. The panel did not address the constitutional issue, stating only that, '[e]ven if the facts showed that the officers had violated Kong's Fourth Amendment right, the law ... did not clearly establish the right.'. . I do not question the panel's authority to skip this analytical step. . But I worry about the impact bypassing this inquiry has on the public's perception of the justice system's efficacy and law enforcement's accountability, both of which are critical for a society governed by the rule of law. In my view, we should do what we permissibly can to strengthen confidence in the rule of law and the judicial system.")

Cole Estate of Richards v. Hutchins, 959 F.3d 1127, 1133-34, 1136 (8th Cir. 2020) ("[W]e conclude Officer Hutchins's use of deadly force was not objectively reasonable. The 'facts known' to Officer Hutchins 'at the precise moment [he] effectuate[d] the seizure,'. . . were that Richards, with his gun pointed either toward the ground or the sky, retreated down Underwood's front steps and had turned away from his front door. . . In that moment, Officer Hutchins did not have probable cause to believe Richards posed an immediate threat of serious physical harm to Underwood as Richards was not pointing the weapon at Underwood or wielding it in an otherwise menacing fashion. In fact, Richards was visibly retreating from Underwood's home. . . . Officer Hutchins chose to shoot him, as upwards of five seconds elapsed between when Richards retreated from Underwood's door and turned toward his vehicle and when Officer Hutchins opened fire. Furthermore, Officer Hutchins chose to 'stand silent before shooting,'. . . despite having five to ten seconds from when he saw Richards emerge from behind his vehicle with a gun to when he shot Richards, which was enough time to provide a warning[.] . . His failure to warn 'exacerbate[s]

the circumstances,'. . . further confirming that use of deadly force was objectively unreasonable here. . . . We conclude the law was clearly established on October 25, 2016 that Officer Hutchins's use of deadly force against Richards was objectively unreasonable in the circumstances of this case. The law was clearly established in two respects relevant here. First, it was clearly established that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion. Second, it was clearly established that a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force. . . . We emphasize the limited nature of today's holding. We do not decide that Officer Hutchins in fact violated Richards's rights. If the factfinder later determines that key facts are not as we must assume them to be—for instance, how Richards held the gun when he was shot, how much time elapsed between when he began to retreat toward his vehicle and when he was shot, whether Richards retreated at all, whether Richards turned away from Underwood's door at all—the legal conclusions that may be drawn at that time may be different than the ones we draw here. But, based on the facts we are bound to assume, we conclude Officer Hutchins violated Richards's clearly established Fourth Amendment right to be free from use of deadly force when he did not pose an immediate threat of serious physical harm to others and any such immediate threat he may have posed previously was no longer present when he was shot. Therefore, we affirm.")

Franklin v. Franklin County, Arkansas, 956 F.3d 1060, 1062-63 (8th Cir. 2020) ("After evaluating the undisputed material facts in the record, which we rehearsed above, we hold that the Griffiths acted reasonably under the circumstances and so did not violate Franklin's right to be free from excessive force, even if they tased him up to eight times. Because the Griffiths did not violate the constitution, they are entitled to qualified immunity. . . We have numerous cases permitting officers to use tasers on noncompliant, violent suspects. . . . These decisions are consistent with the Supreme Court's holding, in the context of a police chase in which officers fired fifteen gunshots, that 'if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.'. . Here, the threat of Franklin's violent aggression did not subside until after the final shot of the taser. We have held it reasonable, moreover, for officers to use tasers and their own body weight to subdue combative jail detainees, apparently under the influence of drugs, who resist officer efforts to move them. . . In short, the scene here 'was a tumultuous one involving seemingly aggressive and noncompliant behavior, circumstances which we have previously held rendered officers' uses of tasers reasonable.'. .The fact that Franklin was tased three times in drive-stun mode while in handcuffs does not affect the result. Franklin continued to resist the officers while he was in handcuffs. We have allowed the use of tasers on detainees in handcuffs in appropriate circumstances. . . A person in handcuffs can still present a danger to officers. . . We have also observed that a tasing in drive-stun mode 'only causes discomfort and does not incapacitate the subject,' suggesting that effects of such force are de minimis. . . We therefore cannot say that Joseph acted unreasonably when he used a taser as he did in this circumstance. It could be argued that the use of force on Franklin while he was in the isolation cell was unreasonable and thus

excessive because the officers did not have a sound reason for wanting to remove Franklin's handcuffs. Perhaps they could have simply closed and locked the door and left Franklin to his own devices. But the Griffiths offered objectively good reasons for removing the handcuffs. As Joseph testified during his deposition and as both Griffiths explained in their incident reports, they wanted Franklin to be able to move about the cell freely, and if he remained handcuffed in the drug-influenced state he was in, he might well have fallen while cuffed and broken his arms or wrists or hit his head. It was also objectively reasonable for them to be concerned that Franklin might be able to maneuver his hands and body in such a way as to use the cuffs as a weapon when someone entered the cell. We therefore hold that the Griffiths are entitled to qualified immunity on the § 1983 excessive-force claims because their actions did not violate the constitution.")

Jackson v. Stair, 953 F.3d 1052, 1052-54 (8th Cir. 2020) (Colloton, J., with whom Loken, J., joins, dissenting from denial of rehearing *en banc*) ("[T]he panel decision necessarily determined that a police action deemed constitutionally reasonable by the district judge and the dissenting panel judge would have been undertaken by only 'the plainly incompetent or those who knowingly violate the law.'. . I would rehear the case 'to secure and maintain uniformity of the court's decisions.'. .Qualified immunity has been a point of emphasis for the Supreme Court over the last decade, particularly in cases involving alleged use of excessive force by police officers. In 2017, the Court explained that, in the preceding five years, it had issued a number of opinions reversing federal courts in qualified immunity cases. *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *see City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases). This was 'necessary 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.'. . The Court's attention to this topic, and the string of reversals, continued in the last two years. . . The Eighth Circuit thus far has avoided reversal in a qualified immunity case, although it may be noteworthy that no petition for writ of certiorari was filed from several divided panel decisions. . . . Officer Stair deployed a taser device three times to subdue Jackson after he refused to comply with commands and raised his fist toward another police officer's head. The panel majority ruled that the first and third deployments were reasonable, but that the second deployment was unreasonable *and* violated a clearly established right of Jackson. The panel opinion cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer, and no decision holding that a subject's 'momentary post-tasered position on the ground' requires an officer to consider it 'a clearly punctuated interim of compliance' that makes another use of the taser unreasonable under the Fourth Amendment. . . Instead, to justify reversing the district court's grant of qualified immunity, the panel majority reasoned that ' "general constitutional principles against excessive force" are enough to create a clearly established right and to put a reasonable officer on notice that a particular tasing was excessive.'. . The opinion does not attempt to reconcile its reliance on 'general constitutional principles' with the rule that clearly established law should not be defined at 'a high level of generality.' The panel opinion also relied on decisions involving different legal inquiries or materially different circumstances that do not squarely govern the specific facts of this case. . . . Whether the panel's reasoning is consistent with the Supreme Court's

admonitions—including that clearly established law should not be defined 'at a high level of generality,' and that 'police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue,'. . . is a matter that warrants further review.")

Jackson v. Stair, 944 F.3d 704, 712-14 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 1263 (2021) ("The district court ruled that Officer Stair's conduct *as a whole* was reasonable without considering whether the second tasing could be a constitutional violation on its own. . . . In light of the video footage depicting the quick succession of the tasings and dispute as to whether Jackson was resisting the officers or posing a threat at the time of the second tasing, we find that there is a genuine issue of material fact as to whether the second tasing amounted to excessive force. . . . In 2013, when the tasings of Jackson occurred, there was sufficient case law to establish that a misdemeanor suspect in Jackson's position at the time of the second tasing – non-threatening, non-fleeing, non-resisting – had a clearly established right to be free from excessive force. . . . The third tasing occurred after Officer Stair gave several clear orders for Jackson to stop moving and lay down on his stomach, or he would be tased. Afterward, Jackson moved in the direction of Officer Stair and rose to his knee in an apparent attempt to get off the ground. Officer Stair then deployed his Taser for the third and final time before Jackson complied with his demands and was arrested. A reasonable officer in Officer Stair's position could have perceived Jackson to be resisting arrest and could have feared for his safety. Based on our review of the record, we conclude the third tasing was objectively reasonable. . . . In the instant case, Officer Stair tased Jackson three times. The district court ruled that Officer Stair used a reasonable amount of force to subdue Jackson, considering the officer's conduct as a whole. The court erred by not considering and analyzing each tasing individually. We find the first and third tasings were objectively reasonable, and no Fourth Amendment violation occurred. As to the second tasing, we find there are genuine issues of material fact regarding whether Officer's Stairs use of force was excessive. If the second tasing amounted to excessive force, then Officer Stair is not entitled to qualified immunity.")

Jackson v. Stair, 944 F.3d 704, 714 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 1263 (2021) (Wollman, J., concurring and dissenting) ("I agree with the court that Officer Stair's first and third tasings were objectively reasonable and that Jackson's First and Fourth Amendment and municipal liability claims are without merit. When viewed in light of his earlier manifestation of unceasing, rage-filled verbal and physical conduct, Jackson's momentary post-tasered position on the ground does not justify considering it as a clearly punctuated interim of compliance with Officer Stair's earlier commands, and thus the second tasing was not objectively unreasonable. Granted that Jackson had not at that point attempted to rise from the ground, his earlier-expressed threatened use of force against Officer Harness, when coupled with the nearly hysterical tone of his voice throughout his interaction with Stair and others nearby, justified the continued application of the taser. It may appear from our chambers-viewed observation of the entire encounter to have been a too-hasty application, but given Jackson's earlier pretasing arm-waving, rant-filled anger and his reluctance to comply with Stair's several earlier-expressed commands and warnings, his momentarily supine position on the ground was hardly a guarantee of a no-longer aggressive subject, as was the case of the medical assistance-seeking detainee in *Smith v. Conway*. In a word,

then, although Officer Stair's quickly applied application following Jackson's initial fall to the ground may have been ill-advised, I do not believe that it was objectively unreasonable in the circumstances, and so I respectfully dissent from the court's decision to remand the case for a further review of that issue.")

NINTH CIRCUIT

Tabares v. City of Huntington Beach, 988 F.3d 1119, 1125-26, 1130-31 (9th Cir. 2021) [Note that appeal here involved only the state law negligence claim; Plaintiff did not appeal order granting summary judgment to defendants on federal claim] ("Under California law, the officer's pre-shooting decisions can render his behavior unreasonable under the totality of the circumstances, even if his use of deadly force at the moment of shooting might be reasonable in isolation. *See, e.g.*, *Mendez v. Cnty. of Los Angeles*, 897 F.3d 1067, 1082–83 (9th Cir. 2018); *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 86 Cal.Rptr. 465, 468 P.2d 825, 831 (1970). Federal law, however, generally focuses on the tactical conduct at the time of shooting, *see Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), though a prior constitutional violation may proximately cause a later excessive use of force, *Mendez*, 897 F.3d at 1076–82. Thus, California negligence law regarding the use of deadly force overall is '"broader than federal Fourth Amendment law."'. . California courts do generally use '[t]he same consideration' as federal law in assessing an officer's *tactical conduct at the time of shooting* as part of the totality of the circumstances. . . California courts consider 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.'. . Under federal law, deadly force can be 'reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."'. . 'Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed.'. . 'Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted ... with a mentally ill individual.'. . .We appreciate and respect the great challenges that law enforcement and first responders face daily in selflessly carrying out their duties. We do not judge Officer Esparza's behavior 'with the 20/20 vision of hindsight.'. . Indeed, we acknowledge the severe stress that can result from situations where an officer may feel his safety is at risk. Ultimately, we do not 'hold that a reasonable jury *must* find in favor of the plaintiff[ ] on this record, only that it *could*.'. . We merely reiterate that under California's broad formulation of negligence, Ms. Tabares's negligence claim survives summary judgment.")

Villanueva v. California, 986 F.3d 1158, 1170-72 (9th Cir. 2021) ("Use of deadly force to stop a recklessly speeding vehicle during a car chase is . . . ordinarily reasonable under the Fourth Amendment. . . But this case does not involve a shooting during a high-speed chase. It is undisputed that Villanueva slowed to below the speed limit on Pritchard and came to a stop on MacArthur before performing the three-point turn. Even under the Officers' view of the facts, 'the

truck was moving forward at a speed of up to five miles an hour' when they shot at it. We have consistently found use of deadly force to stop a slow-moving vehicle unreasonable when the officers could have easily stepped out of the vehicle's path to avoid danger. . . In contrast, we have found use of deadly force against a stopped or slow-moving vehicle reasonable only when the driver was trying to evade arrest in an aggressive manner involving attempted or actual acceleration of the vehicle. . . The key question, then, is whether Villanueva accelerated or attempted to accelerate toward the Officers before the Officers shot at the Silverado and its occupants. . . The Officers claim Villanueva was driving 'recklessly' during the three-point turn, to the point that he hit a car behind him, and that he faced their direction and hit the gas before shots were fired. But witness testimony suggests that Villanueva's three-point turn was controlled, that he did not crash into another car, and that he never accelerated toward the police vehicle or the Officers. Orozco attested that Villanueva was driving below the speed limit while making the turn, and that Orozco did not feel the Silverado collide with another vehicle behind it. He also attested that the Silverado was not moving directly toward the police vehicle at the time of the shooting, and that he did not see either officer 'in the path of the truck' at any point before or during the shooting. Witness Lino Mendez testified that he did not hear the Silverado collide with another vehicle, the engine rev, or the tires screech, and that he was very confident that the Silverado did not accelerate toward the police vehicle. Witness Abel Orozco (no relation) testified that the turn 'wasn't fast' and that he 'didn't hear no revving or no burning tires or anything like that.' Witness Thomas Hinkle, Jr., testified that the Silverado tried to make a U-turn at a very slow" speed' and was not rushing. He never heard the engine rev and did not see the Silverado accelerate forward toward the police sedan. Taking the facts in the light most favorable to the plaintiffs, then, the three-point-turn was performed cautiously, the truck—which was 15 to 20 feet away from the Officers—was not aimed directly at Sergeant Cleveland and was moving very slowly and not accelerating when the Officers began shooting. In these circumstances, a reasonable jury could conclude that the Officers used excessive force, because they 'lacked an objectively reasonable basis to fear for [their] own safety, as [they] could simply have stepped back [or to the side] to avoid being injured.'. .Because excessive use of force is a highly fact-specific inquiry, even when we determine excessive force was used, 'police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue.'. . Leading cases, such as *Graham* and *Garner*, 'are cast at a high level of generality' and provide clearly established law only for the most 'obvious' cases. . . However, '[p]recedent 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.'. . Because at the summary judgment stage we find that the car was slow-moving and the Officers could have simply moved away to avoid injury, their use of deadly force was clearly established as unreasonable as of 1996 by *Acosta*[.] . . . The facts here, when taken in the light most favorable to the plaintiffs, are similarly 'not fairly distinguishable from those in *Acosta*.'. . As in *Acosta*, Villanueva's vehicle was at a stop shortly before the shooting. In both cases, no officer was standing directly in front of the vehicle. Villanueva, like the driver in *Acosta*, did not accelerate toward the police car or the Officers before the Officers opened fire. . . In light of *Acosta*, all

reasonable officers would know it is impermissible to shoot at a slow-moving car when he could 'simply step[ ] to the side' to avoid danger.")

Phelps for the Estate of Phelps v. Carlson, No. 20-35179, 2020 WL 6375414 (9th Cir. Oct. 30, 2020) (not reported) ("Even if a reasonable jury could conclude that Defendants fired too quickly and, thereby, used lethal force unjustifiably, no clearly established law gave Defendants notice that what they did violated Phelps's Fourth Amendment right against excessive force. On May 24, 2016, the date of the shooting, clearly established law did not put every reasonable officer on notice that it was unreasonable to shoot a suspect fleeing from a violent crime after that suspect stopped at a dark dead end and then displayed a 'shiny object' in his hand, even if that object turned out to be a cell phone.")

Monzon v. City of Murrieta, 978 F.3d 1150, 1156-62 (9th Cir. 2020) ("[B]efore considering whether the constitutional violation alleged by plaintiffs is 'clearly established,' we begin by determining whether the officers actually violated a constitutional right based on the record and plaintiffs' alleged facts. . . If we conclude that no constitutional right was violated, then no further analysis is required. Only if we conclude that the officers *did* violate a constitutional right would we then need to proceed to the second step of the inquiry to decide if the constitutional right 'was clearly established at the time of [the officers'] alleged misconduct.'. .We are mindful that we must view the disputed evidence in favor of plaintiffs, and we do so. We accept that Monzon raised his hands in the air when ordered to do so by Zeltner (even though the van was indisputably moving and turning at that time). Likewise, we assume that Zeltner was up to 15 feet away from the van and was not in its direct path at the time he opened fire. And we accept that none of the officers gave a deadly force warning. On the other hand, we are also required to view the facts as an officer would have encountered them on the night in question, not as an ex post facto critic dissecting every potential variance under a magnifying glass. . . We thus cannot ignore that Monzon rebuffed Zeltner's initial attempt to perform a traffic stop and drove away at speeds of up to 100 mph, endangering the pursuing officers and the general public. We must also consider how Monzon recklessly exited and reentered the freeway, drove through stop signs and red lights, and steered the van near and toward officers (who were on foot) on the dark, dead-end street. Monzon drove near Zeltner, headed toward Mikowski and Williams, and then turned to where the van struck Mikowski's cruiser, pushing the cruiser into Williams. The officers fired at various times between when the van neared Zeltner up until and shortly after the van struck Mikowski's car. We conclude that the officers' use of deadly force was reasonable under *Garner* and *Graham*. First, the severity of the crime weighs in favor of the use of force. Monzon led officers on a dangerous high-speed chase at night, and he refused to stop the van at the behest of officers even after coming to the end of a street. Second, Monzon posed an immediate threat to the safety of the officers when he ignored commands to stop the van and drove near, toward, and amongst the officers on foot. These actions also demonstrate that Monzon was actively resisting arrest and attempting to evade arrest by flight. Third, Monzon's driving endangered the officers and left them with only seconds to consider less severe alternatives. Judges and lawyers viewing an event like this in hindsight from the comfort of their armchairs are often tempted to dissect, evaluate, and second-guess the officers' actions

piecemeal. That would be a serious mistake. . . Cherry-picking specific facts in hindsight is not at all reflective of how this event transpired in real life. It all happened in less time than it took to type this sentence, before daylight, in a very dynamic and chaotic environment, where officers were forced to make split-second decisions about a driver who deliberately turned his car around and drove it toward and between them. The officers were faced with a reckless driver who had already endangered their lives and the lives of the public with a high-speed chase, had broken traffic laws, ignored commands to stop his vehicle, and steered and accelerated his van toward them in close quarters on an unlit street. Although we must read the record in the light most favorable to the plaintiffs, we do not—indeed, we cannot—dissect the record in a way that ignores the totality of the dynamic and quickly changing circumstances Monzon created by deliberately turning his car around and driving it toward and between five officers. Finally, we take note that the officers did not provide a deadly force warning. But this fact is not determinative. The urgency of this chaotic situation made a deadly force warning impractical because the van went from a standstill to crashing into a cruiser at over 17 mph in 4.5 seconds. And assuming that Monzon put his hands up in the air, we cannot look at that fact in isolation and ignore the quickly changing situation. The uncontested fact that Monzon was still driving and turning his car toward the officers while allegedly raising his hands in surrender (after having just hit a fence post and finishing a high-speed chase) must also be taken into account. In that circumstance, it was objectively reasonable for the officers to believe that whatever else Monzon was doing, he was not surrendering. A reasonable officer in the position of Zeltner, Mikowski, Williams, Montez, or Bradley would have probable cause to believe that Monzon posed an immediate threat to the safety of one or more of the other officers or himself as Monzon drove his car toward and among the five officers. . . .The use of deadly force here, although tragic, was not unreasonable. . . Monzon endangered the general public by fleeing from officers at speeds up to 100 mph and breaking several traffic laws along the way. Then he drove to the end of a road and threatened the lives of officers on foot by accelerating the van among them, like in *Wilkinson*. The officers acted reasonably in using deadly force to end the grave risk that Monzon posed to the officers near the van. While *Plumhoff* instructs us that Monzon's reckless, high-speed driving posed a severe threat to public safety that may itself have justified the use of deadly force, we need not reach that issue because here the use of deadly force was reasonable to protect the officers whose lives were threatened by the accelerating van. . . .Because none of the officers violated a constitutional right, 'we need not reach the question of whether that right was clearly established.'. . But even if the officers' use of deadly force was not reasonable on the uncontested facts of this case (it is), the second prong of the qualified immunity analysis would still compel affirmance because the officers did not violate a clearly established right.")

Cortesluna v. Leon, 979 F.3d 645, 655-56 (9th Cir. 2020) ("In *LaLonde*, an officer 'forcefully put his knee into [the plaintiff's] back' after the plaintiff had been sprayed with pepper spray and had stopped resisting arrest. . . Here, at the time in question, Plaintiff was prone, similarly was not resisting arrest, and similarly was visibly injured by a prior use of force. If anything, Plaintiff was more subdued—and thus less of a threat—after having been shot twice by a beanbag shotgun rather than having been pepper-sprayed. As in *LaLonde*, Rivas-Villegas 'deliberately dug his knee into

[Plaintiff's] back' with enough force to cause injury. . . The court concluded in *LaLonde* that the officers were not entitled to qualified immunity. . . Officers in Rivas-Villegas' position were thus on notice that their substantially similar conduct is unconstitutional. Judge Collins' dissent seems to argue that, because Plaintiff was accused of a serious crime and initially appeared noncompliant, police could use force throughout the encounter without violating the Fourth Amendment. . . But just as circumstances can escalate rapidly, justifying 'split-second judgments' to use force that might have been excessive a moment earlier, . . . circumstances can de-escalate rapidly. Logic thus dictates that the reverse is true, too: a use of force that may have been reasonable moments earlier can become excessive moments later.Defendants also argue that the method they used to handcuff Plaintiff is a standard procedure, designed to minimize injuries and confrontations. But the fact that a particular practice is standard, or that it usually results in no harm, does not insulate its use in every case. For example, we have repeatedly held that 'tight handcuffing can constitute excessive force,' even though handcuffing is a generally standard and appropriate practice. . . And the amount of force that may be reasonable when applied to the back of a large, fit individual to effect an arrest may be excessive as applied to a small, frail individual. The facts of each case matter. For similar reasons, the dissent's fear that our holding likely will 'eliminate the use of a knee to protectively hold down a non-resisting suspect while handcuffing him,'. . .is unwarranted. We hold only, as we have before, that police may not kneel on a prone and non-resisting person's back so hard as to cause injury. . . Just as our tight-handcuff cases have not eliminated handcuffs, our holding today should not infringe on an officer's ability to secure a compliant and prone suspect without injury. We conclude that there is a genuine issue of fact as to whether the force that Rivas-Villegas used was excessive and that, if Plaintiff's allegations are true, precedent informed Rivas-Villegas that the force was excessive. We therefore reverse the judgment in favor of Rivas-Villegas and remand for further proceedings.")

Cortesluna v. Leon, 979 F.3d 645, 656-59 (9th Cir. 2020) (Gilman, J., concurring in part and dissenting in part) ("I fully concur in the portions of the majority opinion regarding the disposition as to Sergeant Robert Kensic and Officer Daniel Rivas-Villegas. On the other hand, I respectfully dissent from the portion affirming the grant of summary judgment in favor of Officer Manuel Leon. We are not being asked to decide whether Cortesluna will prevail at trial on his excessive-force claim against this officer. The question before us is simply whether a jury could reasonably find in Cortesluna's favor based on the facts that he has presented. I have no doubt that it could. . . .The key question for a jury to decide is whether a reasonable officer would have felt immediately threatened by Cortesluna at the time that Officer Leon shot Cortesluna with two rounds from the officer's beanbag shotgun. . . The two photos attached to this dissent clearly support the proposition that Cortesluna posed no immediate threat to any of the officers present. In both photos, which are exhibits from Cortesluna's home-security camera, Cortesluna is shown standing still with his head and hands down. Photo 1 shows Officer Leon firing the first beanbag round at Cortesluna from a distance of approximately 10 feet. Roughly a second later, Photo 2 shows the second beanbag round being fired. Even with a knife shown protruding blade up in Cortesluna's left front pocket, there is no indication that he was in the act of reaching for it when the rounds were fired. And with the knife blade up rather than down, there was no way that he could have quickly taken it from his

pocket to threaten the officers. This is especially so when one takes into account that *five* police officers were present, *all with their guns trained on Cortesluna*. I frankly fail to see how anyone looking at these photos would deduce that Cortesluna was an immediate threat to any of the officers under the circumstances. A jury could instead easily find that Officer Leon was a trigger-happy member of the police force who literally 'jumped the gun' in a display of excessive force. This is amply shown by Officer Leon saying 'I'm going to hit him with less lethal' (the beanbag shotgun) even before Cortesluna had emerged from the house. . .The majority, moreover, appears to acknowledge the strength of Cortesluna's claim against Officer Leon despite their unwillingness to let a jury decide the issue. In denying qualified immunity to Officer Rivas-Villegas, for example, the majority acknowledges that 'the knife was protruding blade-up such that it would not have been possible for Plaintiff to grab it and attack anyone.'. . Yet Officer Leon proceeded to shoot Cortesluna twice with the beanbag rounds without making any effort whatsoever to ascertain that Cortesluna's possession of the knife posed no immediate threat. The majority also recognizes the teaching of *Graham v. Connor* . . . that the most critical moment is 'when excessive force was employed.'. . . Yet Cortesluna was totally passive at the time he was shot, despite his earlier aggressive actions as reported to the police dispatcher. And even well before the shooting, when the officers first saw Cortesluna, he was observed doing nothing more that standing in the house 'drinking a beer.'. .Finally, the majority acknowledges the need to consider the various factors set forth in *Kingsley v. Hendrickson*. . . when analyzing an excessive-force claim, . . . but fails to give them appropriate weight. The application of these factors—including the serious harm that can be caused by a beanbag shotgun, the lack of any effort by Officer Leon to warn Cortesluna, and the absence of any resistance or attempt to flee by Cortesluna—all tilt in his favor. In sum, I believe that there is more than sufficient evidence to raise a genuine dispute of material fact regarding the excessive-force claim against Officer Leon. . . The use of excessive force by a police officer, of course, is in violation of the victim's constitutional rights. . . And whether the force used was excessive is generally a question for the jury. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc). This brings us to the second issue of whether Cortesluna's right not to be shot was 'clearly established at the time of [Officer Leon's] actions, such that any reasonably well-trained officer would have known that his conduct was unlawful.'. .Existing precedent does not require a prior case with the exact same facts. . . The law instead requires '[p]recedent involving *similar* facts.'. . And here the existing precedent is close enough to have put Officer Leon on notice that his actions constituted excessive force. [discussing cases] . . . .For all of the above reasons, I would reverse the grant of summary judgment in favor of Officer Leon and remand the case for further proceedings as to all of the defendants other than Sergeant Kensic.")

Cortesluna v. Leon, 979 F.3d 645, 659-65 (9th Cir. 2020) (Collins, J., concurring in part and dissenting in part) ("I concur in the majority opinion insofar as it partially affirms the district court's judgment dismissing Ramon Cortesluna's claims of excessive force in connection with his arrest. However, I disagree with the majority's reversal of the judgment in favor of Officer Daniel Rivas-Villegas and its partial reversal of the judgment dismissing Cortesluna's claims against the City of Union City. I would affirm the judgment in its entirety, and I therefore respectfully dissent from sections III(C) and III(E) of the majority's opinion. . . . The suggestion that Cortesluna

suddenly 'no longer posed a risk' at the moment the beanbag shots were fired. . . is factually unreasonable. Cortesluna was carrying a pick tool when he first approached the officers and, after putting that down, he disobeyed the officers' instructions to keep his hands up and instead lowered his hands to where a long knife was protruding from his pocket. . . After being shot with the beanbag rounds and starting to get on the ground, Cortesluna still had the knife in his *left* pocket—*i.e.*, on the side where Rivas-Villegas placed his knee. Using a knee on that side to ensure that Cortesluna stayed down and did not make a motion toward the knife was eminently reasonable in light of what the officers knew about the situation. . . The majority erroneously discounts the threat presented by the knife, asserting that, because it was 'protruding blade-up' in Cortesluna's pocket, 'it would not have been possible for Plaintiff to grab it and attack anyone.'. . The majority overlooks the fact that, as the videotape makes clear, the knife was loosely sitting in the large pocket of Cortesluna's baggy pajama bottoms—meaning that Cortesluna could have fit his hand into the pocket to reach the handle. The majority's reasoning is also legally flawed, because it ignores the Supreme Court's pointed admonition to this court not to confidently downplay, from the comfort of our chambers, the dangers that officers face in making arrests. . . . [U]nder the majority's opinion, it is now apparently the law in the Ninth Circuit that all an arrestee has to do to get a jury trial on an excessive force claim—including defeating qualified immunity—is to assert that the arrest resulted in ongoing subjective pain. For the reasons I have explained, that is not correct. I would hold that, even construing the record evidence in the light most favorable to Cortesluna, no reasonable jury could find that Rivas-Villegas used excessive force. . . Alternatively, I conclude that, at a minimum, Rivas-Villegas's actions did not violate clearly established law and that he therefore is entitled to qualified immunity. . . The majority errs in holding otherwise. . . . [I]n explaining how to determine whether the law was sufficiently clear for purposes of qualified immunity, the Supreme Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . This obligation to define clearly established law with specificity 'is particularly important in excessive force cases.'. . .In concluding that 'existing precedent squarely governs the specific facts' of this case, . . . the majority relies solely on our decision in *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000). . . In my view, 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. . . .The only material similarities between *LaLonde* and this case are that Rivas-Villegas briefly pressed his knee into Cortesluna's back while securing his arms for handcuffing; Cortesluna was not then actively resisting; and Cortesluna claims that the press of Rivas-Villegas's knee has caused him continuing pain. The majority finds those commonalities to be dispositive, . . . but in doing so, it ignores several critical differences between *LaLonde* and this case. . . . There is a very significant difference between using a knee to hold down a person who is suspected of a serious violent crime who is armed with a knife (as in this case) and using a knee to hold down a noisy neighbor armed with nothing more than a sandwich (as in *LaLonde*). . . By ignoring the multiple critical differences between this case and *LaLonde*, the majority thereby improperly defines the legal rule established in *LaLonde* at too high a level of generality. . . Indeed, the practical effect of the majority's ruling today will likely be to eliminate the use of a knee to protectively hold down a non-resisting suspect while

handcuffing him. The majority discounts that possibility, claiming that it has merely reaffirmed that 'police may not kneel on a prone and non-resisting person's back *so hard as to cause injury*.'. . But this disregards the fact that an officer on the scene *cannot know whether the arrestee will later claim ongoing subjective pain*; the officer can only know what his or her objective actions are and what the arrestee's contemporaneous response is. Here, the officers' body-cameras' audiotapes confirm that, from the moment he was shot with the beanbags, Cortesluna moaned in pain during his arrest and that Cortesluna did not say at the time that the *knee* was hurting him. On this record, there was nothing about the then-knowable circumstances that would suggest to the officer that the force here was excessive. Under the majority's opinion—in which a later claim of ongoing subjective pain from the use of a knee is all you need to get to a jury—an officer would be taking a significant risk by using a knee to secure an arrestee during handcuffing. The majority discounts this concern, noting that our 'tight-handcuff cases' have not 'eliminated handcuffs.'. . But our tight-handcuff cases have not done so presumably because (unlike today's flawed ruling) those cases have not allowed arrestees to defeat summary judgment on an excessive force claim merely by claiming ongoing subjective pain. . .Once again, a panel of this court disregards the Supreme Court's repeated admonition that, in the excessive force context, 'police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue.'. . Because neither *LaLonde* nor any other existing precedent governs the specific facts presented here, Rivas-Villegas is entitled to qualified immunity.")

Adame v. Gruver, 819 F. App'x 526, ___ (9th Cir. 2020) ("Unlike the officer in *Gonzalez*, Officer Gruver faced an immediate threat of serious bodily injury or worse based on his compromised position at the moment Adame pulled away. . . . Because the officer in *Gonzalez* was securely in the vehicle when it began to pull away, the only danger to him came from the speed of the vehicle, which our court regarded as a disputed fact. . . Here, in sharp contrast, Officer Gruver was partially inside and partially outside the vehicle when Adame pulled away. Regardless of the speed of the vehicle (the issue in *Gonzalez*), Officer Gruver thus faced a serious risk of bodily injury based on the possibility that he would fall out of the moving car and be run over by Adame's car. . . In addition, unlike the officer in *Gonzalez*, Officer Gruver did not have 10 seconds to ponder his course of action while sitting securely, albeit unwillingly, inside a slow-moving vehicle. Instead, immediately after Officer Gruver leaned into the vehicle, Adame began to drive away, with both officers yelling at him to stop and Officer Gruver hanging partially outside the vehicle with his right foot bouncing awkwardly along the street. It was in this dangerous and rapidly evolving situation that Officer Gruver fatally shot Adame. Officer Gruver was thus faced with a 'tense, uncertain, and rapidly evolving' situation where he had a 'split-second' to decide upon an appropriate course of action. . . . Although the district court here correctly concluded that *Gonzalez* depended almost entirely on whether the vehicle there was rapidly accelerating, it erred in not heeding the explicit reminder in *Gonzalez* that courts must recognize 'the importance of considering all the facts in excessive force cases.'. . The *Gonzalez* court distinguished *Wilkinson* because in *Gonzalez*, the officer 'was not on foot next to a vehicle that might run him over at any moment should it have accelerated,' and the defendants in *Gonzalez* 'presented no evidence of anyone else in danger.'. . The fact that Officer Gruver faced

harm because he was partially outside an accelerating vehicle is a crucial fact that distinguishes this case from *Gonzalez*. . . . Neither *Gonzalez* nor *Wilkinson* 'squarely governs' the unusual predicament faced by Officer Gruver. . . Given the unusual circumstances Officer Gruver faced, his split-second decision to shoot Adame, even if it violated Adame's constitutional rights, still entitles him to qualified immunity. . . . As Officer Gruver's decision to use lethal force was, at most, a reasonable misapprehension of *Gonzalez*, he is entitled to qualified immunity.")

Adame v. Gruver, 819 F. App'x 526, ___ (9th Cir. 2020) (Schroeder, J., dissenting) ("The district court got this right. There was no danger. Decedent Derek Adame had been asleep in a parked compact Nissan Sentra when Officer Gruver approached, gun drawn, telling Adame to keep his hands up. Adame, who was unarmed, initially complied, but then reached with one hand towards the starter and started the car. Gruver then put one leg inside the small car, and at the moment the car began to move, Gruver shot Adame in the head without warning, killing him instantly. The weight of Adame's falling body caused the car to accelerate and run into a truck parked on the street. The district court followed our decision with facts closest to this one. *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc). There, the officer was in the car when the suspect started the engine and began to drive. . . There was a material conflict in the evidence as to whether the car began to move fast. . . We held that if the car had gained speed quickly, the officer was in danger and the shooting justified. If the car was moving slowly, the killing was not justified. . . In this case the car was barely moving, if at all. Officer Gruver was not yet in the car. If there is one principle that is clearly established in this circuit it is that deadly force is justified only by an imminent threat of serious harm. . . Here, when the officer shot, there was none. The car had just started to slowly move, and the door was open for Officer Gruver to step out. Officer Gruver had witnessed no dangerous conduct on the part of Adame, which distinguishes this case from *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010). In *Wilkinson*, we held that use of lethal force was reasonable. There, following a high speed chase, the decedent attempted to accelerate towards an officer, and the only reason he was unable to do so was because his wheels were stuck in mud. . . At the time the officer shot the decedent, the officer believed another officer had already been run over by the decedent's vehicle. . . This case was briefed to us on the theory that Officer Gruver was in immediate danger because he had one leg in the car when the engine started and was left 'dangling' as the vehicle began to move. That might have been the case had the vehicle in question been a semi-trailer truck. But this was a Nissan Sentra. The majority seemingly ignores this fact. 'Dangling' is an impossibility when the car sits only a foot or so off the ground. The district court therefore was correct when it denied Officer Gruver qualified immunity, because the situation created no imminent danger to the officer or to anyone else. The majority seems to have a different situation in mind and I therefore must respectfully dissent.")

Smith v. City of Stockton, 818 F. App'x 697, ___ (9th Cir. 2020) ("We affirm the denial of qualified immunity to Officer Michael Perez ('Perez') for his shooting of Smith. Viewing the facts in the light most favorable to Smith, he had raised both hands in surrender and announced that he was unarmed when Perez fired. Officer Perez's initial suspicion that Smith was engaged in a carjacking does not justify his use of deadly force *after* Smith had surrendered. . . . Although

Officer Perez maintains that Smith's right hand was out of sight, such a factual dispute is for the jury to decide. Thus, the district court did not err in permitting this claim to proceed to trial. We likewise affirm the denial of qualified immunity to Detective Robin Harrison ('Harrison') for her shooting of Smith. At the time of the shooting, viewing the fact in the light most favorable to Smith, Smith had attempted to surrender to the officers and did not pose a serious threat. Detective Harrison initially recognized this and holstered her gun but joined in the shooting once Officer Perez opened fire. Taking Smith's account of the incident as true, Detective Harrison violated clearly established law in shooting Smith.")

Martinez v. City of Pittsburg, 809 F. App'x 439, ___ (9th Cir. 2020) ("[T]he integral participant rule 'extends liability to those actors who were integral participants in the constitutional violation, even if they did not directly engage in the unconstitutional conduct themselves.'. . In evaluating whether each officer violated Mr. Martinez's Fourth Amendment rights, the officer's actions should not be viewed in a vacuum. Here, viewing the evidence in the light most favorable to Appellees, the district court determined that '[a]ll the officers named in this suit were actively involved in the struggle to restrain Martinez' and that 'each of the named officers struck, tased, or otherwise attempted to restrain Martinez during the confrontation.' The facts thus support the conclusion that each officer had 'some fundamental involvement in the conduct that allegedly caused the violation.'. .Construing the facts in Appellees' favor, clearly established law put each officer on notice that his actions made him an integral participant in the use of excessive force against Mr. Martinez. *See Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) ("it was clearly established [before January 25, 2014] that the use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment's prohibition on the use of excessive force"); *Blankenhorn*, 485 F.3d at 481 n.12 (denying qualified immunity to officer helping to handcuff the plaintiff because the handcuffing, although not excessively forceful in itself, "was instrumental in the officers' gaining control of [him], which culminated in" excessive force); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) ("squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable").

Orn v. City of Tacoma, 949 F.3d 1167, 1175-81 (9th Cir. 2020) ("Clark does not dispute that an officer who fires into the side or rear of a vehicle moving away from him lacks an objectively reasonable basis for claiming that he did so out of fear for his own safety. He instead urges us to analyze the lawfulness of his actions under his version of events, in which he stood in the path of Orn's vehicle as it accelerated toward him, causing him to fear for his life. As noted at the outset, we cannot analyze the case through that lens because Clark's version of events conflicts with the facts construed in the light most favorable to Orn. Most fundamentally, Orn's testimony provides an account of the shooting in which Clark was never at risk of being struck by Orn's vehicle. . . .Clark claims that he feared for the safety of Officer Rose because Orn had just attempted to run Clark over and thus might have been inclined to assault Officer Rose as well. . . But if a jury rejects Clark's account of the shooting and concludes that Clark was never at risk of being struck by Orn's vehicle, nothing else Orn had done suggested that he posed a threat to the safety of Officer

Rose. Orn was driving at a slow speed in a non-reckless manner as he maneuvered around Clark's SUV, and although his vehicle clipped Clark's SUV and Officer Butts's patrol car as he maneuvered between them, the contact was slight and clearly accidental. . . In addition, at every juncture earlier in the evening, Orn had deliberately driven his vehicle *away* from nearby officers. Taking this view of the facts, a reasonable jury could conclude that Clark had no basis for believing that Orn's vehicle posed a threat to Officer Rose. . . . Clark has not argued that his use of deadly force was justified on the theory that permitting Orn to escape could have posed a threat to the safety of the general public. Nor is there any basis in the record for making such an argument. A fleeing suspect's escape can pose a threat to the public when police have probable cause to believe that the suspect has committed a violent crime, . . . but neither of the offenses for which Orn was wanted involved any sort of violence. Such a threat can also exist when the suspect has driven in a manner that puts the lives of pedestrians or other motorists at risk, as by leading officers on a high-speed chase. . . In such cases, officers have an interest in terminating the suspect's flight because the flight itself poses a threat of serious physical harm to others. But to warrant the use of deadly force, a motorist's prior interactions with police must have demonstrated that 'he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around.'. . A reasonable jury could conclude that Orn did not engage in any such conduct here, and that Clark therefore had no basis for believing that Orn would pose a threat of serious physical harm to the general public if permitted to escape. . . .We turn next to the second step of the qualified immunity analysis, which asks whether Orn's right to be free from the use of excessive force was clearly established at the time of the shooting. In making that determination, we are mindful of the Supreme Court's repeated admonition not to define the right at issue at a high level of generality. . . . In an 'obvious case,' the general standards established in *Garner* and *Graham* can suffice to put an officer on notice that his conduct is unlawful. . . But usually uncertainty will remain as to whether the particular set of facts confronting an officer satisfies those standards. . . When that is the case, an officer will be 'entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.'. . .By the time of the shooting in October 2011, at least seven circuits had held that an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him. [collecting cases] In the end, this is not a case in which the legality of the officer's conduct falls within the 'hazy border between excessive and acceptable force.'. . When the facts are viewed in the light most favorable to Orn, as they must be at this point in the litigation, Clark had 'fair and clear warning of what the Constitution requires.'. . What Clark most forcefully contests is whether his alternative account of the shooting should be accepted as true. Factual disputes of that order must be resolved by a jury, not by a court adjudicating a motion for summary judgment.")

TENTH CIRCUIT

Cox v. Wilson, 971 F.3d 1159, 1169-73 (10th Cir. 2020) (amended on denial of reh'g en banc) ("Cox argues that the district court erred in failing to instruct the jury that in determining the reasonableness of Wilson's use of force, it could consider whether Wilson's own reckless conduct

unreasonably created the need to use such force. . . .There is some Supreme Court authority supporting the district court's view of the law. In *City & County of San Francisco, California v. Sheehan*, the Court stated that a plaintiff could not 'establish a Fourth Amendment violation based merely on bad tactics that result[ed] in a deadly confrontation that could have been avoided.'. . Two years later, *County of Los Angeles, California v. Mendez* rejected the Ninth Circuit's 'provocation' rule, which had 'permit[ted] an excessive force claim under the Fourth Amendment where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation.'. . But *Mendez* made clear that it was not deciding the validity of the proposition of law stated in the sentence omitted from the instruction by the district court in this case. A footnote to the opinion states that the Court was declining to address the view that assessing the reasonableness of the use of force requires 'taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it.'. . And after both *Sheehan* and *Mendez* we held in *Pauly v. White* that '[t]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'. . Nevertheless, the district court did not commit any error by declining to include the sentence in the instruction. A party is not entitled to a jury instruction just because it correctly states a proposition of law. It must be supported by the evidence at trial. . . . In this case, including the sentence omitted by the court would have denied Wilson the qualified immunity to which he was entitled. . . . Here, qualified immunity did not completely protect Wilson from Cox's claim. Cox was certainly entitled to an instruction on the unreasonable use of force. The jury could have inferred from the testimony of Officer Klaus and of Ms. Kincaid that, contrary to Wilson's testimony, Cox had not made any attempt to drive his vehicle at Wilson when Wilson shot him, that Cox did not pose a threat of imminent danger to Wilson after Wilson exited his vehicle, and that therefore Wilson's use of deadly force against Cox was unreasonable. But the jury found otherwise. And, in light of the doctrine of qualified immunity, it would have been contrary to law for the jury to hold Wilson liable based on his conduct before the time of the shooting. Therefore, it would have been improper to give the jury an instruction that would have allowed it to do so. We explain. The sentence omitted from the instruction said: 'Defendant Don Wilson's own conduct prior to the shooting can be a part of your determination of reasonableness, but only if his own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.'. . Cox sought the instruction to allow him to base liability on his claim that, even if Wilson was in imminent danger when he shot Cox, the only reason Wilson was exposed to danger was that he unreasonably exited his police vehicle and approached Cox's pickup. At trial Cox called as an expert witness a person with excellent credentials who testified that Wilson's recklessness created the danger leading to the shooting. The expert opined that Wilson should not have left his car to approach Cox because of the danger to Wilson once he was on foot on the Interstate and in a vulnerable position between his patrol car and Cox's vehicle. He said that Wilson should have remained in his vehicle and attempted to deescalate the situation, perhaps waiting for support from additional officers. And he said that once Wilson stepped onto the Interstate, he should have moved to a position of safety at the rear of his vehicle. Perhaps it would have been safer for Wilson to remain in his vehicle. But there were other

considerations at play. Cox had ignored repeated warnings from Wilson to turn off his car's engine. Wilson reasonably believed that if Cox could continue to drive on the Interstate, he would present a profound danger to other motorists. Although Cox was temporarily boxed in, there was no reason for Wilson to believe that this situation would persist for any substantial amount of time; Kincaid did not turn off her engine and had not spoken with Wilson or otherwise informed him that she intended to remain stopped in front of Cox indefinitely. If Kincaid moved forward, Cox could have continued his dangerous driving, which, according to both Wilson and Kincaid, he appeared intent on doing. And both Wilson and Kincaid testified that Cox was repeatedly reaching down for something, which they assumed was a firearm. If Cox was to be prevented from further dangerous driving, the most reasonable thing for Wilson to do may have been to expose himself to danger in order to disable Cox from driving. More importantly, even if the jury was persuaded by the expert's trial testimony that Wilson had acted unreasonably in leaving his vehicle, qualified immunity protected Wilson from liability on that score. As Wilson frames the issue, the question on appeal is whether there is:

a controlling case finding a Fourth Amendment violation due to the officer's recklessly causing the need to use deadly force, where after participating in a high speed and dangerous chase of a suspect, the officer exited his vehicle during a temporary stop in traffic to confront the driver with a show of deadly force?

. . . Cox has not presented, nor are we aware of, any opinion by the Supreme Court or this court, or, for that matter, any other court, holding that an officer in similar circumstances acted unreasonably. It would have been error for the district court to instruct the jury that it could find Wilson liable on a ground for which he was protected by qualified immunity. A recent decision of this court provides a compelling illustration of the scope of qualified immunity where the issue was the same as in this case—allegedly unreasonable police conduct leading to the use of deadly force. [Court discusses *Pauly v. White*] . . . . *Pauly* illustrates the strength of the protection provided by qualified immunity. Unlike Wilson's decision to leave his vehicle to try to disable Cox's vehicle, the impropriety of the alleged actions by the officers before the shooting in *Pauly* would be apparent to most laypersons. Yet the *Pauly* officers were protected by qualified immunity because of the absence of clearly established law prohibiting their conduct. So too here.")

Reavis for the Estate of Coale v. Frost, 967 F.3d 978, 988-95 (10th Cir. 2020) ("In evaluating whether the suspect poses an immediate threat when deadly force is employed, the court must consider the totality of the circumstances. That is, the question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances. . . . Here, the district court properly assessed whether a jury could conclude Deputy Frost was no longer in danger when he fired shots into Mr. Coale's fleeing truck. While the district court focused its analysis on whether Deputy Frost was in danger at the precise moment that he used force against Mr. Coale, it did so in the context of the totality of the circumstances. . . The district court considered the events leading up to the shooting and found that Deputy Frost had 'moved or jumped out of the way of Mr. Coale's vehicle when it started moving in his direction.'.

. And 'Defendant Frost did not fire his weapon until the front of the vehicle and Mr. Coale himself had passed him – all of the bullets were behind and to the side of Mr. Coale.'. . The district court also found that Deputy Frost and Mr. Coale 'were essentially alone on a dirt road, meaning that there were no other officers or bystanders to be concerned about the vehicle's path.'. . Taking all of these facts into consideration, the district court concluded that a reasonable jury could find that 'there was no immediate danger to other officers or civilians and the only risk at the moment the gun was fired was that created by Mr. Coale fleeing from the stop.'. .On these facts, and under the totality of the circumstances, the district court also properly rejected Deputy Frost's argument that he is entitled to qualified immunity as a matter of law because a reasonable officer in his position would have believed there was a threat of serious physical harm, even if there was no actual immediate threat when he pulled the trigger. The dissent contends, 'Neither Frost nor a reasonable officer could be expected to figure out instantaneously the suspect's next moves when the suspect had just tried to run him over.'. . But this contention ignores the facts found by the district court and the factual inferences that we must draw from those facts in favor of the Estate as the non-moving party. . . Importantly, Deputy Frost 'moved or jumped out of the way of Mr. Coale's vehicle when it started moving in his direction,' . . . and Deputy Frost raised his gun to fire '[a]bout the time [Mr. Coale's] side mirror passed by [him].'. . From these facts, we conclude that a reasonable officer in Deputy Frost's position would have perceived that Mr. Coale's vehicle had passed him, and he was no longer in any immediate danger from an oncoming vehicle when he raised his gun to fire. A reasonable officer in Deputy Frost's position would have also perceived that Mr. Coale's vehicle did not pose any immediate danger to anyone else as they were alone on a dirt road. Given that all the shots Deputy Frost fired were 'from behind and to the side' of Mr. Coale's vehicle, . . . we further conclude that even in the short time it took Deputy Frost to raise his weapon and line up his shot, a reasonable officer would have perceived he was shooting at the back and side of a fleeing—not an oncoming—vehicle. . . Thus, a reasonable officer in Deputy Frost's position would have known when he raised his weapon and fired that there was no immediate threat of harm to himself or others such that 'the general dangers posed by [Mr. Coale's] reckless driving' were insufficient to justify the use of deadly force. . . Nonetheless, Deputy Frost contends he is entitled to qualified immunity under our decision in *Clark v. Bowcutt*, 675 F. App'x 799 (10th Cir. 2017) (unpublished). But *Clark* is easily distinguished. There, the officer was standing directly in front of an oncoming vehicle. . . Rather than move out of the way, the officer stood his ground and shot the driver through the vehicle's windshield. . . We held the officer's use of force was objectively reasonable because the officer was standing directly in the path of the oncoming car, inches from its bumper, when he used force to avoid being hit. . . In contrast, Deputy Frost's use of force was not to avoid being hit by Mr. Coale; the district court found that Deputy Frost had moved out of the truck's path and the vehicle had passed when Deputy Frost fired at the back and side of the truck, killing Mr. Coale. The other decisions Deputy Frost cites are similarly inapposite because the officers in those cases were in the path of an oncoming vehicle when they used deadly force. . . .In sum, on the facts that the jury could find, an objectively reasonable officer would not have feared for his life when Deputy Frost fired at Mr. Coale, the district court correctly denied summary judgment on whether Deputy Frost violated Mr. Coale's Fourth Amendment right to be free from excessive force. . . . The Estate must also demonstrate that the constitutional right

'was clearly established at the time [Deputy Frost shot Mr. Coale], such that "every reasonable official would have understood" that such conduct constituted a violation of that right.'. . . [T]he Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . 'Nevertheless, our analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law.'. . . It is clearly established that an officer may use deadly force when 'threatened by a weapon (which may include a vehicle attempting to run over an officer).' . . And our decisions have held that an officer's use of deadly force is objectively reasonable when the officer shoots at a vehicle coming directly toward the officer or toward other persons. . .But these cases do not answer the question before us—whether it is objectively reasonable for an officer to use deadly force to stop a fleeing vehicle when an objectively reasonable officer in Deputy Frost's position could have perceived that any threat posed by Mr. Coale's truck had abated before he fired. To answer that question, we turn to the Supreme Court's decision in *Tennessee v. Garner*, . . .which addressed a Tennessee statute permitting an officer to 'use all the necessary means to effect the arrest' of a fleeing suspect. . . *Garner* clearly established that when a 'suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'. . In other words, it is clearly established that an officer cannot use deadly force once a threat has abated. . . . As in *Cordova*, our analysis relies in part on the district court's conclusion that a reasonable jury could find that Mr. Coale's fleeing vehicle did not pose any immediate danger to Deputy Frost or others at the time of the shooting. So from *Cordova*'s application of *Garner*'s general principle to facts similar to those here, it was clearly established at the time Deputy Frost shot and killed Mr. Coale that when an officer uses deadly force to stop a fleeing vehicle, he must do so based on an immediate threat to himself or a threat to others. And use of deadly force is clearly unreasonable when (1) the only threat is one posed by reckless driving and (2) the immediacy of the threat to the officer is a disputed fact that a reasonable jury could resolve against the officer. . . . Construing the facts, as the district court found them, in the light most favorable to the Estate, we conclude that a reasonable officer in Deputy Frost's position would have known when he raised his weapon and fired that there was no immediate threat of harm to himself or others. Accordingly, the focus of our analysis here is whether it was clearly established that an officer may not use deadly force to stop a fleeing vehicle when a reasonable officer would have perceived he was in no immediate danger at the time he fired. Given our decision in *Cordova*, it would be clear to every officer that the use of deadly force to stop a fleeing vehicle is unreasonable unless there is an immediate threat of harm to himself or others. Thus, it would also be clear to every reasonable officer—who would have perceived any threat posed by Mr. Coale's truck had abated—that the use of deadly force to stop Mr. Coale's truck was unreasonable. Accordingly, the district court correctly concluded that Deputy Frost had fair notice that opening fire at a fleeing vehicle that no longer posed a threat to himself or others was unlawful.")

Reavis for the Estate of Coale v. Frost, 967 F.3d 978, 995-1003(10th Cir. 2020) (Briscoe, J., dissenting) ("I assume without deciding that Frost's actions (under the version of the facts a reasonable jury could find when read in the light most favorable to Coale) violated the Fourth

Amendment. After careful review of applicable precedent, however, I cannot agree that every reasonable officer in Frost's position would have known that the law governing those actions was clearly established. This is especially true given recent Supreme Court rulings which have emphasized that 'clearly established law' requires prior precedent which 'squarely addresses' the specific circumstances confronting officers when they deploy force. Here, taking into account ambiguities in our case law, not every reasonable officer standing in Frost's shoes would have known it was illegal to fire as Coale's truck pulled close to him and passed. . . . The majority places a significant amount of weight on *Tennessee v. Garner*, . . . citing the case for the proposition that 'when a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'. . But decisions like *Garner* 'lay out excessive-force principles at only a general level.'. . Stated differently, when an excessive force claim is in play, cases like *Garner* 'do not by themselves create clearly established law outside "an obvious case."'. . As we remarked in *Estate of Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020), 'the Supreme Court has repeatedly chastised courts for relying in such a manner on its broad statement of the law in *Garner*.'. .We can presume that every reasonable officer is aware of general Fourth Amendment principles, but Supreme Court precedent requires at least one prior decision which 'squarely governs' the facts at hand. . . . *Cordova* was decided before the Supreme Court issued a number of decisions clarifying the 'clearly established' prong of the test for qualified immunity, including *Plumhoff*, . . . *City & Cty. of San Francisco*, . . . *Mullenix*, . . . *White*, . . . *Kisela*, . . . and *City of Escondido*[.] . . .That this court would focus on the 'precise moment' of the shooting to deny immunity would not necessarily have been clear under our case law to every reasonable officer. We have said that analyzing the precise moment of lethal force (and whether an officer recklessly created the need to use such force) is at most 'a specific application of'—not a substitute for—'the "totality of the circumstances" approach inherent in the Fourth Amendment's reasonableness standard.'. . . Although the 'precise moment' principle generally traces back to *Sevier*, the panel in that case ultimately dismissed the matter for lack of jurisdiction. . . We have continued to use the phrase in other decisions, often in the process of granting (rather than denying) immunity. [collecting cases] . . . . [W]hile the majority acknowledges the importance of the totality of the circumstances, today's ruling essentially rests on a single presumed fact. Over and over, the majority touts the possibility that a jury could conclude there was no threat of harm to Frost at the moment he fired, as shown by (*inter alia*) the deadly bullet coming from the back. . .Under binding Supreme Court precedent, that analysis is far too cramped. All of the circumstances matter. . . And as summarized above, there are at least ten other facts demonstrating that even if Frost made a mistake, not every reasonable officer would have known that our case law prohibited the use of his firearm in the specific circumstances he faced. Those facts come directly from the district court's opinion. . . In light of numerous excessive force cases from the Supreme Court which serve as our guide in addressing qualified immunity, I vote to reverse the denial of Frost's summary judgment motion. I therefore respectfully dissent.")

VII. Role of the Judge/Jury

Salazar-Limon v. City of Houston, Tex., 137 S. Ct. 1277, 1278 (2017) (Alito, J., with whom Thomas, J. joins, concurring in the denial of certiorari) ("[T]his Court applies uniform standards in determining whether to grant review in cases involving allegations that a law enforcement officer engaged in unconstitutional conduct. We may grant review if the lower court conspicuously failed to apply a governing legal rule. . . The dissent cites five such cases in which we granted relief for law enforcement officers, and in all but one of those cases there was no published dissent. . . The dissent has not identified a single case in which we failed to grant a similar petition filed by an alleged victim of unconstitutional police conduct. As noted, regardless of whether the petitioner is an officer or an alleged victim of police misconduct, we rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case. . . The case before us falls squarely in that category. This is undeniably a tragic case, but as the dissent notes, . . . we have no way of determining what actually happened in Houston on the night when Salazar–Limon was shot. All that the lower courts and this Court can do is to apply the governing rules in a neutral fashion.")

Salazar-Limon v. City of Houston, Tex., 137 S. Ct. 1277, 1278-79, 1281-83 (2017) (Sotomayor, J., with whom Ginsburg, J., joins, dissenting from the denial of certiorari) ("Just after midnight on October 29, 2010, a Houston police officer shot petitioner Ricardo Salazar–Limon in the back. Salazar–Limon claims the officer shot him as he tried to walk away from a confrontation with the officer on an overpass. The officer, by contrast, claims that Salazar–Limon turned toward him and reached for his waistband—as if for a gun—before the officer fired a shot. The question whether the officer used excessive force in shooting Salazar–Limon thus turns in large part on which man is telling the truth. Our legal system entrusts this decision to a jury sitting as finder of fact, not a judge reviewing a paper record. . . . . Three Terms ago, we summarily reversed the Fifth Circuit in a case 'reflect[ing] a clear misapprehension of summary judgment standards.'[citing *Tolan v. Cotton*] This case reflects the same fundamental error. I respectfully dissent from the Court's failure to grant certiorari and reverse. . . .The question before the lower courts was whether the facts, taken in the light most favorable to Salazar–Limon, entitled Thompson to judgment on Salazar–Limon's excessive-force claim. . . Although such cases generally require courts to wade through the 'factbound morass of "reasonableness,"'. . . here the question whether Thompson's use of force was reasonable turns in large part on exactly what Salazar–Limon did in the moments before Thompson shot him. Indeed, the courts below needed to ask only one question: Did Salazar–Limon turn and reach for his waistband, or not? If he did, Thompson's use of force was reasonable. If he did not, a jury could justifiably decide that the use of force was excessive. Given that this case turns in large part on what Salazar–Limon did just before he was shot, it should be obvious that the parties' competing accounts of the event preclude the entry of summary judgment for Thompson. Thompson attested in a deposition that he fired his gun only *after* he saw Salazar–Limon turn and 'ma [k]e [a] motion towards his waistband area.'. . Salazar–Limon, by contrast, attested that Thompson fired either 'immediately' or 'seconds' after telling Salazar–Limon to stop—and in any case *before* Salazar–Limon turned toward him. . . These accounts flatly contradict

each other. On the one, Salazar–Limon provoked the use of force by turning and raising his hands toward his waistband. On the other, Thompson shot without being provoked. It is not for a judge to resolve these 'differing versions of the truth' on summary judgment . . .; that question is for a jury to decide at trial. The courts below reached the opposite conclusion only by disregarding basic principles of summary judgment. The District Court reasoned that Salazar–Limon 'offered no controverting evidence' against Thompson's testimony that he turned and reached for his waistband before he was shot, . . . and the Fifth Circuit similarly reasoned that Salazar–Limon had not 'submitted any other controverting evidence' regarding that fact. . . . This is plainly wrong. Salazar–Limon's own testimony 'controverted' Thompson's claim that Salazar–Limon had turned and reached for his waistband. The sworn testimony of an eyewitness is competent summary judgment evidence. And Salazar–Limon's testimony 'controverted' Thompson's; indeed, the two contradict one another in every material way. Salazar–Limon needed no other evidence to defeat summary judgment. . . .This is not a difficult case. When a police officer claims that the victim of the use of force took some act that would have justified that force, and the victim claims he did not, summary judgment is improper. The Fifth Circuit's decision should be reversed. Only Thompson and Salazar–Limon know what happened on that overpass on October 29, 2010. It is possible that Salazar–Limon did something that Thompson reasonably found threatening; it is also possible that Thompson shot an unarmed man in the back without justification. What is clear is that our legal system does not entrust the resolution of this dispute to a judge faced with competing affidavits. The evenhanded administration of justice does not permit such a shortcut. Our failure to correct the error made by the courts below leaves in place a judgment that accepts the word of one party over the word of another. It also continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. See, *e.g., White v. Pauly,* 580 U.S. ——, 137 S.Ct. 548, 196 L.Ed.2d 463 (2017) (*per curiam*); *Mullenix v. Luna,* 577 U.S. ——, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (*per curiam*); *Taylor v. Barkes,* 575 U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015) (*per curiam*); *Carroll v. Carman,* 574 U.S. ——, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (*per curiam*); *Stanton v. Sims*, 571 U.S. ——, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*). But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on '"society as a whole[.]"'. . than does the erroneous denial of summary judgment in such cases. We took one step toward addressing this asymmetry in *Tolan*. . . We take one step back today. I respectfully dissent.")

Tolan v. Cotton, 134 S. Ct. 1861, 1866-68 (2014) ("Courts have discretion to decide the order in which to engage these two prongs. . . But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen,* 543 U.S. 194, 195, n. 2, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*); *Saucier, supra,* at 201; *Hope, supra,* at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'. . Summary judgment is appropriate only if 'the movant shows that there is no genuine

issue as to any material fact and the movant is entitled to judgment as a matter of law.'. . In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.'. . Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.'. . Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions. . . In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party[.] . . . Considered together, [the] facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while 'this Court is not equipped to correct every perceived error coming from the lower federal courts,'. . . we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. . .The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party. Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law. . . .The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.")

Thomas v. Nugent, 539 F. App'x 456, 461 (5th Cir. 2013) ("Thomas asserts that just as in *Newman*, the *Graham* excessive-force factors clearly establish the answer in this case such that a body of relevant case law is unnecessary. But as with *Bryan*, *Newman* is also distinguishable from the facts of this case. In *Newman*, the suspect had committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command. . .In fact, the plaintiff claimed he was tasered repeatedly despite never being given any command by the officers . . . . In contrast, Pikes was arrested pursuant to an active felony warrant, attempted to evade arrest, was subdued only through the threat of deadly force, and did not comply with the officers' repeated requests to cooperate in effectuating the arrest. Thus, this case does not provide an 'obvious'

example of excessive force such that Thomas satisfied her burden to demonstrate that Officer Nugent's use of force was unreasonable under clearly established law."), *cert. granted,* 134 S. Ct. 2289 (2014), *vacated and remanded in light of* ***Tolan v. Cotton,*** 134 S. Ct. 1861 (2014) (*per curiam*).

See also ***Dawson v. Anderson County, Tex.***, 566 F. App'x 369 (5th Cir. 2014), *infra, pet. for reh'g and reh'g en banc denied*, 769 F.3d 326 (5th Cir. 2014).

In ***Hunter v. Bryant***, 502 U.S. 224, 228 (1991) (Per Curiam), the Supreme Court reversed a judgment of the Ninth Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. In criticizing the approach taken by the Ninth Circuit, the Court noted:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment...based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' . . . This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial.... Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Scott v. Harris, 127 S. Ct. 1769, 1776 & n.8 (2007) ("The question we need to answer is whether Scott's actions were objectively reasonable. . . . JUSTICE STEVENS incorrectly declares this to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' . . At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, . . . the reasonableness of Scott's actions–or, in JUSTICE STEVENS' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' . . . is a pure question of law.") (emphasis original).

Scott v. Harris, 127 S. Ct. 1769, 1784, 1785 (2007) (Stevens, J., dissenting) ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. . . Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. . . .In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.").

Brosseau v. Haugen, 125 S. Ct. 596, 598, 601-04 (2004) (per curiam) (Stevens, J., dissenting) (" In my judgment, the answer to the constitutional question presented by this case is clear: Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape. What is not clear is whether Brosseau is nonetheless entitled to qualified immunity because it might not have been apparent to a reasonably well trained officer in Brosseau's shoes that killing Haugen to prevent his escape was unconstitutional. In my opinion that question should be answered by a jury. . . .[T]he Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill-advised. [citing *Hope* and *Lanier*] Indeed, the cases the majority relies on are inapposite and, in fact, only serve to illuminate the patent unreasonableness of Brosseau's actions. Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight–or, more precisely, uncertainty about how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident–that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.' . . .Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury. . . The bizarre scenario described in the record of this case convinces me that reasonable jurors could well disagree about the answer to the qualified immunity issue. My conclusion is strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record. . . .The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral argument is woefully unpersuasive. If Brosseau had deliberately shot Haugen in the head and killed him, the legal issues would have been the same as those resulting from the nonfatal wound. I seriously doubt that my colleagues would be so confident about the result as to decide the case without the benefit of briefs or argument on such facts. . . At a minimum, the Ninth Circuit's decision was not clearly erroneous, and the extraordinary remedy of summary reversal is not warranted on these facts. . . . In sum, the constitutional limits on an officer's use of deadly force have been well settled in this Court's jurisprudence for nearly two decades, and, in this case, Officer Brosseau acted outside of those clearly delineated bounds. Nonetheless, in my judgment, there is a genuine factual question as to whether a reasonably well-trained officer standing in Brosseau's shoes could have concluded otherwise, and that question plainly falls with the purview of the jury.").

D.C. CIRCUIT

Flythe v. D.C., 791 F.3d 13, 18-22 (D.C. Cir. 2015) ("Although deciding deadly force cases typically requires that we 'slosh our way through the factbound morass of reasonableness,'. . . here we need consider only one question: What happened when Tremayne Flythe turned to face Officer Eagan? If, as Officer Eagan claims, Flythe attacked him with a knife, then Eagan reasonably responded to an imminent threat. . . But if, as Ms. Flythe contends, Tremayne obeyed Officer Eagan's command to 'stop' and turned around to surrender, then Eagan's actions were patently unreasonable. . . On this question, we may affirm the district court's grant of summary judgment

only if, after viewing the facts in the light most favorable to Ms. Flythe and drawing every reasonable inference in her favor, we can say that no rational trier of fact could disbelieve Officer Eagan's account. . . . An African proverb teaches that only when lions have historians will hunters cease being heroes. Put another way, history is usually written by those who survive to tell the tale, and in this case the only survivor is Officer Eagan. Tremayne Flythe is dead and, although several witnesses observed the two men face each other, none can testify as to exactly what happened between them. Under these circumstances, where 'the witness most likely to contradict [the officer's] story—the person [he] shot dead—is unable to testify,' courts, as the Ninth Circuit has explained, 'may not simply accept what may be a self-serving account by the police officer.'. . Instead, courts must 'carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts.'. . Courts 'must also look at the 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.'. . Every circuit to have confronted this situation—where the police officer killed the only other witness to the incident—follows this approach. For example, the Seventh Circuit has explained that '[t]he award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify.'. . Accordingly, 'a court must undertake a fairly critical assessment of the forensic evidence ... to decide whether the officer's testimony could reasonably be rejected at a trial.'. . In this case, record evidence casting doubt on Officer Eagan's testimony abounds. Indeed, in several significant respects Eagan's testimony conflicts with that of every other witness, as well as the physical evidence. . . . That an individual at one point posed a threat does not grant officers an irrevocable license to kill. Justification for deadly force exists only for the life of the threat. As the Supreme Court has explained, 'police officers are justified in firing at a suspect in order to end a severe threat to public safety ... *until* the threat has ended.'. . Here, the threat to Vazquez had ended by the time Eagan confronted Flythe, and Eagan never claimed that he viewed Flythe as an immediate threat. . . .Accordingly, whether Eagan acted reasonably *does* turn on whether, as he alleges, Flythe attacked him with a knife. And given all of the evidence discussed above—the inconsistencies between Eagan's testimony and the testimony of other witnesses, the physical evidence, and the evidence raising questions about Eagan's personal credibility—and drawing all inferences in Ms. Flythe's favor, we believe that a reasonable jury could conclude that Tremayne Flythe never threatened Officer Eagan with a knife. True, a jury could also conclude that he did, but '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ... on a motion for summary judgment.'. . We shall therefore reverse the district court's grant of summary judgment to Officer Eagan.")

Lash v. Lemke, 786 F.3d 1, 6-7 (D.C. Cir. 2015) ("Lash insists, relying on *Tolan,* that we cannot define the 'context' for this case by concluding as a matter of law that he was resisting arrest. Doing so, he argues, would 'import[ ] genuinely disputed factual propositions' into the qualified immunity analysis, exactly as *Tolan* forbids us to do. . . We disagree: Here, there is no genuine dispute regarding Lash's conduct. Multiple videorecordings of the episode make perfectly clear

that Lash resisted the officers' efforts to arrest him. He pulled his arms free from the officers' efforts to restrain them twice in succession. The first of these, Lash argues in his affidavit, was no more than a natural reaction to being seized when he did not know who had seized him. But Lash does not even acknowledge, much less attempt to justify, the second occasion on which he pulled away. Much worse, Lash further claims that as soon as he realized that officers were trying to arrest him he immediately acquiesced and allowed them to put his arms behind his back. And in his brief he insists that the officers 'began to place [his arms] behind his back' while he 'continued to insist he had done nothing wrong.' But it is plain from multiple videorecordings that each of these claims is a 'visible fiction.'. . Even when each of Lash's arms was firmly held by a uniformed USPP officer, Lash continued to resist, straining to remain upright despite the officers' efforts to destabilize him and force him to the ground. Nor did Lash allow the officers to move his arms behind his back before handcuffing him. His arms remained extended even as the officers attempted to restrain him and were never pinned until after Lemke used her Taser. Just as in *Scott*, the video record here makes the normal factual solicitude for the nonmovant at summary judgment both unnecessary and inappropriate. No matter what Lash claims now, we know to a certainty that he resisted arrest because we can see him doing so. . . .The videorecordings in the record provide us all we need to determine what a reasonable officer would have known at the scene. And we do not hesitate to conclude from the videorecording that there is 'no genuine issue of material fact' regarding Lash's active resistance.")

FIRST CIRCUIT

Underwood v. Barrett, 924 F.3d 19, 20-21 (1st Cir. 2019) (per curiam) ("The district court conceded that the video evidence was 'compelling,' but opted to reject the teaching of *Scott*, explaining that it preferred the contrary view expressed in both Justice Stevens's *Scott* dissent, *see id*. at 395 (Stevens, J., dissenting) (opining that the Court improperly 'usurped the jury's factfinding function'), and in what the district court described as an 'academic consensus' favoring the dissent. In so proceeding, the district court failed to fulfill its obligation to follow the law as set forth in controlling precedent. . . Because the denial of the qualified immunity defense was predicated on this error of law, it is appealable. . . We therefore vacate the district court's denial of the motion for summary judgment, and *remand* the case to another district court judge for further proceedings consistent with the law.")

Begin v. Drouin, 908 F.3d 829, 834-35 (1st Cir. 2018) ("Whether an immediate threat exists is a question of fact for the jury as long as the evidence is sufficient to support such a finding. . . In this case, the district court determined that the evidence could support a jury finding 'that Plaintiff did not pose an immediate threat to Defendant Drouin and the others who were present.' That determination -- that the evidence was sufficient to support a jury verdict on an issue of fact -- is not a ruling that we can review on this interlocutory appeal. . . . The conclusion that a jury could find here the absence of the immediate threat necessary to make a shooting constitutional does not by itself mean that a jury could also find Drouin liable. Police officers do not have the luxury of calmly considering the circumstances they face as if they were jurors or judges. . . . Drouin

therefore cannot be held liable, even if Begin's rights were in fact violated, unless the right implicated was 'clearly established' and the plaintiff can 'show that an objectively reasonable officer would have known that [her] conduct violated the law.'. . . What the law does or does not clearly establish for purposes of assessing a qualified immunity defense is itself a question of law. . . So while we do not reconsider the facts as found by the district court or as otherwise viewed favorably to the plaintiff, we do consider afresh, and without deference to the district court, whether given those facts it was clear that no objectively reasonable officer would have believed the use of deadly force was lawful.")

Ciolino v. Gikas, 861 F.3d 296, 298-306 (1st Cir. 2017) ("We are faced with the question of whether to sustain the district court's post-verdict denial of qualified immunity to Sergeant Gikas. . . We affirm. The jury found that Gikas violated Ciolino's Fourth Amendment right to be free from excessive force. Responding to special questions on the verdict form, the jury also found that Ciolino failed to comply with police orders and taunted K-9 dogs immediately prior to his arrest and that Gikas had probable cause to arrest Ciolino on the night in question. The jury did not answer one of the special questions, which asked whether Ciolino was 'inciting the surrounding crowd immediately prior to his arrest.' The district court then denied Gikas's post-verdict motion for judgment as a matter of law, rejecting Gikas's argument that he was entitled to qualified immunity. We agree with the district court that a reasonable officer in Gikas's position would have understood that Gikas's actions violated Ciolino's Fourth Amendment right to be free from excessive force. . . . In this case, the jury has already found that Gikas violated Ciolino's Fourth Amendment right to be free from excessive force. Gikas has not challenged the sufficiency of the evidence supporting that verdict, either in his post-verdict motion in the district court or before us. As a result, we address the second prong: whether the right that Gikas violated was 'clearly established' at the time Gikas acted. . . 'The second prong, in turn, has two elements: "We ask (a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right."'. . The first element of prong two is easily satisfied. The legal contours of Ciolino's right were clear and a reasonable officer would have had 'clear notice' of it. . . . Gikas focuses his argument on the second element of prong two: whether a reasonable officer would have understood that Gikas's actions were unconstitutional under the particular circumstances he confronted. . . . We agree with the district court that a reasonable officer in Gikas's position 'would have understood that what he [wa]s doing violate[d]' Ciolino's Fourth Amendment right. . . . The record before us does not support Gikas's argument that he had to make a split-second judgment and that the atmosphere outside the Club was so highly combustible that he had to arrest Ciolino as he did. The video, although it captures only 24 seconds, refutes Gikas's argument. Notably, the video shows that Sergeant Pickles, the officer whose dog Ciolino taunts just before the arrest, barely reacts to Ciolino's behavior and certainly does not treat Ciolino as a threat. Nor do the other officers on the scene. And no officer on the scene testified that Ciolino was posing an immediate threat of violence and had to be removed. Even Gikas himself testified that he did not perceive Ciolino as an active threat; rather, his goal in removing Ciolino forcibly from the sidewalk was to

prevent Ciolino from having an 'opportunity to [incite] the crowd,' which 'could instigate a larger problem.'. . .Finally, we reject Gikas's argument that he acted in a manner consistent with his training and police protocol when he took Ciolino to the ground with force. . . Gikas testified at trial that he had been taught to employ 'open-hand' techniques to subdue arrestees who have refused to obey verbal commands and that he used such a technique on Ciolino, rather than a more extreme use of force, after perceiving that Ciolino had refused police instructions to 'move along' and to leave the K-9 dogs alone. If anything, Gikas's actions appear to be contrary to the training he says he received on the spectrum of police responses. A reasonable officer might well have laid hands on Ciolino, either to arrest him or to remove him, but would have used a less aggressive technique, such as seizing and securing Ciolino's hands, rather than taking the actions Gikas did. The record contains no evidence that Gikas was trained to 'jump[ ] immediately to the extreme end of the "open-hand" force category,'. . . rather than to control Ciolino with a less forceful technique. Nor is there any evidence that Gikas was trained to regard a disobeyed order to 'move along' as equivalent to a disobeyed order to submit to arrest. . . Gikas gave Ciolino no warning at all that he was under arrest before Gikas decided to use force.We conclude, as did the district court, that Gikas's actions not only violated Ciolino's Fourth Amendment right but also fell outside the 'margin of error,' . . . that qualified immunity provides.")

SECOND CIRCUIT

Edwards v. Quiros, 986 F.3d 187, 195 (2d Cir. 2021) ("Quiros once again claims he is entitled to qualified immunity, as he did in seeking summary judgment. But we rejected essentially the same argument at an earlier stage of this litigation. . . and we have no new reason to grant qualified immunity to Quiros now. The disputed issues of fact that remained after our prior decision have now been resolved against him by the jury. The jury reasonably determined, upon sufficient evidence, that Quiros knowingly violated Edwards's clearly established right to meaningful exercise under the circumstances and lacked a sufficient justification for doing so. We will not disturb the jury's finding that Quiros was not entitled to qualified immunity.")

Jones v. Treubig, 963 F.3d 214, 230-35 (2d Cir. 2020) ("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.'. . However, qualified immunity only protects 'reasonable mistakes.'. . . 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. . . 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,' . . . 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. . . 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. . . 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. . . . 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. . . 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. . . 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. . . 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 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?'. . 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. . . 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?'. . . .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.'. . 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. . . 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. . .Accordingly, given the absence of any finding by the jury as to the reasonableness of the mistaken factual belief by Lt. Treubig regarding resistance 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.")

Adamson v. Miller, No. 18-3443, 2020 WL 1813545, at *2–3 (2d Cir. Apr. 9, 2020) (not reported) ("The central dispute on this claim is a factual one: whether Adamson was placed in a chokehold and punched. A genuine issue as to that material fact would be sufficient to defeat summary judgment under either constitutional standard. . . Adamson adduced no admissible evidence supporting his version of events apart from his own deposition testimony and affidavit. . . However, rather than assessing whether Adamson's own testimony would, if credited, support a jury verdict in his favor, the district court only considered whether Adamson's testimony was corroborated by the testimony of other witnesses. After noting that none of the other witnesses testified to seeing Adamson in a chokehold, the court concluded that 'the witness testimony in this case does not show a genuine issue for trial because the testimony is not actually in conflict.'. . This was error. By omitting Adamson's own testimony from its analysis, the district court failed to 'view the evidence in the light most favorable' to Adamson and to 'favor [him] with all reasonable inferences.'. . Nor could the district court have properly disregarded Adamson's testimony on the ground that it was simply incredible. '[I]t is undoubtedly the duty of district courts not to weigh the credibility of the parties at the summary judgment stage.'. . And Adamson's testimony, although not corroborated by other evidence, was not 'contradictory and incomplete,' nor was it 'so replete with inconsistencies and improbabilities that no reasonable juror' could credit it. . . To the contrary, Adamson has consistently asserted for the past ten years that he was placed in a chokehold and punched during the lineup. Viewing the evidence in the light most favorable to Adamson, as we must at the summary judgment stage, we conclude that a reasonable jury could credit his version of events. We further conclude that a reasonable jury could find that placing Adamson in a chokehold and punching him was an excessive use of force, whether judged against the Eighth or Fourteenth Amendment standards. We therefore vacate the district court's order insofar as it granted summary judgment to defendants on this claim.")

Outlaw v. City of Hartford, 884 F.3d 351, 356, 367-72 (2d Cir. 2018) ("On the cross-appeal, we conclude that Allen's contentions are without merit given that, as qualified immunity is an affirmative defense, the burden was on Allen to prove by a preponderance of the evidence any factual predicates necessary to establish that defense; that in order to avoid having the court instruct the jury that he had that burden, Allen chose not to have submitted to the jury the fact questions as to which he now wants favorable answers presumed; that the jury's answers to the interrogatories accompanying its verdict did not imply the factual findings that Allen imputes to the jury; and that the pertinent factual findings by the district court are not inconsistent with the jury's answers to questions that were posed. . . .Qualified immunity is an affirmative defense on which the defendant has the burden of proof. *See, e.g., Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Rogoz v. City of Hartford*, 796 F.3d at 247. 'To the extent that a particular finding of fact [i]s essential to an affirmative defense, ... it [i]s incumbent on [the defendant] to request that the [factfinder] be asked the pertinent question.' *Kerman*, 374 F.3d at 120. . . Usually, if a jury trial has been properly demanded, the factfinder for such questions will be a jury. . . . The jury may be asked to make its findings by answering special interrogatories. . . When such interrogatories are used, of course, the court will need to give the jury proper 'instructions and explanations,'. . . to enable the jury to make its findings in accordance with, *inter alia*, the proper allocation of the burden of proof. However, the parties may agree to forgo their Seventh Amendment rights, either entirely or with respect to specified issues. . . . These rules mean that the parties, directly or through their attorneys, are allowed to agree to forgo their Seventh Amendment rights on specified factual questions and have those questions decided by the court. . . . In the present case, the district court properly, and without objection, charged the jury as to, *inter alia*, what it must find Outlaw had proven by a preponderance of the evidence in order to return verdicts in his favor on his claims of excessive force in violation of the federal and state constitutions. . . . We presume, absent any indication to the contrary, that the jury followed the court's instructions, and that the jury, having found that Allen intentionally or recklessly subjected Outlaw to force that was 'excessive,' did not then conclude that so much of the force as was excessive was justified. . . . Allen argues that the jury must have found justification for the total amount of force he used because, he says, '[t]he *only* reasonable interpretation of the jury finding Officer Allen liable for excessive force and at the same time not liable for assault is that Officer Allen reasonably believed *the* force was *necessary to protect* himself, Detective Gordon, or third parties *from the Plaintiff's use or imminent use of force*'. . . and that it was 'very wrong' for 'the District Court [to] ma[k]e findings of fact in contravention of the *jury's finding* that Officer *Allen believed* force was necessary *to prevent harm to himself, another officer, or a third party*'. . . . This argument is factually, doctrinally, and logically flawed. The factual flaw is, of course, that there were no jury findings as to Outlaw's conduct or Allen's beliefs. The jury was not asked whether Outlaw used force, or threatened force, or appeared to do so. The jury was not asked what Allen saw or believed. The doctrinal flaw is that what Allen himself 'believed' is not a consideration in determining qualified immunity for a federal constitutional violation but rather is an element only in the state-law concept of justification[.]. . . As discussed above, the federal standard for qualified immunity is what a reasonable officer in Allen's position would have believed, not

what Allen himself believed. . . . A third logical flaw inheres in Allen's total disregard of the principle that, as to the facts necessary to establish his entitlement to qualified immunity, he had the burden of proof. . . .Allen does not suggest that he made any principled attempt to have questions as to facts that could show his entitlement to qualified immunity submitted to the jury. To the contrary, although the transcript of the charge conference indicates that defendants initially wanted to have the jury asked some questions of that nature, the transcript also makes clear, as indicated in Part I.C. above, that defense counsel made a strategic choice to forgo submission of such questions to the jury. The apparent reason was that the district court stated—properly—that as to any such questions the court would have to instruct the jury that the burden of proof as to those matters was on the defendants, and that defense counsel preferred not to have the jury so instructed. Since the court insisted that the jury be instructed properly, defense counsel proposed that no such questions be submitted to the jury and that all of the requisite factual determinations be made by the court. Outlaw, who bore no responsibility for seeing that a sufficient record was created for an affirmative defense, expressly consented. Thus, as defendants wished, questions with regard to 'qualified immunity for federal claims' and 'qualified immunity for state law claims' were deleted . . . all mentions of the concept of a qualified immunity defense were deleted . . . and an explanation that as to some issues in the case the plaintiff does not have the burden of proof was deleted[.]. . As to the entirety of the qualified immunity defense, defense counsel said, 'Your Honor has that on your lap, period'. . . and the court accordingly made findings as to facts about which the jury was deliberately not asked. We cannot allow Allen now to put words in the jury's mouth. While Allen argues that, in asking the court to make factual findings, he did not consent to have the court make findings inconsistent with those made by the jury, that argument is inconsequential. The jury made none of the factual findings he wishes to impute to it. Finally, we note that Allen makes no attempt to argue that the evidence at trial was insufficient to support the district court's factual findings. Ironically, he argues that 'there was no finding by the jury that it necessarily believed' the various witnesses' 'testimony concerning [Outlaw's] version of the facts'. . . . However, in contrast to the lack of any instructions to the jury on defendants' qualified immunity defense, the jury was instructed that '[i]n order for the *plaintiff* to establish [that he was deprived of a constitutional right], *he must show* ... by a preponderance of the evidence,' *inter alia*, '*that the defendants committed the acts alleged by the plaintiff*.'. . The jury so found with respect to Outlaw's constitutional claims. In sum, we conclude that Allen's arguments that the jury necessarily made factual findings that (a) would entitle him to qualified immunity, and (b) were contrary to the posttrial factual findings made by the court, are meritless. The jury made no findings, express or implicit, as to whether Allen carried his burden of establishing any factual predicate for his defense. The court, having been asked by the parties to make findings of fact with respect to the qualified immunity defense, had the authority to make credibility assessments and draw such inferences as it believed appropriate. Its findings of fact, described in Part I.C. above, are amply supported by the trial record. We affirm so much of the judgment as awarded Outlaw damages against Allen.")

THIRD CIRCUIT

Santini v. Fuentes, 795 F.3d 410, 420 (3d Cir. 2015) ("[M]aterial factual disputes exist as to whether Santini's constitutional rights were violated. The existence of those disputes compels us to find that the District Court's grant of summary judgment was inappropriate, as was its denial of Santini's motion to reconsider that decision. [citing *Curley*] We also find that those factual issues must be resolved by a jury, not a judge. . . We accordingly vacate in part the decisions of the District Court and remand this case for further proceedings consistent with this Opinion.")

Curley v. Klem, 499 F.3d 199, 208-11 & n.12 (3d Cir. 2007) (***Curley II***) ("The point of immunity is to protect someone from the burden imposed by litigation itself. It is supposed to be 'an *immunity from suit* rather than a mere defense to liability....' . . . Hence, the Supreme Court has instructed that '[i]mmunity ordinarily should be decided by the court long before trial.'. . .That is well and good when there are no factual issues in a case, but often the facts are intensely disputed, and our precedent makes clear that such disputes must be resolved by a jury after a trial. . . . The fundamental challenge lies in the nature of the questions that compose the test. Since they are mixed questions of law and fact, one is left to ask who should answer them. As we noted in *Curley I*, '[a] disparity of opinion exists among our sister circuits as to whether a judge or jury should make the ultimate immunity determination.'. . The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. The Fifth, Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries. Precedent from the Second and Eighth Circuits can be viewed as being on both sides of the issue, with the evolution being toward reserving the question for the court. . . . . Our precedents too have evolved. Our recent precedents say that the court, not a jury, should decide whether there is immunity in any given case. . . . [T]he *Carswell* approach, despite its limitations, . . . appears to have taken root and to represent the pattern and practice both in our Circuit and much of the rest of the country. We therefore take the opportunity to reiterate and clarify a central message from that case: whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury. . . When a district court submits that question of law to a jury, it commits reversible error. . . . When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity, . . . but responsibility for answering that ultimate question remains with the court." [footnotes omitted])

Curley v. Klem, 499 F.3d 199, 212 n.14 (3d Cir. 2007) (***Curley II***) ("We note that in the Supreme Court's recent decision in *Scott*, 127 S.Ct. 1769 (2007), the Court stated that, because the case 'was decided on summary judgment, there [had] not yet been factual findings by a *judge* or jury....' *Id.* at 1774 (emphasis added). Without wanting to read too much into that statement, since it may refer to nothing more than a case in which the parties waive any right to a jury, it appears the Court at least contemplated a circumstance where a judge may resolve factual issues. Certainly the dissent in *Scott* was concerned about judicial fact finding.").

Curley v. Klem, 499 F.3d 199, 214 (3d Cir. 2007)(***Curley II***) ("Confusion between the threshold constitutional inquiry and the immunity inquiry is also understandable given the difficulty courts have had in elucidating the difference between those two analytical steps. . . 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.")

Curley v. Klem, 499 F.3d 199, 224-26 (3d Cir. 2007) (***Curley II***) (Roth, J., dissenting) ("'Objective reasonableness' can be a jury issue to the extent it applies to the question of whether, as a factual matter, a violation was committed. However, 'objective reasonableness' is most definitely not a jury issue to the extent it applies to the question of whether, as a legal matter, a right was clearly established. Whether a right was clearly established is the 'key immunity question'; we have never permitted a jury to answer that question. Indeed, we never would have said so because determining whether a right is clearly established–which requires a review of the applicable case law–is clearly outside the expertise of the jury. There is simply nothing in *Sharrar* or *Karnes* that permits submission of the ultimate question of qualified immunity , i.e., *Saucier* step two, to the jury. . . . . Courts, including this one, create confusion by talking about 'objective reasonableness' in the Fourth Amendment context without specific reference to either *Saucier* step one or two. The use of the term 'objective reasonableness' without reference to factual or legal reasonableness is what has made this area of the law so confusing and it is why our precedents appear at times to say contradictory things with regard to the respective roles of judge and jury in determining objective reasonableness. I will try to clarify matters. If there are no disputed material facts, the court must determine the objective reasonableness of a mistake of fact (here, whether it was objectively reasonable for Klem to mistake Curley for the perpetrator). However, if there are triable issues of material fact, the jury must determine the objective reasonableness of that mistake of fact. With regard to the objective reasonableness of a mistake of law (here, whether it was objectively reasonable for Klem to believe that the law permitted him to use of deadly force against Curley in the situation at hand), the court should always determine this issue, because doing so requires a review of case law, which is not a task appropriate for the jury. . . . If there are no disputed material facts, the court should make this determination as soon as possible. However, if factual disputes relevant to this legal analysis do exist, the court will have to postpone making this determination until the jury resolves all the relevant factual disputes, because determining what actually happened is a prerequisite to determining whether the law clearly established that a particular action was permitted or prohibited by the Fourth Amendment under those circumstances. . . . After the jury resolves these relevant fact disputes, presumably through the use of special interrogatories, . . . the court is then capable of deciding whether or not the law clearly permitted or prohibited the conduct constituting the constitutional violation.").

FOURTH CIRCUIT

Gordon v. Schilling, 937 F.3d 348, 362-63 (4th Cir. 2019) ("[T]he defendants contend that they are entitled to qualified immunity on Gordon's Eighth Amendment deliberate indifference claims and that the district court has already ruled in that regard. The defendants, however, misread the Opinion. The court did not determine whether the defendants are entitled to qualified immunity on the deliberate indifference claims. Here, we conclude, as previously explained, that factual disputes exist as to whether the defendants contravened Gordon's Eighth Amendment rights. *See Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005) ("[T]o the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.").")

Harris v. Pittman, 927 F.3d 266, 271, 275-76, 280-82 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1550 (2020) ("[W]e vacated the grant of summary judgment and remanded with instructions 'to determine, in the first instance, if construing the salient facts in the light most favorable to Harris, Pittman is entitled to qualified immunity.'. . On remand, the district court again granted summary judgment to Pittman. This time, the court assumed that Pittman was standing over Harris when he fired the final shots. But even under those circumstances, the court held, his use of force was objectively reasonable as a matter of law. That the final shots were (by assumption) fired while Pittman was standing over Harris, the court reasoned, did not render them unreasonable, given record evidence 'that the shots were fired in rapid succession' and the preceding 'relentless' attacks on Pittman by Harris, 'even after [Harris was] struck by a taser.' . . And '[n]otably,' the court concluded, 'from the location of [Harris's] wounds, it appears that Pittman intended his shots only to disable [Harris].'. . Because Harris's own assertions did not establish a constitutional violation, the court held, Pittman was entitled to summary judgment under the first prong of the qualified immunity analysis. And in any event, the court continued, Pittman would be entitled to summary judgment under the second prong, because even if Harris could establish a violation of his Fourth Amendment right to be free of excessive force, that right was not clearly established with the requisite specificity at the time of the incident. . . . The only issue on appeal is whether, at this early stage of the litigation and before a jury has had a chance to assess witness credibility and other evidentiary issues, it can be said that Pittman is entitled to qualified immunity as a matter of law. We conclude that genuine factual disputes bearing directly on Pittman's qualified immunity defense preclude the award of summary judgment, and therefore reverse the judgment of the district court. . . .On appeal, Pittman does not defend the district court's answer to the question we posed in our mandate: 'whether, construing the facts in the light most favorable to Harris (i.e., Harris was lying on the ground when Pittman, still on top of him, fired the final shots), a reasonable officer would have probable cause to believe that Harris posed a significant threat of death or serious physical injury,' *Harris*, 668 F. App'x at 487. Instead, he rejects the premise – and with it, our mandate – arguing for the first time that Harris's account should *not* be credited on summary judgment, primarily because it is 'blatantly contradicted by the

record' and thus fails to create a genuine dispute of fact under *Scott v. Harris*[.]. . . Even if this argument were not foreclosed by the mandate rule that precluded Pittman from raising it before the district court, . . . we would find it unpersuasive. . . .As we have clarified, *Scott* is the exception, not the rule. It does not 'abrogate the proper summary judgment analysis, which in qualified immunity cases "usually means adopting ... the plaintiff's version of the facts."'. . . Summary judgment is proper under *Scott* only when there is evidence – like the videotape in *Scott* itself – of undisputed authenticity that shows some material element of the plaintiff's account to be 'blatantly and demonstrably false.'. . . In sum, under *Brockington*, as well as *Waterman*, the facts alleged by Harris, taken in the light most favorable to him, would allow a reasonable jury to find a violation of his constitutional rights, satisfying the first prong of the qualified immunity analysis. . . . That leaves us with the district court's alternative holding, under the second prong of the analysis: that even if Pittman could be found to have violated Harris's right to be free of excessive force, Pittman is entitled to qualified immunity because that right was not 'clearly established' with sufficient specificity at the time of the incident. . . We disagree. The cases on which we rely above, laying out the rule that governs here, were decided in 2005 (*Waterman*) and 2011 (*Brockington*), before the 2012 events of this case. Since 2005, it has been established that 'an imminent threat of serious physical harm to an officer is not sufficient to justify the employment of deadly force *seconds after the threat is eliminated* if a reasonable officer would have recognized when the force was employed that the threat no longer existed.' *Waterman*, 393 F.3d at 482 (emphasis added). Six years later, in *Brockington*, we held that the *Waterman* rule was sufficiently specific to 'clearly establish[ ]' the right of a suspect, once shot by an officer and lying wounded on the ground, not to be shot again. *Brockington*, 637 F.3d at 508. And although an exact factual match is not required to overcome a qualified immunity defense, . . . *Brockington* certainly comes close: Under *Brockington*, it is clear that even a police officer who has just survived a harrowing encounter that necessitated the use of deadly force to extricate himself may not continue to use deadly force once he has reason to know that his would-be assailant is lying on the ground wounded and unarmed[.] This is not a case, in other words, in which an officer would be required to reason backward from case law 'at a high level of generality' to determine whether his conduct violated a constitutional right. . . Here, 'pre-existing law makes the unlawfulness' of the conduct in question – as alleged by Harris, and drawing all reasonable inferences in Harris's favor – ' "apparent."'. . In so holding, we are cognizant of the reality that 'police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving[.]'. . This is a case in point; even on Harris's account, and certainly on Pittman's, Officer Pittman was faced with a genuine and no doubt terrifying threat to his safety during his struggle with Harris. We do no more today than reiterate what this court repeatedly has held: that even where deadly force initially is justified by a significant threat of death or serious physical injury, a police officer may not continue to employ deadly force when the circumstances change so as to eliminate the threat. Applying that principle to this case, we conclude that Pittman is not entitled to qualified immunity on summary judgment. This conclusion, of course, does not mean that Harris 'will prevail if the action is tried on the merits[.]'. . That decision is not ours – or the district court's – to make at this juncture. Instead, we hold only that there remain genuine disputes of material fact bearing on

Pittman's qualified immunity defense, and that summary judgment therefore is not appropriate on this record.")

Harris v. Pittman, 927 F.3d 266, 282-87 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1550 (2020) (Wilkinson, J., dissenting) ("This dispute began when Herman Harris fled from Officer Zachary Pittman, after repeatedly being told to stop. Pittman caught up to Harris at the edge of a tree line and both men fell many feet down into the woods. In the ensuing struggle, the suspect fought off a taser and repeatedly struck Pittman. As Harris later admitted in a guilty plea for this assault, he tried to shoot Pittman in the head with Pittman's gun. Both men sustained serious injuries. When the altercation ended, Officer Pittman's face was lacerated, his hands were bleeding, taser wire covered the forest floor, and parts of Pittman's uniform and gun holster were destroyed. Harris was shot multiple times. Only a few minutes passed between the time that Officer Pittman first announced his presence and the time he emerged injured from the woods. The majority shaves this incident oh so fine, parsing and segmenting the encounter almost second by second, ultimately finding that Pittman's efforts to save his life in the final moments of the altercation were excessive. Sadly for the majority, the action here spun by; the struggle allowed the combatants no time for a coffee break. In the majority's view, if a suspect lands a punch in one moment, drags you to the ground the next, and goes for your gun a second later, a reasonable officer must shed any attempt to preserve his own life if, in the course of the ongoing fight, the officer gains so much as a fleeting advantage. It was much to be hoped that the majority would understand the difference between a struggle in which life and death hinged on an instant and the leisured contemplation brought to events years later. To the best of my knowledge, the majority was not present at the scene. The majority was not tumbling down a wooded ravine in the dark of night. The majority was not alone, fighting a person who had disregarded clear warnings, fled arrest, fought through a taser, and tried to grab its gun. The majority did not struggle to regain its weapon while lying beaten and bloodied on the ground. And the majority did not fear for its life when that weapon was ultimately used to stop the assault. The law of qualified immunity does not allow us to ignore the serious and ongoing threat faced by Officer Pittman. Although I may never understand the risks that officers face in the service of public safety, settled law requires that I try. Because I cannot see how Pittman's actions were in any way unreasonable, I respectfully dissent. My esteemed colleagues in the majority are surely right in one respect. Police officers do overreach. And when they do, the law must hold them to account. . . . Four years ago, the Supreme Court noted how often it is called upon to reverse federal courts that deny qualified immunity in excessive force cases: '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.'. . The Court's view on the importance of qualified immunity has not wavered. Each year, it has continued to issue opinions, often per curiam, reversing a denial of qualified immunity in an excessive force suit. [collecting cases] In some cases, lower courts erred by defining the constitutional right at such a high level of abstraction that no conduct whatsoever was protected by the immunity. . . At other times, courts have erred in applying the immunity standard, either by assessing the officer's conduct without regard to the facts on the ground, *see, e.g.*, *Kisela*, 138 S. Ct. at 1153, or wrongfully finding a 'genuine' dispute of fact, *see, e.g.*, *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686

(2007). The Supreme Court has been forced into the fray to prevent the total erosion of qualified immunity. At some point a pattern of Court decisions becomes a drumbeat, leaving one to wonder how long it will take for the Court's message to break through. Perhaps the Court's patience on this point is endless, because, golly, it has been so sorely tried. The failings that have been so routinely documented by the Supreme Court rear their head once again. The majority has used the summary judgment standard once more to eviscerate qualified immunity protections. In the majority's hands, every dispute becomes genuine and every fact becomes material. Qualified immunity fades to the end of every discussion, its values reserved for lip service until little enough is left. The result? The majority has ignored Supreme Court precedent, somehow finding Pittman's actions to save his own life something our Constitution cannot condone. . . .This case comes to us at the summary judgment stage and a suit can only proceed if some material fact is 'genuinely' disputed. Although it may not be clear from reading the majority opinion, awards of pre-trial dismissals are crucial to the utility of any immunity. The Supreme Court has repeatedly emphasized that qualified immunity 'is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'. . . If a case goes to trial when a valid basis for summary judgment exists, the entire purpose of the immunity is thwarted. The majority belies all of this teaching in repeatedly referring to this case as at an 'early stage of the litigation,'. . . thereby betraying its view that these sorts of cases should be resolved at a later, rather than earlier, point in time. But the more litigation the merrier is not at all what qualified immunity is about. . . .To be sure, there are prior cases in this circuit in which a use of force was reasonable one moment but was unreasonable in the next. *See Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011); *Waterman v. Batton*, 393 F.3d 471, 476 (4th Cir. 2005). From these cases it is evident that, as a general matter, an officer's use of force must be examined at the moment it takes place. The district court did not disagree with that proposition, nor do I. What mattered in our prior cases, however, and what ought to matter here, is whether the risk facing the officer was still present when force was used. In *Waterman*, officers continued to fire on a car after the 'vehicle passed the officers,'. . . while the officer in *Brockington* fired additional gunshots after the plaintiff 'fell off the porch onto the concrete backyard below,' 637 F.3d at 507. Neither case bears any resemblance to the one here. In this case, Pittman was in an isolated patch on a dark night. He was indisputably facing a man who had struggled to grab his weapon, sought by his own admission to shoot him in the head, fought through taser wire, ignored an order to 'get down, get down,' and had earlier disregarded clear warnings to stop. There was no break in the action. Pittman could well and reasonably believe that he was faced with a mortal threat and he was permitted to respond accordingly. It may be that one day this court will openly announce what is implicit here: a rule of constitutional law that subjects a police officer to liability for trying to save his life. I rather doubt, however, that our founding document forces officers to play roulette with their own existence. All we have ever needed to resolve this case is the recognition that no such unfeeling rule currently exists. Qualified immunity shields all but those are 'plainly incompetent or ... knowingly violate the law,'. . . and Officer Pittman is clearly not deserving of either label. He has violated no clearly established right, or any other right for that matter, and he is entitled to immunity. Interactions between citizens and police continue on edge, and minority communities and neighborhoods have justly felt that race brings with it an

unwarranted presumption of wrongdoing. The Fourth Amendment, invaluable as it is, is but an imperfect check on the invisible hand of discriminatory enforcement. These grievances are now rightly garnering increased attention, but attention to one side of a fraught equation raises the risk that the other side will be neglected. And there is another side. 'Nationwide, interest in becoming a police officer is down significantly.' *See* Tom Jackman, Who Wants to be a Police Officer? Job Applications Plummet at Most U.S. Departments: Perceptions of Policing, Healthy Economy Contribute to Decreased Applications at 66 Percent of Departments, Wash. Post (Dec. 4, 2018) ("Recently, [Chuck Wexler, head of the Police Executive Research Forum,] asked a roomful of chiefs to raise their hands if they wanted their children to follow them into a law enforcement career. Not one hand went up."). While this drop has many causes, unwarranted disrespect for the police profession is surely one. Police work, like the calling of many a skilled tradesman, has often been handed down through the generations in America, but self respect depends in part upon societal respect, and that for officers is sadly ebbing. Court decisions that devalue not only police work but the very safety of officers themselves risk severing those bonds of generational transmission that have so sustained the working classes of our country. It is a shame, because professional police work helps to bridge the gulf between the haves and have nots in a community and protects our most vulnerable and dispossessed populations. Law must sanction officers who would abuse their power or disregard controlling law; it should not scare off those who worry that no matter what they do or whom they protect, they cannot avoid suits for money damages. When Officer Pittman emerged from that tree line, 'gasping for air and ... in physical pain,'. . he ought to have been greeted with respect. Instead he has been pulled from one fight and thrust into another, this time in a courtroom. The district court in this case applied our precedent faithfully and the officer here showed conspicuous courage. I cannot join a decision that engineers such a perverse punishment for his actions and tells future officers that they cannot preserve their very lives without having their conduct assessed through the uncomprehending lens of hindsight. The second-guessing will have no end. If not now, never.")

Gandy v. Robey, 520 F. App'x 134, 145-47 (4th Cir. 2013) ("The district court submitted interrogatories # 3 and # 4 to the jury in an effort to sort out the question of qualified immunity. Under the approach established in *Saucier*, analysis of a qualified immunity claim involves a two-step procedure 'that asks first whether a constitutional violation occurred and second whether the right violated was clearly established.'. . As previously suggested, the district court intended interrogatory # 3 to resolve the first question of whether Robey committed a constitutional violation by asking the jury:

Has the plaintiff, Terry A. Gandy, established by a preponderance of the evidence that defendant Neal Patrick Robey violated David Charles Gandy's Fourth Amendment *right to be free from excessive use of force,* or his Fourteenth Amendment [right] not to be deprived of life without due process of law, when he shot David Charles Gandy?

J.A. 961 (emphasis added). The jury answered 'yes' to this question. In interrogatory # 4, which

the district court intended to resolve the second question of whether Robey was entitled to qualified immunity despite the constitutional violation, the jury was asked:

Do you find that at the time that he shot David Charles Gandy, Deputy Neal Patrick Robey had a reasonable belief that Mr. Gandy posed an *imminent threat* of causing death or serious bodily injury to Deputy Robey or to other persons present at the scene?

J.A. 962 (emphasis added). The jury answered 'yes' to this question as well, but then reached a general verdict in Terry's favor, awarding her $267,000 in compensatory damages. In responding affirmatively to special interrogatory # 3, the jury concluded as a factual matter that Deputy Robey's act of shooting David constituted excessive force, in violation of the Fourth Amendment. This finding is inconsistent with the jury's answer to special interrogatory # 4, in which the jury concluded that Deputy Robey had a reasonable belief that David posed an imminent threat of causing death or serious bodily injury to persons present at the scene of the incident. The inconsistency between the answers to these two questions is apparent because the factual question presented in interrogatory # 4, whether Deputy Robey reasonably believed that David posed a threat of imminent harm, is a core component of the issue addressed by special interrogatory # 3, namely, whether the force employed by Deputy Robey was excessive. As the Supreme Court held in *Graham v.. Connor,* 490 U.S. 386 (1989), an analysis of the reasonableness of a particular use of 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.' *Id.* at 396 (emphasis added). This court, too, has made clear that the question of whether a suspect posed an immediate threat of harm to an officer is a factor relevant to the analysis of an excessive force claim under the Fourth Amendment. [citing cases] Accordingly, the factual question of whether an individual poses a threat of danger is a component of, and is subsumed by, the broader question of whether the officer's use of force to seize an individual was excessive in violation of the Fourth Amendment. Unfortunately, special interrogatories # 3 and # 4 permitted the jury to answer these interrelated questions in an inconsistent manner. According to the jury, Deputy Robey reasonably believed that David posed an imminent threat of serious harm, yet the jury concluded that Deputy Robey used excessive force in preventing David from carrying out such a threat of harm. In addition to being inconsistent with each other, of course, these interrogatory answers are inconsistent with the general verdict awarding Terry $267,000 in compensatory damages. Despite its conclusion that Robey reasonably perceived an immediate threat from Gandy, it awarded damages as a result of his conduct. These inconsistencies implicate Fed. R. Civ. P 49(b)(4) and leave us no choice but to remand for a new trial.")

FIFTH CIRCUIT

Oliver v. Arnold, No. 20-20215, 2021 WL 2660249, at *7 (5th Cir. June 29, 2021) ("Our dissenting colleague argues that Arnold simply gave an unconventional teaching assignment that no clearly established law prohibits. . . He further posits that, in holding that Arnold's conduct, if proven,

would violate clearly established rights, we open the door for students to sue over any classwork they deem offensive. . . But the dissent fails to heed the limits on our jurisdiction in this context and to consider the facts in the light most favorable to Oliver. In this appeal, the 'impure motive' we must assume Arnold had for giving the Pledge assignment is not simply 'foster[ing] respect for the Pledge' as the dissent contends. . . Instead, because the district court found that Arnold's motives are genuinely disputed, we must presume here that Arnold was requiring his students to make precisely the sort of written oath of allegiance that the dissent acknowledges would be impermissible. . . We are not permitted to look beyond the district court's findings of disputed facts to conclude that, based on the evidence in the record, Arnold was instead merely employing a 'curious teaching method.'. .The dissent also places much weight on the fact that what is at issue here is a 'written assignment.'. . But the Court in *Barnette* stated, 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein.'. . It is immaterial that, under the facts we must accept here, the required pledge was a written oath rather than an oral one and that the consequence for non-compliance was an academic penalty rather than an overt disciplinary action. *Barnette* clearly states that teachers and other school officials may not require students to swear allegiance, and with the case in this posture, we must assume that this is what Arnold did. Thus, there is no danger that our decision will pave the way for students to file lawsuits over their being required to study Dr. Seuss or any of the other figures featured in the scenarios the dissent imagines. . . Unless a teacher is requiring students to swear their fealty and devotion to Dr. Seuss and his teachings, the assignments the dissent envisions are clearly not implicated by the present case.")

Oliver v. Arnold, No. 20-20215, 2021 WL 2660249, at *8-10 (5th Cir. June 29, 2021) (Duncan, J., dissenting) ("Qualified immunity yields only where an official violates 'clearly established law,' meaning binding authority 'that defines the contours of the right in question with a high degree of particularity.'. . But *Barnette* does not provide the 'particularity' to settle Oliver's First Amendment claims. In *Barnette*, the Pledge figured in a distinct context: students were made to join in a 'ceremony' where they stood and 'salut[ed]' the American flag while reciting the Pledge. . . By contrast, the Pledge assignment here involves nothing like *Barnette*'s coerced ceremonial recitation. Rather, the undisputed record shows students would 'transcribe' the Pledge's words as part of a timed in-class exercise. This is a curious teaching method, but no case cited to us addresses whether it violates the First Amendment. The majority mentions our *Barnette*-related decision in *Brinsdon*, . . . but that case addressed a mock exercise where students had to 'mimic the pledge ceremony that Mexican citizens follow' by reciting the Mexican Pledge of Allegiance and singing the Mexican National Anthem. . . Like *Barnette*, *Brinsdon* involved a coerced pledge recitation, not an assignment where students write a pledge's words. The majority concludes we lack jurisdiction to decide this issue because of disputes about Arnold's motives for giving the assignment. . . Like the district court, it relies on an in-class monologue Arnold gave the day after the assignment—a stream-of-consciousness rant ranging from the Pledge to communism, the Pope, the Cuban Missile Crisis, sex offender laws, and the Day of the Dead (the Mexican holiday, not the zombie movie). . . This appeal being interlocutory, I assume a jury could therefore infer that

Arnold gave the assignment hoping to inculcate respect for the Pledge. . . But nothing prevents us from deciding whether that dispute is *material* to qualified immunity. . . I fail to see how it is. Let's assume Arnold had an impure motive for giving the Pledge assignment. What decision clearly establishes that, because of that motive, he violated the First Amendment? Indeed, what decision says that asking students to *write down words as part of a class exercise* constitutes 'compelled speech' in the first place? . . . To be sure, one can conjure up a scenario where a teacher makes students 'swear allegiance' to the flag through a written oath. But no one pretends that is the situation here. . . Even if Arnold hoped to foster respect for the Pledge, that does not make him a latter-day Henry VIII. Finally, consider the implications of the majority's approach. It sends to trial a § 1983 claim based on a student's objection to a written assignment, merely because there is a question about the teacher's motive for giving it. One can imagine where this approach, if taken in a precedential opinion, might lead. It is not a happy place.")

Tucker v. City of Shreveport, 998 F.3d 165, 172-73 (5th Cir. 2021) ('Whether an official's conduct was objectively reasonable [in light of the law that was clearly established at the time of the disputed action] is a question of law for the court, not a matter of fact for the jury.'. . But, 'in certain circumstances where "there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question."'. . 'A qualified immunity defense alters the usual summary judgment burden of proof.'. . Although nominally an affirmative defense, the plaintiff has the burden to negate the defense once it is properly raised. . . The plaintiff has the burden to point out clearly established law. . . The plaintiff also bears the burden of 'raising a fact issue as to its violation.'. . Thus, once the defense is invoked, '[t]he plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct' according to that law. . .At the summary judgment stage, however, all inferences are still drawn in the plaintiff's favor. . . This is true 'even when ... a court decides only the clearly-established prong of the [qualified immunity] standard.'. . Likewise, 'under either [qualified immunity] prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.'. . 'Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions.'")

Tucker v. City of Shreveport, 998 F.3d 165, 175-81, 185 (5th Cir. 2021) ("As previously stated, we agree with the district court that 'two distinct moments of force must be separately analyzed: [(1)] [Officers] McIntire and Cisco taking Tucker to the ground, and [(2)] Defendant Officers punching and kicking him as he lay on the ground.' With each, the district court concluded that a reasonable jury could find that Defendant Officers acted unreasonably such that Tucker's Fourth Amendment rights were violated and, moreover, that Defendant Officers were not entitled to qualified immunity. Putting aside the question of whether Defendant Officers acted unreasonably for purposes of establishing a Fourth Amendment violation, we disagree with the district court's determinations relative to qualified immunity. . . .After watching the video footage of McIntire's sudden takedown of Tucker and the struggle that followed on the ground, it is easy for us—having the benefit of hindsight and multiple angles of video to scrutinize, frame by

frame—to question whether Tucker might have been handcuffed without scuffle or injury if McIntire had immediately verbally consulted with Cisco upon arrival, told Tucker that he was under arrest, and/or repeated Cisco's 'put your hands behind your back' instruction to Tucker before forcefully pulling him to the ground. . . Importantly, however, the legal reasonableness of a police officer's use of force—for purposes of the Fourth Amendment and qualified immunity—is not evaluated with the benefit of hindsight. Rather, our focus is on the officers' reasonable perception of the events at issue, as they happened, *without* the aid of hindsight, multiple viewing angles, slow motion, or the ability to pause, rewind, and zoom. Considering the record in this manner, we find the district court erred in concluding that the conduct of Officers McIntire and Cisco—in taking Tucker to the ground—was objectively unreasonable in light of pertinent clearly established law in November 2016. For the most part, the cases cited by the district court and Tucker, including some not decided until *after* the November 2016 incident here—simply acknowledge uncontroversial general principles. . . Moreover, *none* of these pronouncements 'squarely govern' the particular facts at issue here such that, in November 2016, *no* reasonable officer would have thought that the Defendant Officers' takedown of Tucker was legally permissible. . . .Faced with this scenario, viewed in its entirety, an officer in McIntire's position, having just arrived on the scene, could reasonably question whether Tucker might attempt to break away, fight being handcuffed, or even attempt to grab one of the officer's weapons. At a minimum, he could reasonably question whether Cisco had sufficient control over the scene or instead required immediate officer assistance. And, while consultation amongst the officers and Tucker might have quelled such concerns, hesitation for that purpose, absent an ability to predict the future with certainty, likewise could well have operated to the officers' detriment. This is evident, notwithstanding the district court's inference that a reasonable officer, in Defendant Officers' position, would have believed that Tucker was unarmed after Cisco removed the pocketknife from Tucker's pocket. . . . Given these uncertainties, and Tucker's superior height, particularly relative to McIntire, who apparently precipitated the officers' efforts to get Tucker to the ground, . . . we are convinced that the district court erred in its qualified immunity assessment of the 'takedown' aspect of Tucker's claim. . . Specifically, we are not convinced that applicable jurisprudence provided fair warning to Cisco and McIntire, as of November 30, 2016, that pulling Tucker to the ground under the circumstances and in the manner that occurred here would necessarily violate his Fourth Amendment rights against unreasonable seizure. . . Rather, even construed in Tucker's favor for summary judgment purposes, the foregoing facts and circumstances, when viewed in their entirety, created a scenario sufficiently 'tense, uncertain, and rapidly evolving' to place the officers' takedown of Tucker, even if mistaken, within the protected 'hazy border between excessive and acceptable force,' established by then-existing Fourth Amendment excessive force jurisprudence. Consequently, it is immaterial whether, as the dissent urges, the video footage 'does not blatantly contradict' Tucker's assertion that, immediately prior to the takedown, he was putting his hands behind his back in compliance with Cisco's orders and did not pull away prior to being taken to the ground. Accordingly, we find the district court erred in not granting summary judgment in favor of Defendant Officers, on grounds of qualified immunity, relative to the takedown. . . . In hindsight, knowing as we do that Tucker was unarmed, was not in possession of drugs or other contraband, and was pulled over for a non-violent traffic offense, it is regrettable

that Tucker suffered *any* injury or indignity at the hands of law enforcement officers, no matter how slight or temporary. And, of course, one might logically wonder if injury could have been avoided, or at least lessened, if one of the five persons involved had reacted differently. In one respect, the answer certainly is 'yes'; that is, Tucker could have obeyed and pulled over when Cisco signaled; or he could have quieted, stilled, and put his hands behind his back when ultimately stopped. Otherwise, in these scenarios, unlike in boxing, there unfortunately is no referee to ring a bell requiring everyone to 'return to their corners' for time out to rest, re-evaluate, and reconsider strategies. Even so, one might argue that, at some point in the maelstrom, considering that Tucker was on the ground and surrounded by three, and then with Kolb's arrival, four officers, including one of substantially superior height and brawn (Kolb), one of the officers could, or should, have called for a pause—that is, for the officers to cease any efforts to physically restrain Tucker—in order to give Tucker an opportunity, void of confusion and in a moment of calm, to make the logical decision to simply cooperate in Cisco's efforts to handcuff him, despite believing handcuffs to be unwarranted. We need not and do not decide that question today, especially on the instant record, reflecting that the entirety of the struggle lasted less than one minute. And, importantly, for its duration, the situation was replete with rapid movement, confusion, and the (apparently ignored) repeated directives, both by Defendant Officers and Tucker's onlooking girlfriend, for Tucker to: 'Put your hands behind your back! Stop moving! Stop resisting! Quit moving! Quit resisting!' In any event, clearly established law, as of November 30, 2016, certainly did not impose such a requirement. Nor, on the instant facts, viewed from the perspective of the officers, as the events occurred, *not* from hindsight, is this situation one in which it should have been obvious to Defendant Officers, even in the absence of pre-existing, factually similar case law, that the force being utilized was excessive.")

Tucker v. City of Shreveport, 998 F.3d 165, 185-87 (5th Cir. 2021) (Higginson, J., dissenting) ("The district court, in an extensively detailed order, determined that issues of fact precluded summary judgment based on qualified immunity for the Defendant Officers. I agree with the district court that fact issues remain as to whether Tucker, a motorist whose brake light was out, actively resisted arrest to justify a sudden, violent takedown and repeated physical blows and open kicks while prone and unarmed and surrounded by officers. . . I would affirm the district court. Video footage of the incident confirms the violent takedown and Defendant Officers' use of repeated strikes and kicks against Tucker while he was on the ground. Tucker asserts that, immediately prior to the takedown, he was putting his hands behind his back in compliance with Officer Cisco's order and did not pull away from Officers Cisco and McIntire prior to being taken to the ground. The footage does not 'blatantly contradict' his account. . . The law is clearly established that the use of violent physical force against—not to mention the extreme violence of kicking—an arrestee who is not actively resisting arrest is a constitutional violation. . . It may be that the Defendant Officers will nonetheless prove entitled to qualified immunity for the extreme force they used against Tucker from start to finish. But, as the district court found, a jury must first resolve the factual uncertainty as to whether Defendant Officers had justification and urgency to throw Tucker down and repeatedly strike and kick him. . . I regret not having persuaded the majority. I hope, however, our disagreement highlights the importance of recent attention given to

the issue of qualified immunity and violent police-citizen encounters. *See Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc); *id.* at 470 (Willett, J., dissenting); *id.* at 473 (Ho & Oldham, JJ., dissenting); *see also Jamison v. McClendon*, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) (exhortation to revisit doctrine of qualified immunity). From my perspective, it is not our role to second guess a district court's assessment of factual disputes, here pretermitting resolution of uncertainties about excessive force, specifically why police inflicted such abrupt and steadily escalating violence against this motorist whose brake light was out. When there is no dispute about the reasonableness of the use of force, for example when an arrestee flees or is an aggressor, the doctrine of qualified immunity will shield defendant officers. But here, I agree with the district court that qualified immunity is not yet an available tool to resolve this fact-laden, extended, and brutal police-citizen encounter. . . Instead, careful resolution properly comes, and constitutionally must come, from citizen peer jurors. Their fair assessment is vital as much for fellow citizens like Tucker and public trust, as it is for the police who respond to situational threats with professional restraint and seek to be distinguished from the few who do not, whose misconduct is maliciously unrestrained. One acting under color of law who throws a fellow citizen to the ground and then, when the other is prone, surrounded, and unarmed, repeatedly strikes and kicks him, surely gives rise to a material question of fact as to whether that government force is excessive.")

Renfroe v. Parker, 974 F.3d 594, 599-600 (5th Cir. 2020) ("The district court cannot be said to have resolved conflicting facts in favor of Deputy Parker . . . because Mrs. Renfroe did not offer any competent evidence of her own alleged facts. Despite being present, Mrs. Renfroe did not submit an affidavit describing what she saw as the shooting unfolded. And the allegations in her complaint are insufficient. . . . The evidence properly before the district court shows that Deputy Parker was responding to a call from dispatch reporting that a truck similar to the Renfroes' was present during an attempted burglary. Mr. Renfroe ran toward Deputy Parker, unaffected by the deputy's use of a taser. According to the unrebutted testimony of Deputy Parker, Mr. Renfroe began assaulting him as soon as he disappeared from the dash camera. And that unrebutted testimony is supported by video, which shows the body of the police vehicle jostling and shaking. Mrs. Renfroe emphasizes that Mr. Renfroe was not armed at the time of the shooting and that Deputy Parker did not warn him before using lethal force. But this court has previously found that an individual need not be armed for a law enforcement officer to believe that he is in danger of serious physical harm. *See, e.g.*, *Colston v. Barnhart*, 130 F.3d 96, 99–100 (5th Cir. 1997). And as this court recognized in *Colston*, an officer's duty to warn a suspect before using deadly force depends on whether that officer has time to do so. . . The video footage reflects that, given Mr. Renfroe's swift approach, it was not feasible for Deputy Parker to issue a warning.")

Bryant v. Gillem, 965 F.3d 387, 392-93 (5th Cir. 2020) ("There is no evidence that Gillem intended to shoot Bryant, and indeed, there is overwhelming evidence that he did not. Bryant argues otherwise, but we reject the argument based on this record. What needs further attention, though, is the effect of the evidence about Gillem's failure to holster his firearm as he was attempting to handcuff Bryant. Bryant contends that if Gillem acted unreasonably prior to the accidental shooting by intentionally failing to holster his weapon, that intentional act can be the basis for

liability under Section 1983. A nonprecedential opinion of this court dealt with that factual situation, stating that even if an officer's shooting of a suspect is accidental, there may be a constitutional violation if the officer 'acted objectively unreasonably by deciding to make an arrest, by drawing his pistol, or by not holstering it before attempting to handcuff' the suspect. *Watson v. Bryant*, 532 F. App'x 453, 457–58 (5th Cir. 2013). In that opinion, the court was addressing a situation in which the officer intentionally kept his weapon in one hand while handcuffing with the other despite his training not to do so, because of concerns the suspect had his own weapon. . . . No such concerns are involved here. The district court here found no 'competent summary judgment evidence reasonably showing that Gillem's failure to holster his firearm and his discharge of the firearm were intentional acts.' We look to the validity of that finding. There is not much in the record directly relevant to Bryant's possible intent to keep his weapon drawn. We conclude the district court properly summarized what is in the record:

After Gillem shot Bryant, he immediately pointed the pistol away from him. Gillem subsequently holstered the pistol on the right side of his hip and requested assistance. ... At deposition, Gillem stated that he thought he had holstered his gun prior to attempting to secure Bryant, that he did not intend to pull the trigger of his firearm, and that he accidentally shot Bryant. Consistent with his deposition testimony, Gillem subsequently filed a declaration in which he declared that '[t]he discharge was purely an accident,' that '[he] did not intend to discharge [his] weapon at any time,' and that '[he] did not even realize [he] was holding the gun in [his] left hand as [he] kneeled down and accidentally discharged the gun.'

Taking this to be the entirety of the relevant evidence, as we must on summary judgment, . . . we conclude that there is no fact dispute that Gillem unintentionally kept his firearm in his hand as he sought to restrain Bryant. Any finding by jurors to the contrary would only be 'unsupported speculation.'. . Because Bryant has failed to show a violation of any Fourth Amendment rights, we need not consider the second qualified-immunity prong.")

Mason v. Faul, 929 F.3d 762, 764-66 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 116 (2020) ("[A]lthough the parties might better have relied in their briefs on Supreme Court precedent from the ensuing three decades following *Young*, the trial court's reliance on that case as a general matter was not misplaced. Contrary to the views expressed by Judge Higginbotham's dissent in *Mason I* . . . and adopted here by Appellants, *Young*'s holding expresses the law regarding qualified immunity just as accurately for this case, involving both the officer's release of a trained canine and a shooting, as it did for a police encounter involving the shooting alone. It was for the jury to determine, as Judge Higginbotham's dissent acknowledged, . . . whether Mason's actions at any point could have led a reasonable officer to believe that Mason was posing a serious threat to others. Qualified immunity is justified unless *no* reasonable officer could have acted as Officer Faul did here, or *every* reasonable officer faced with the same facts would *not* have shot at Mason. . . . Appellants contend that the trial court erred by submitting to the jury two jury interrogatories, one on unconstitutional excessive force and one on qualified immunity. They contend that this alleged error, fortified by the court's misplaced reliance on *Young*, led to an inconsistent jury verdict on the issues. There is no error. The court's charges on the constitutional issue and qualified immunity separated the two questions and were

precisely and almost verbatim stated according to the Fifth Circuit Pattern Jury Instructions (Civil) 10.1 and 10.3. The pattern instructions, in turn, represent an admirable summary, based on Supreme Court and Fifth Circuit precedent, of the elements of a plaintiff's claim that must be proven at trial. We find no error in the court's use of the pattern charges. . . .Because the jury found that Officer Faul used 'objectively unreasonable' excessive force (Issue One) but was also entitled to qualified immunity (Issue Two), Appellants contend the verdict is fatally inconsistent. We disagree. That these two issues were framed according to governing law and the pattern jury instructions has already been pointed out. It is therefore inherently difficult to credit an argument of legal inconsistency, much less redundancy. To be sure, an officer's conduct must be objectively unreasonable to find a Fourth Amendment violation. . . And qualified immunity must be rejected where the facts found by the jury demonstrate not only a constitutional violation but also that the law was clearly established such that the officer's conduct was objectively unreasonable according to that law. . . It was not clearly established at the time of this shooting that an officer armed with a pistol and a trained canine could not release the canine on a suspect and nearly simultaneously begin to shoot to incapacitate Mason, unless *no* reasonable officer could have believed that Mason continued to pose a danger. The term 'objective reasonableness' pertains independently to the determination of a constitutional violation and also to the immunity issue. . . While Officer Faul, according to the jury, used objectively unreasonable excessive force in deploying the canine and shooting Mason, this is not fatally inconsistent with a factual finding of immunity. The jury must have found that although Officer Faul's belief that Mason posed and continued to pose a serious threat was incorrect, it was excusable or, at most, negligent in the heat and immediacy of the confrontation. Put otherwise, for immunity purposes, the jury need not have accepted the contention, advanced in Judge Higginbotham's dissent, that Mason posed no 'sufficient threat' before or during the confrontation. . . In that situation, qualified immunity was required. It is this court's duty to resolve any facial conflict in a jury's verdict. . . Here, given the numerous witnesses and conflicting versions of the encounter, we cannot conclude that the facts found by the jury could not support both of its findings.")

SIXTH CIRCUIT

Gerics v. Trevino, 974 F.3d 798, 803-08 (6th Cir. 2020) ("We can review summary judgment denials that raise only '"purely legal" issues'—those that 'typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law.'. . Because the historical facts are undisputed, Gerics urges us to find that the probable cause question in his civil suit falls within this exception to our usual rule. Defendants contend otherwise. Both parties find support in our caselaw. This court has inconsistently treated the ultimate question of probable cause in civil cases as both a question of fact for the jury *and* as a question of law for the judge. [citing cases] And in fact, other courts of appeals have not spoken with one voice on this question. [collecting cases] . . . . This confusion is not unfounded. The probable-cause question is a mixed question of fact and law that 'deal[s] with the factual and practical considerations on which reasonable people act,' and that question 'looks a lot like negligence, a classic jury question.'. . . [W]e conclude that the ultimate question of probable cause

(*separate* from the determination of historical facts) in a civil case when the historical facts are undisputed is a question of law for the court and not a jury. . . At summary judgment, the district court in this case determined that the historical facts were undisputed. . . Nevertheless, the court reserved the ultimate question of probable cause for the jury. . . But given the lack of disputed, historical facts, under *Ornelas*, the court should have resolved the probable-cause question as a matter of law. The case, however, proceeded to trial. And, of course, as part of that trial, the parties presented the facts to the jury through witness testimony and exhibits. The jury, however, was not specifically asked to resolve any disputes of historical fact. That's not surprising here, given that there really weren't historical fact disputes for the jury to resolve—consistent with what happened at summary judgment. Again, given that posture, the trial court should have resolved the probable-cause question. Instead, the court instructed the jury on the concept of reasonableness and asked the jury to resolve that issue as part of its verdict in the case. But asking the jury to resolve any question beyond disputes regarding historical facts on the probable-cause question was inappropriate. The jury found in favor of Defendants. But that ruling is not on appeal. . . Gerics doesn't challenge it because he believes that the trial court shouldn't have given the case to the jury in the first place. But despite the fact that we agree with Gerics on all of that, we are still left with the question of whether we can review the trial court's denial of summary judgment consistent with *Ortiz*. We conclude that we cannot. Although the probable-cause question involves a legal determination, it is not the kind of pure legal question (like the interpretation of a legal document, for example) envisioned by *Ortiz* because it depends on the resolution of historical facts. In other words, a mixed question of law and fact is not the same as a pure legal question for purposes of applying *Ortiz* even if the factual record is undisputed at summary judgment. As courts have noted in other contexts, summary judgment records are not trial records. . . . To be sure, our case does not present this scenario but, suffice it to say, courts recognize that trial records and summary judgment records are not the same. To us, this strongly suggests that we should not extend *Ortiz*'s exception (allowing review of pure legal questions) to mixed questions that depend on the determinations of historical facts—even if those facts appear undisputed at summary judgment. So we 'lack appellate jurisdiction over this portion of [Gerics's] appeal.'. . As for Gerics's unlawful-seizure argument, he does not argue that Hall lacked probable cause—independent of the probable cause needed for the arrest—for the unlawful seizure claim. Instead, Gerics's unlawful seizure argument on appeal rests entirely on whether Hall had probable cause to arrest Gerics that morning. . . So, we lack jurisdiction to review that claim as well.")

Hood v. City of Columbus, Ohio, 827 F. App'x 464, ___ (6th Cir. 2020) ("Even if it was reasonable for the Officers to open fire, . . . that does not automatically clear the entire encounter of the Constitution's prohibition against excessive use of force. We have analyzed similar claims in segments and found some parts of police officers' actions to be reasonable and other parts to be unreasonable. . . . Applying a segmented approach to this situation, the question is whether 'the officers' initial decision to shoot was reasonable but there was no need to continue shooting.'. . . Both Rosen and Bare said they stopped shooting when Green fell to the ground. In cases involving the use of deadly force, the deceased suspect is unable to tell what occurred, and '[a] court may not simply accept what may be a self-serving account by the police officer. It must look at the

circumstantial evidence that, if believed, would tend to discredit the police officer's story.'. . Several witnesses discredit the Officers' claim. . . . Considering the totality of the circumstances as explained by the multiple witnesses, including expert witnesses, the encounter between the Officers and Green is similar to the circumstances in *Russo* and *Margeson*, where the police continued to shoot even after the suspects were incapacitated, on the ground, and no longer safety threats. Genuine issues of material fact exist as to when the Officers stopped shooting at Green. This dispute is material to whether the Officers continued to shoot at Green after he was no longer a physical threat, in violation of Green's constitutional rights. Drawing all reasonable inferences in favor of Hood, the nonmoving party, a jury could reasonably conclude that the Officers' use of force in this context was unreasonable. . . . Our precedents provide 'fair warning' to the Officers that shooting at Green after he was no longer a safety threat is unconstitutional. Officers Rosen and Bare are not entitled to qualified immunity on summary judgment.")

Hood v. City of Columbus, Ohio, 827 F. App'x 464, ___ (6th Cir. 2020) (Guy, J., concurring in part and dissenting in part) ("I concur in the majority opinion except for the conclusion that there is a genuine dispute whether the officers continued to shoot at Green after a reasonable officer would have known that Green no longer posed a safety threat. The exchange of gunfire was brief, and the officers fired all of their rounds within a period of approximately five seconds. I cannot agree that the officers had time 'to stop and reassess the threat level' before the last shots were fired. . . In my view, no reasonable juror could find there was a point at which an objectively reasonable officer would have known that Green was no longer a threat. I would affirm the district court's judgment in full.")

Zuress v. City of Newark, Ohio, 815 F. App'x 1, __ (6th Cir. 2020) C("[I]n plaintiff's briefing, she concedes that the facts are undisputed. There cannot be a genuine dispute of material fact if no facts are disputed. Second, plaintiff argues that whether a use of force was reasonable is a question of fact. But in our circuit, whether a use of force was reasonable is 'a pure question of law.' *Chappell v. City of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009) (quoting *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007)); *see Dunn v. Matatall*, 549 F.3d 348, 353 (6th Cir. 2008) ("The Supreme Court ... clarified the summary-judgment standard for excessive-force claims, rejecting the argument that the question of objective reasonableness is 'a question of fact best reserved for a jury.' " (quoting *Scott*, 550 U.S.at 381 n.8)). The testimony of plaintiff's experts on a legal question cannot establish a genuine dispute of a material fact.")

Henry v. City of Flint, 814 F. App'x 973, ___ (6th Cir. 2020) ("The legal question before us turns, with regard to Henry's false-arrest claim, on only one issue. Could any reasonable officer have thought Henry violated City of Flint Code of Ordinance § 31-12 (Disorderly Conduct and Disorderly Persons)? Answering that question, in turn, depends on another: Did a neighbor turn on a light in his house? If so, a reasonable officer standing in the shoes of the Flint police might have had probable cause to think the ordinance had been violated, and thus qualified immunity would attach. If not, then no reasonable officer could have thought that arresting Henry was constitutional. Because this fact question was not captured on video and is disputed in the evidence,

we reverse and remand for a jury to make that determination. . . . Qualified immunity is an officer-friendly doctrine, designed to ensure that police, who have to make snap judgments to protect themselves and others in uncertain conditions, will not face undue Monday-morning quarterbacking from courts afterward. Qualified immunity therefore limits success in such suits to only those situations in which no reasonable officer, of all the universe of reasonable officers, would make a given decision. Review of a grant of summary judgment, on the other hand, is extremely friendly to the party that did not move for it, which in qualified immunity cases is often, but not always, the plaintiff, as here. Because juries, not judges, are supposed to be the trier of contested facts, and summary judgment involves a judge disposing of the case before it gets to a jury, summary judgment is reviewed taking all inferences as to facts that can reasonably be disputed in favor of the non-moving party. Only if that party's claim cannot survive even with every factual inference in his or her favor, do we uphold the district court's decision to terminate the lawsuit before it reaches a jury. As one can imagine, the interaction of the standards for qualified immunity and for summary judgment can cause courts considerable difficulties. In one situation, however, this tangle falls away, yielding a simple question. Consider a stylized hypothetical. A candidate for governor is giving a speech denouncing the incumbent, during which he is arrested by the state police. The police claim that they arrested him because, during the speech, the candidate drew a gun and shot a member of the audience. The candidate sues, stating flatly that no such thing happened and that the police arrested him because of his criticisms of the governor. There is no question that if the politician did in fact shoot someone, the police were justified in arresting him and therefore qualified immunity should shield them from suit. Alternatively, there is no question that if the shooting did not happen, the politician was the victim of an unlawful arrest redressable at law. Absent sufficient proof to resolve on summary judgment whether the shooting did or did not happen, this presents a question of fact for trial. The case, in other words, turns not on the question of qualified immunity, but on a question of fact predicate to the question of qualified immunity. . . .Such cases and their disposition reflect our longstanding rule that 'where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.'. . The question thus becomes whether our case fits into this scenario (which we will call the *Brandenburg* rule) in which qualified immunity either clearly applies or clearly does not, and which it is turns on a disputed question of fact. If this is such a *Brandenburg* rule case, remand for trial is appropriate. For while the legal question is clear either way (qualified immunity either would or would not attach), the factual question predicate to qualified immunity remains unclear. We now turn to examine whether this is such a case. . . . We hold that there is a genuine issue as to these facts, and so qualified immunity must be denied [as to false arrest claim] at this stage. . . . Although we again emphasize that our ruling is not a judgment on the ultimate state of facts, only that questions of fact remain, nevertheless the officers are not, at this stage, entitled to qualified immunity. We therefore reverse on this point. . . . Henry's handcuffing claim is a closer call. We have clearly established law that '[t]he Fourth Amendment prohibits unduly tight or excessively forceful handcuffing during the course of a seizure.'. . . Under our circumstances, in which Henry's complaints were indistinct, the need to get him some water was pressing, the station was near, and the officers had a very upset arrestee, qualified immunity at the very least attaches to the officers

as regards the handcuffing claim. Thus, the handcuffing claim cannot survive independently, though if the arrest is found unlawful, the handcuffing may form part of the damages as regards the arrest.")

Hernandez v. Boles, 949 F.3d 251, 257-58 (6th Cir. 2020) ("The Hernandez-Plaintiffs argue that the stop was legally improper because the Troopers 'were using a traffic stop as a pretext to fish for evidence of other crime.' It is well established, however, that police officers may stop a vehicle that commits a traffic violation and look for evidence of a crime, even if the traffic stop is merely a pretext and they do not have an independent reasonable suspicion of criminal activity. . .To be sure, the Hernandez-Plaintiffs were free to argue to the jury that the Troopers impermissibly extended the traffic stop by checking a second database or waiting 20 minutes to call BLOC because they were trying to uncover evidence of a crime. But Trooper Boles's admission that he was interested in ferreting out crime rather than merely issuing traffic tickets does not alter the Fourth Amendment analysis. It remains the case that an officer's subjective intent is generally immaterial; the stop, by contrast, is unlawful if it is prolonged beyond the duration of tasks incident to the traffic stop or 'beyond the time reasonably required' to address the traffic violation. . . .Certainly, the jury could have found that it was unreasonable to continue to detain the Hernandez-Plaintiffs after the initial warrant check of Hernandez and Betancourt came back negative because that was not necessary to carry out the traffic stop—especially given that no ticket was being written—or that the Troopers were unreasonably dilatory in waiting 20 minutes to call BLOC. But the Hernandez-Plaintiffs cite no authority mandating such a determination as a matter of law. And though the delay caused by checking two different databases is troubling, the Hernandez-Plaintiffs point to no bright-line rule that officers are limited to checking one database for warrants during a traffic stop. Whether the traffic mission was (or should have been) over by the time the dog arrived was a question properly submitted to the jury. In sum, the jury assessed all the facts and arguments and determined that the Troopers did not unreasonably prolong the traffic stop. The district court correctly determined that the question of whether the Troopers impermissibly prolonged the traffic stop was reserved to the jury. Drawing all reasonable inferences in favor of the Troopers, as we must, we cannot say that the Hernandez-Plaintiffs have met the high burden of showing that the jury's verdict was unreasonable as a matter of law. We therefore affirm the denial of the Hernandez-Plaintiffs' Rule 50(b) motion for judgment.")

Jones v. City of Elyria, Ohio, 947 F.3d 905, 917 (6th Cir. 2020) ("Viewing the evidence in the light most favorable to Jones, Weber and Chalkley employed excessive force in arresting Jones. By their own admission, the two officers tackled Jones to the ground, placed their weight on top of him, employed 'closed fist strikes' on his arms and sides, punched him in the face, and then tased him. They likewise concede that, when they first arrived on the scene, they were not investigating a crime. In fact, they had little more than a vague, generalized suspicion that Jones might be a threat to himself or others. And as these events unfolded, Jones says he neither resisted nor made any attempt to escape, while repeatedly asking the officers to stop. On Jones's version of the facts, these actions were objectively unreasonable. . . Of course, whether Jones was actually offering resistance or attempting to escape is critical to this matter's ultimate resolution. That

factual dispute appears to be one for a jury to resolve. . . .It is well established that an officer may not use more force than is necessary to effectuate the arrest of a suspect who offers no resistance. . . Viewing the facts in the light most favorable to Jones, the force Weber and Chalkley employed against Jones appears to have been unnecessary, as the district court concluded. Whether the events truly unfolded this way, however, is not for us to decide at this stage.")

SEVENTH CIRCUIT

Estate of Green v. City of Indianapolis, No. 19-3464, 2021 WL 1904871, at *5–7 (7th Cir. May 12, 2021) (not reported) (" The Estate does not quarrel on appeal with the rationale underlying the district court's qualified immunity determination—specifically, that it was not clearly unconstitutional for the officers to shoot at a fleeing driver whose maneuvering of the vehicle posed a danger to one or more of the officers themselves—but rather challenges the factual premise of the court's holding. The Estate asserts that if one resolves all disputes and inconsistencies and draws all inferences in its favor, one may reasonably infer that the Nissan had come to a halt, and that Green was outside of the vehicle or emerging therefrom when he was struck with the fatal bullet. The Estate bases its assertion on both the path of the fatal bullet as described in the coroner's report and the damage that bullet did to Green's heart. If the car was no longer moving and Green was no longer behind the wheel, the Estate posits, he posed no danger to any of the officers and there was no need to employ lethal force against him. Because Green is dead and we have only the officers' accounts of their fatal encounter with him, we must engage in a 'fairly critical assessment' of the evidentiary record. . . Nevertheless, the Estate as the party opposing summary judgment retains the burden of presenting evidence that creates a dispute of material fact for a finder of fact to resolve. . . We disagree with the Estate that, on the limited record before us, the factfinder could reasonably conclude that the Nissan had come to a stop and Green had already emerged from the car (or was in the process of doing so) when the fatal bullet struck him. The defendants themselves all testified to the contrary. They were present at the scene, observed the relevant events first-hand, and testified based on their personal knowledge. Their testimony, however self-serving it may have been, was affirmative evidence that Green was still inside of the Nissan, and was driving it toward the officers, when they shot at him. The fact that the fatal bullet entered Green's back (as did the bullet that struck his lower leg) makes it a possibility that he was already out of the car, but it was only one possibility among several. Green might have remained inside the car but turned his body away from officers defensively as they began to shoot at him. He might have been preparing to exit the car and turning toward the car door for that purpose. Or the bullet might have ricocheted within the car so as to strike him in the back. . . These additional possibilities are consistent with the officers' testimony. Setting aside for a moment that testimony, which unequivocally places Green inside of the car, we can only speculate as to the likelihood of any of the various alternative possibilities, including the possibility that Green had already emerged or was emerging from the car. Expert testimony may not always be necessary to enable a factfinder to make an assessment as to the likely trajectory of a bullet, but this strikes us as the sort of case in which such testimony is essential to support the Estate's factual theory. . . Without expert opinion on this subject, there would literally be no evidence to guide the jury in any direction in assessing the likelihood that

Green was not inside the car, as the officers testified, but rather outside of the car, as the Estate presupposes, when the fatal bullet struck him. On the record as it stands, a jury could only do what we can, which is to speculate. As the Estate itself concedes, speculation is not a valid basis for a judgment in the Estate's favor or for defeating the officers' motion for summary judgment. . . Nor can we say that the damage done by the bullet that pierced Green's heart rules out the possibility that the bullet struck him while he was still in the car. The Estate presumes, based on the coroner's finding that the bullet transected Green's heart and disrupted coronary blood flow, that Green's death must have been virtually instantaneous and that it would have been impossible for him to open the car door and get to his feet, 'as if nothing had happened,' before collapsing, as Stewart testified. But this, again, is a subject on which expert testimony is required. We ourselves can only speculate on the record before us as to how quickly the injury to Green's heart would have disabled and killed him. Again, the coroner's report is silent as to how quickly death would have resulted. The same is true with respect to the injuries to Green's lower leg, which the Estate likewise suggests would have made it impossible for Green to get out of the car and rise to his feet. Without medical testimony as to the likely effects of such injuries, we, like the factfinder, can only guess as to what Green could or could not have done. In a further effort to call into doubt the officers' exculpatory recounting of the events, the Estate has flagged certain inconsistencies among the officers' accounts and between those accounts and certain other evidence in the record. None of the discrepancies, however, is sufficient to establish a dispute of fact material enough to preclude summary judgment. . . . For the reasons we have set out above, the district court did not abuse its discretion in excluding the report of the Estate's expert. Nothing in the remaining evidence presents a material dispute of fact precluding summary judgment and requiring a trial. In the absence of admissible expert testimony supporting the Estate's theory that Green was emerging from or outside of the car when he was fatally shot by the defendant police officers, a jury could only speculate that Green was exiting the car and no longer plausibly posed a danger to the officers.")

King v. Hendricks County Commissioners, 954 F.3d 981, 985-87 (7th Cir. 2020) ("To ensure fairness to a deceased plaintiff whose representative alleges an impermissible use of deadly force, given the impossibility of victim testimony to rebut the officers' account, we scrutinize all the evidence to determine whether the officers' story is consistent with other known facts. . . . We appreciate the difficulty King faces in countering the officers' testimony, but most of this evidence does not undermine the officers' account. King in the end is forced to rely on the theory that the officers shot Bradley for no reason and planted the knife on him. But the evidence supporting that version of events does not rise above speculation or conjecture. It creates only metaphysical doubt and requires us to make logical leaps rather than reasonable inferences. . . . Ultimately, we are left with substantial testimonial and physical evidence supporting Hays's version of events, and no concrete evidence rebutting it. King did not present enough evidence to raise a genuine dispute of fact for trial, and so summary judgment for Hays on the section 1983 claim was appropriate. In light of our ruling on the merits, we have no need to address Hays's back-up assertion that he was entitled to qualified immunity.")

Strand v. Minchuk, 910 F.3d 909, 913-19 (7th Cir. 2018) (as amended on pet. for rehearing, Dec. 6, 2018) ("In answering whether a police officer is entitled to qualified immunity as a matter of law, we must avoid resolving contested factual matters. . . If we detect a 'back–door effort' to contest facts on appeal, we lack jurisdiction. . . Aware of this jurisdictional limitation, Officer Minchuk emphasizes that he is not contesting any facts and indeed, for purposes of this appeal, accepts them in the light most favorable to Strand as the non–moving party. We take him at his word and proceed to evaluate whether Officer Minchuk is entitled to qualified immunity as a matter of law. . . . In traveling this path, we cannot retreat from our obligation to avoid trying to answer (as a factual matter) the question the district court emphasized remains unresolved: whether enough time went by between Strand's surrender and Minchuk's use of deadly force such that Strand was subdued at the moment Minchuk fired the shot. The Supreme Court has underscored the necessity for this exact discipline in this exact context—appellate review of a denial of qualified immunity on summary judgment. [citing *Tolan v. Cotton*] In evaluating Officer Minchuk's entitlement to qualified immunity, we undertake the twofold inquiry of asking whether his conduct violated a constitutional right, and whether that right was clearly established at the time of the alleged violation. . .We are free to choose which prong to address first. . .The first prong of the inquiry, whether Officer Minchuk used excessive force and thereby violated Strand's Fourth Amendment rights, is governed by the Supreme Court's decisions in *Tennessee v. Garner*. . .and *Graham v. Connor*[.] . . . Whether we approach Officer Minchuk's request for qualified immunity by first assessing the merits of Strand's claim or instead by evaluating whether Minchuk's conduct violated clearly established law, we come to the same barrier: we cannot—as we must—view the facts in Strand's favor and conclude as a matter of law that Minchuk is entitled to qualified immunity on summary judgment. Officer Minchuk resorted to the use of deadly force at a time when Strand had stopped fighting, separated from Minchuk, stood up, stepped four to six feet away from Minchuk, and, with his hands in the air, said, 'I surrender. Do whatever you think you need to do. I surrender, I'm done.' The record shows that Strand was unarmed at all points in time. Furthermore, upon standing, raising his hands, and voicing his surrender, Strand never stepped toward Minchuk, made a threatening statement, or otherwise did anything to suggest he may resume fighting or reach for a weapon. Recall, too, the broader circumstances that led to the shooting. The police were not in hot pursuit of an individual known to be armed and dangerous. Nor had the police responded to a report of violent crime or otherwise arrived at a location only to find an individual engaged in violent or menacing conduct or acting so unpredictably as to convey a threat to anyone present. To the contrary, the entire fracas leading to Officer Minchuk's use of deadly force began with his issuance of parking tickets. After Strand declined to make an on–the–spot cash payment and instead sought to take pictures to show the absence of no–parking signs, Officer Minchuk allowed the situation to escalate and boil over by slapping Strand's cell phone to the ground and then tearing Strand's shirt from his body. The fist fight then ensued, with Strand choosing to stop throwing punches and stand up and offer his express surrender, including by raising his hands above his head. It was then—with no direction to Strand to keep his hands in the air, to fall to his knees, or to lay on the ground—that Officer Minchuk drew his gun and fired the shot. A reasonable jury could find that Officer Minchuk violated Strand's constitutional right to remain free of excessive force. On these facts and

circumstances, considered collectively and in the light most favorable to Strand, Strand no longer posed an immediate danger to Officer Minchuk at the time he fired the shot. The Fourth Amendment does not sanction an officer—without a word of warning—shooting an unarmed offender who is not fleeing, actively resisting, or posing an immediate threat to the officer or the public. . . . The district court correctly observed that additional fact finding was necessary to determine whether "the rapidly–evolving nature of the altercation" justified Officer Minchuk's use of deadly force or whether 'he had time to recalibrate the degree of force necessary, in light of [Strand's] statement of surrender.' This fact finding cannot occur on summary judgment (or appeal), so we cannot conclude that the district court committed error in determining a genuine issue of material fact prevented a resolution of the merits of Strand's claim. . . . What Officer Minchuk sees as undisputed—whether Strand continued to pose a threat at the moment Minchuk deployed deadly force—is actually unresolved and indeed vigorously contested by Strand. For Minchuk to prevail at this stage, the record must show that he fired while Strand still posed a threat. Instead, the record shows that Strand had backed away, voiced his surrender, and up to five, ten, or fifteen seconds may have elapsed while Strand stood with his hands in the air. And that is why the district court rightly determined, after a close and careful analysis of the record, that Minchuk was not entitled to qualified immunity as a matter of law at summary judgment on the merits of Strand's claim. This same factual dispute also prevents us from concluding, as Officer Minchuk urges, that Strand's clearly established constitutional rights were not violated, the second prong of the qualified immunity inquiry. We analyze whether precedent squarely governs the facts at issue, mindful that we cannot define clearly established law at too high a level of generality. Yet we can look at the facts only with as much specificity as the summary judgment record allows. It is beyond debate that a person has a right to be free of deadly force 'unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force.'. . But the district court could not determine whether—at the point Minchuk used deadly force—Strand posed an imminent harm to Officer Minchuk. The record left unclear precisely how much time went by from the moment the fist fight stopped to the moment Officer Minchuk pulled the trigger. . . . And this is the hurdle—the unresolved material question of fact—that Officer Minchuk cannot clear on summary judgment. . . .The existence of the substantial factual dispute about the circumstances and timing surrounding Minchuk's decision to shoot Strand precludes a ruling on qualified immunity at this point. This is not to foreclose the availability of qualified immunity to Officer Minchuk at trial. At trial a jury may resolve these disputed facts in Officer Minchuk's favor, and the district court could then determine he is entitled to qualified immunity as matter of law. . . . But we cannot make such a determination at this stage on this record.")

Edwards v. Jolliff-Blake, 907 F.3d 1052, 1062-63, 1067 (7th Cir. 2018) (Hamilton, J., dissenting in part) ("Plaintiffs' claims against defendant Jolliff-Blake should be remanded for trial. As recognized by Judge Chang, the first district judge to handle this case, both Officer Jolliff-Blake and the 'John Doe' informant who testified have significant credibility problems. Those credibility problems call into question the foundation for the search warrant. A jury should decide the claims against Jolliff-Blake. . . . The central claim in this lawsuit is that Officer Jolliff-Blake made false

statements, either knowingly or recklessly, to the judge who issued the search warrant. . . The plaintiffs contend that Officer Jolliff-Blake was at least reckless in obtaining a search warrant for their home based on what he was supposedly told by an unreliable heroin addict, one who was desperately 'dope-sick' and desperate to tell the police something—or anything. It's not surprising that heroin addicts are sources of information about where to buy heroin. But the key questions are what Officer Jolliff-Blake knew when he sought the warrant, and whether he had obvious reasons to doubt the information he reported to the judge. . . . To be clear, if we accept the defendants' *final* version of the facts here, then all defendants were entitled to summary judgment. The majority's account of the law applicable to the defense's final version of the facts is correct. The search of the plaintiffs' home was a fruitless fiasco, but it did not violate the Fourth Amendment if it was based on a mistaken but honest judgment to trust what the informant told the police. But I disagree with my colleagues because two genuine issues of material fact are at the heart of plaintiffs' claims against Officer Jolliff-Blake. Conflicting testimony from Jolliff-Blake and 'Doe' means that neither's testimony can or should be accepted for purposes of summary judgment. The first issue is the sheer identity of the 'John Doe' informant upon whom the search warrant application was based. The second is which house 'John Doe' supposedly told Jolliff-Blake was where he had bought heroin. The majority accepts as undisputed the final answers provided in discovery by Jolliff-Blake and then by Doe. As explained below, however, those final answers conflicted with repeated, sworn testimony from both Jolliff-Blake and John Doe on the same subjects. . . . I do not contend that trivial variations in a witness's testimony always require denial of a summary judgment motion based on his testimony. The contradictions here, however, go to the heart of the case: who was 'John Doe,' where did he say he bought the heroin, and did the police have any business trusting him? If Jolliff-Blake cannot keep his sworn testimony straight on these matters, it is a mistake to say the courts *must* accept the final, defense-friendly version of his testimony. Consistent with our pattern instructions, this case presents issues for trial, not summary judgment. The majority's decision to accept Jolliff-Blake's explanations for his conflicting testimony and impeachment takes this court well outside the proper role for summary judgment. Maybe this fiasco of a search was the result of an honest but too-credulous officer's mistake in crediting 'Doe.' That's what my colleagues believe. But that's not our decision to make. Maybe we are just seeing a cover-up for the fiasco. The evidence also permits a reasonable inference that Jolliff-Blake's and Doe's defense-friendly account of any facts simply does not deserve to be believed. Plaintiffs' claims against Jolliff-Blake should be tried. To that extent, I respectfully dissent.")

EIGHTH CIRCUIT

Burbridge v. City of St. Louis, Missouri, No. 20-1029, 2021 WL 2603181, at *4 (8th Cir. June 25, 2021) ("While the district court could have been clearer, we interpret its statements and citations to mean that it found a reasonable jury could find that the amount of force applied to Drew by each officer, including Officer Biggins, was unreasonable. Officer Biggins does not challenge the district court's statement that the officers undisputedly participated in Drew's arrest and used force during it. Rather, he argues that video evidence blatantly shows that his involvement

in the arrest was limited to kneeling on Drew's legs and that therefore his use of force was *de minimis*. We have carefully reviewed the videos of the incident, and we are unable to clearly see that Officer Biggins's involvement was limited to kneeling on Drew's legs, nor are we able to otherwise parse the actions of individual officers. We therefore conclude that the videos do not blatantly contradict Drew's version of events or the district court's determinations regarding the record.")

McManemy v. Tierney, 970 F.3d 1034, 1040 (8th Cir. 2020) ("Construing the facts in McManemy's favor, Deputy Tierney still did not violate a clearly established right. McManemy does not suggest that this is the 'rare[,] obvious case,' in which the violation is so clear that it is unnecessary to identify an 'existing precedent.'. . So to prevail on this claim, McManemy must point to a case that 'squarely governs the specific facts at issue.'. . He believes there are two: *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008), and *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009). Neither, however, 'squarely governs' this case. The first, *Gill*, is the closer of the pair. There too, an officer slammed his knee into an arrestee's head. . . The arrestee, who was lying on the ground at the time, suffered five facial-bone fractures, a concussion, and a brain bleed after the officer performed a standing knee-drop maneuver on him. . . We upheld the jury's finding that this level of force was unreasonable under the circumstances. . . For two reasons, however, *Gill* is still not close enough. First, Gill offered 'no resistance,' whereas McManemy led deputies on a 10-minute, high-speed chase and, by his own admission, put up some resistance once he was captured. . . Second, the level of force was different. By jumping on Gill from a standing position, the officer used near-deadly force and caused life-threatening injuries. . . Although what happened here was violent, it is not in the same league as the knee-drop maneuver from *Gill*. . . The second, *Krout*, is not even close. It involved extreme levels of 'gratuitous' force against a 'fully[-]subdued,' non-resisting arrestee who eventually died. . . An officer 'hip toss[ed]' him to the ground, and then, together with other officers, beat him. . . The use of force in this case, by contrast, falls well short of *Krout*. And perhaps most importantly, McManemy admits that he suffered his injuries during a struggle to handcuff him, not when he was 'fully subdued.'. .This analysis extends to the other deputies, too. To hold them liable for their failure to intervene, McManemy had to establish that they knew 'or had reason to know that excessive force would be or was being used.'. . If Deputy Tierney did not violate a clearly established right, then the other deputies would not have had 'fair notice' that he was using *unconstitutionally* excessive force against McManemy either.")

McManemy v. Tierney, 970 F.3d 1034, 1041-42 (8th Cir. 2020) (Grasz, J., concurring in part and dissenting in part) ("Viewed in a light most favorable to McManemy, the facts establish Deputy Tierney repeatedly — twenty to thirty times — kneed McManemy in the eye area *after* he was subdued and restrained. Therefore, I do not believe Tierney is entitled to qualified immunity for this gratuitous use of force and I dissent from Section II.B. of the court's opinion. When defining the context surrounding the challenged use of force for purposes of either prong of the qualified immunity analysis, we are required to grant inferences in favor of the non-moving party. . . Failure to do so results in the impermissible invasion into the province of the fact-finder by weighing the evidence. . . Here, I believe the context surrounding Tierney's use of force is

particularly important. McManemy led police officers on a long, high-speed chase. This put both the participants and the public at risk. But ultimately he laid facedown in the middle of the road with his arms and legs spread, giving himself up for arrest. According to McManemy, the resulting melee occurred because the officers incorrectly thought he was resisting arrest when they tried to handcuff him, when in fact a preexisting shoulder injury and an involuntary response to tasing caused the appearance of resistence. Regardless of the reason for the struggle, I agree with the court it was reasonable for the officers to believe otherwise and this justifies some of the physical force used. But I do not believe Tierney's repeated kneeing of McManemy in the eye was within that justified use of force. The video evidence presented showed Tierney arrived at the scene after McManemy had laid down and after at least four officers were already on top of him. Tierney arrived, first kicked or stomped on McManemy's leg, and then moved to the left side of McManemy's head. As the court explains, the video does not show what Tierney then does for the next minute or so. But if we are to believe McManemy, Tierney repeatedly — up to twenty or thirty times — kneed him, resulting in demonstrable injury to the eye. The court distinguished what happened to McManemy from cases like *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008), and *Krout v. Goemmer*, 583 F.3d 557 (8th Cir. 2009), by noting that the plaintiffs in those cases were subdued and offered no resistence. But in light of the above-mentioned evidence and our duty to draw inferences in McManemy's favor, a jury could conclude that some of the strikes from Tierney's knee occurred after McManemy was handcuffed and after any reasonable belief in resistance would cease. That is, a jury could find that Tierney struck McManemy's face when he was subdued and offered no resistence. If true, such actions were completely unnecessary to effect the arrest. This circuit has clearly established that gratuitous force after a subdued suspect no longer poses a threat violates the Fourth Amendment. [citing cases] Thus, I believe there is sufficient evidence of a clearly established Fourth Amendment violation and would reverse the district court's grant of summary judgment in favor of Tierney.")

Littrell v. Franklin, 388 F.3d 578, 581-87 (8th Cir. 2004) ("Officer Franklin did not raise the issue [of qualified immunity] until trial, when he asserted it as a defense. The district court presented the qualified immunity question to the jury in the form of an interrogatory. The verdict form posed four questions. The first asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin used excessive force when he arrested plaintiff on February 9, 2001?' The jury responded, 'Yes.' The second interrogatory asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin reasonably believed that his conduct on February 9, 2001, with respect to the plaintiff, was objectively reasonable in light of the legal rules clearly established at that time?' Again, the jury responded, 'Yes.' Because of its affirmative response to the second interrogatory, the jury was instructed not to answer the third and fourth questions on the verdict form, which pertained to damages. In accordance with the jury's response to the second interrogatory, the district court entered judgment in favor of Officer Franklin, finding that he was entitled to judgment as a matter of law on the basis of qualified immunity. . . .In Ms. Littrell's appeal, [footnote omitted] she argues that the district court's submission of the second interrogatory to the jury was erroneous because the reasonableness of an officer's actions in light of clearly established law is a question of law for the court, and not the jury, to determine. . . .The

district court properly submitted the issue of excessive force to the jury, and the jury found that Officer Franklin violated Ms. Littrell's constitutional right to be free from excessive force. . . . After the jury found that Officer Franklin used excessive force when he apprehended Ms. Littrell, it found (in the form of its response to interrogatory number two) that he reasonably believed his actions were objectively reasonable in light of clearly established law. Ms. Littrell contends that the district court erroneously submitted this second question to the jury because the court–not the jury–is charged with determining whether a defendant is entitled to qualified immunity. Ms. Littrell does not contend that the second interrogatory misstated the law of qualified immunity. Rather, she argues merely that the district court itself should have made the qualified immunity ruling. Ms. Littrell is correct. The law of our circuit is clear. The issue of qualified immunity is a question of law for the court, rather than the jury, to decide . . . . The issue of qualified immunity, however, is frequently intertwined with unresolved factual questions. Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling. . . . On the facts of this case, special interrogatories should have asked (1) whether Ms. Littrell resisted arrest before Officer Franklin forcibly restrained her and (2) whether Officer Franklin knew Ms. Littrel was injured when he continued to handcuff and forcibly place her in the car. Specific findings on these questions of fact would have enabled the district court to address the legal issue of qualified immunity through reference to excessive force standards that are clearly established. . . . In short, where questions of historical fact exist, the jury must resolve those questions so that the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law. . . . The specific contours of a plaintiff's rights may be established through reference to prior cases. Carefully drafted interrogatories allow jurors to decide factual issues and preserve the ultimate legal determination for the court. It is error, however, to submit the ultimate question of qualified immunity to the jury. Our inquiry, however, does not end here. The district court relied on Fifth Circuit precedent when it submitted the qualified immunity question to the jury. . . . Ms. Littrell objected to neither this practice nor the content of the second interrogatory submitted to the jury. She does not argue that she offered alternate instructions that the district court rejected. We, therefore, review the district court's judgment only for plain error. . . . Submission of the qualified immunity issue to the jury was wholly consistent with the practice of the Fifth Circuit. Although different from our own practice, we do not think the Fifth Circuit's practice is fundamentally unfair or in any way threatens the integrity of the judicial process. Importantly, the Supreme Court has not censured the Fifth Circuit's practice. This is true even though there exists a split among the circuits as to the proper apportionment of responsibility between juries and judges in this context. [footnote omitted] Against this backdrop, we do not find that reliance on the practice of the Fifth Circuit resulted in the sort of error that we may properly characterize as plain error.").

NINTH CIRCUIT

Hunter v. City of Federal Way, 806 F. App'x 518, ___ (9th Cir. 2020) ("Durell argues that the district court erroneously refused to submit special interrogatories to the jury because such interrogatories might have strengthened his qualified immunity defense. But there is 'no authority from this circuit supporting the proposition that special interrogatories are *required* for the purpose of evaluating a post-verdict qualified immunity defense.' *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017).")

Nehad v. Browder, 929 F.3d 1125, 1140-41 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 235 (2020) ("Courts may examine either prong first, depending on the relevant circumstances. . . Here, the district court granted Browder qualified immunity on the second prong. A review of the district court's order, however, reveals that the court construed the facts in the light most favorable to Browder, asserting as established fact not only Browder's version of events, but also other facts favorable to Browder, such as the disputed fact that Browder verbally warned Nehad to 'Stop[,] Drop it.' '[W]hen there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity.'. . As discussed above, there are numerous genuine disputes of material fact, which preclude a grant of summary judgment on qualified immunity. . . .Under Appellants' version of the facts, Browder responded to a misdemeanor call, pulled his car into a well-lit alley with his high beam headlights shining into Nehad's face, never identified himself as a police officer, gave no commands or warnings, and then shot Nehad within a matter of seconds, even though Nehad was unarmed, had not said anything, was not threatening anyone, and posed little to no danger to Browder or anyone else. Appellees cannot credibly argue that the prohibition on the use of deadly force under these circumstances was not clearly established in 2015.")

Easley v. City of Riverside, 765 F. App'x 282, ___ (9th Cir. 2019) (en banc) ("In this case, based on testimony elicited at the *sua sponte* evidentiary hearing, the district court resolved disputed factual issues, some of which required the court to assess witnesses' credibility. Resolving disputed issues of fact and making credibility determinations are not permitted at the summary judgment stage. Because there were disputed issues of fact, and in light of the parties' joint stipulation, we must reverse the entry of summary judgment and remand for trial. The defendant officers may still seek qualified immunity by filing a Federal Rule of Civil Procedure 50(a) motion before the case is submitted to the jury, as outlined in *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009); *see also* Fed. R. Civ. P. 50(a).")

Easley v. City of Riverside, 765 F. App'x 282, ___ (9th Cir. 2019) (en banc) (Graber, J., with whom Berzon, Christen, and Hurwitz, JJ., join, concurring) ("I write separately to add that, in my view, a district court may not—as the court did here—sua sponte raise the issue of qualified immunity (or any other non-jurisdictional affirmative defense) when the defendant has waived that issue. . . .Here, the waiver pertained only to summary judgment, but that is precisely the waiver that the district court failed to respect. Defendant Macias affirmatively waived

the qualified-immunity affirmative defense, both in writing and orally, for the purpose of summary judgment; that is, he agreed to go to trial on that affirmative defense. And there was consideration for his promise; he agreed not to move for summary judgment in exchange for Plaintiff's dismissing certain claims. I would hold, therefore, that the district court improperly injected the issue of qualified immunity into a pretrial summary judgment proceeding.")

Easley v. City of Riverside, 765 F. App'x 282, ___ (9th Cir. 2019) (en banc) (Berzon, J., concurring) ("I concur in the majority disposition and in Judge Graber's concurrence. I write separately to note another basis for reversing the district court: I would hold that an evidentiary hearing to determine whether summary judgment is appropriate is never permitted. The district court erred in using such a procedure. . . . Here, . . . the district court conducted what was essentially a two-day bench trial, during which Easley, Officer Macias, and multiple witnesses testified on the stand. Far from expediting the case, the district court's evidentiary hearing 'force[d] the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'. . I join the majority disposition in full. In my view, however, the district court never should have held the evidentiary hearing it ordered *sua sponte*, whether or not the parties stipulated to bypass summary judgment (as they did), and whether or not the court held the hearing with the intent to make credibility findings improper on summary judgment (as it did).")

Estate of Elkins v. Pelayo, 737 F. App'x 830, 833 (9th Cir. 2018) ("In *Cruz*, we stated: 'To decide this case a jury would have to answer just one simple question: Did the police see Cruz reach for his waistband? If they did, they were entitled to shoot; if they didn't, they weren't.' *Cruz*, 765 F.3d at 1079. Here, because the record contains reasons to doubt whether Officer Pelayo actually saw Elkins reach for his waistband, the decision similarly should be left to the jury. In summary, regarding Plaintiffs' Fourth Amendment claim, a reasonable jury could find on the evidence presented that Elkins was not reaching for his waistband or that, even if he was, the use of deadly force in this case was excessive.")

Estate of Elkins v. Pelayo, 737 F. App'x 830, 834-37 (9th Cir. 2018) (N.R. Smith, J., dissenting) ("In making its decision, the majority ignores the Supreme Court's constant admonition to determine issues of qualified immunity at the earliest stage of litigation by failing to apply the summary judgment rules related to the doctrine of qualified immunity. Let me explain. . . .Reviewing all of the evidence in the record, there is simply no evidence contradicting Officer Pelayo's testimony. Instead, the evidence corroborates Officer Pelayo's statements. First, Elkins was carrying a methamphetamine pipe near his waistband. Plaintiffs admit that '[g]iven that Elkins landed from a significant height in a crouching position, it is possible that Elkins reached towards the methamphetamine pipe because it was digging into his abdomen or had caused him pain.' In addition, the district court noted that '[s]uspects have been known to discard contraband when fleeing from the police.' Second, Plaintiffs note that Elkins was wearing baggy pants and may have reached for his waistband to pull them up. Surveillance video from the gas station supports this theory. In the video, Elkins appears to reach for and grab his waistband while fleeing his vehicle

on foot. Third, Officer Pelayo's contemporaneous statements confirm these uncontroverted facts. . . As the officers approached Elkins after the shooting, Officer Pelayo was yelling 'Why were you reaching? Do you have a gun? Do you have a gun? Why were you reaching for your waistband?' Finally, the testimony of Sergeant Ynclan and Detective Guzman is consistent with Officer Pelayo's statement that Elkins reached for his waistband. In sum, Officer Pelayo was pursuing a suspect, known to use deadly force to escape capture. When Officer Pelayo saw the suspect reach into his waistband, he believed the suspect was attempting to retrieve a weapon. As a result, Officer Pelayo responded with deadly force. . . . Facing a nearly identical factual situation, we have already determined that the use of deadly force is objectively reasonable. In *Cruz*, officers were pursuing a reportedly armed suspect who displayed 'dangerous and erratic behavior.'. . We determined that '[i]t would be unquestionably reasonable for police to shoot [such] a suspect ... if he reaches for a gun in his waistband, or even if he reaches there for some other reason.'. . Thus, it was reasonable for Officer Pelayo to use deadly force when he saw Elkins reach into his waistband even though Elkins was not in fact armed. . . Consequently, his conduct did not violate Elkins' constitutional rights. On the other hand, even if Officer Pelayo's actions somehow violated a constitutional right, Plaintiffs have not satisfied the second prong of the qualified immunity analysis. . . .Here, even the majority admits Officer Pelayo's use of deadly force may not have violated Elkins' rights. Indeed, *Cruz* appears to foreclose any other conclusion. . . Thus, Officer Pelayo is entitled to qualified immunity. . . . We may not absolve Plaintiffs of their burden of presenting evidence sufficient to survive summary judgment, no matter the tragic circumstances in a case. Here, there is no evidence to contradict Officer Pelayo's statement that Elkins (who had previously tried to run over an officer with his car to escape capture) reached for his waistband. Rather, all of the circumstantial evidence is consistent with Officer Pelayo's statement. Thus, no reasonable jury could find that Elkins did not reach. The majority fails to cite any evidence in the record sufficient to convince a reasonable jury that Elkins did not reach for his waistband. Construing the facts cited by Elkins in his favor, 1) Officer Pelayo was not told that Elkins was armed with a gun, 2) the officers did not find a weapon when they searched Elkins after the shooting, and 3) Elkins' wounds had a back-to-front trajectory. However, none of this evidence shows that Elkins did not reach into his waistband. . . . [T]he fact that the officers did not find a weapon when they searched Elkins does not prove that Elkins did not reach into his waistband. Rather, it merely evidenced that he did not reach into his waistband to retrieve a weapon. Instead, there are other reasons Elkins may have reached into his waistband. As previously noted, Elkins may have reached to grab the methamphetamine pipe or to pull up his baggy pants. . . .Faced with these facts, the majority misapplies the summary judgment standard to reach its outcome. . . . Here, there is no evidence that Elkins did not reach for his waistband nor is there evidence that contradicts Officer Pelayo's statement. Thus, we must grant summary judgment; we cannot deny summary judgment based on mere speculation or 'some metaphysical doubt.'")

Morales v. Fry, 873 F.3d 817, 819-26 (9th Cir. 2017) ("The primary issue in this appeal is whether the 'clearly established' prong of the qualified immunity analysis should be submitted to a jury. Following the lead of nearly all of our sister circuits, we conclude that it is a question of law that must ultimately be decided by a judge. . . . [Q]ualified immunity was conceived as a summary

judgment vehicle, and the trend of the Court's qualified immunity jurisprudence has been toward resolving qualified immunity as a legal issue before trial whenever possible. This approach presents a dilemma when, as here, a qualified immunity case goes to trial because disputed factual issues remain. Qualified immunity is then transformed from a doctrine providing immunity from suit to one providing a defense at trial. . . Nonetheless, comparing a given case with existing statutory or constitutional precedent is quintessentially a question of law for the judge, not the jury. A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved. . . . Nearly all our sister circuits agree with the position we adopt here. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits take the view that whether a right is clearly established is a legal issue for the judge to decide, although special interrogatories to the jury can be used to establish disputed material facts. [collecting cases] The Tenth Circuit also considers this the 'better approach,' although it acknowledges certain rare and 'exceptional circumstances where historical facts are so intertwined with the law' that the court can permissibly 'define the clearly established law for the jury' and then allow the jury to 'determine [whether] what the defendant actually did ... was reasonable in light of the clearly established law.' *See Gonzales v. Duran*, 590 F.3d 855, 860-61 (10th Cir. 2009). . . .By contrast, only the Fifth Circuit has unequivocally endorsed the jury determining whether the right was clearly established if qualified immunity is not decided until trial. *See McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). The Officers argue that the jury instructions were proper because we have previously allowed the issue of qualified immunity to be asserted at trial, citing three cases: *Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994), *Ortega v. O'Connor*, 146 F.3d 1149, 1155 (9th Cir. 1998), and *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988). None of these cases is persuasive. . . . [T]o the extent that *Ortega* and *Thorsted* suggested that the 'clearly established' prong could be submitted to the jury, we conclude that those cases are clearly irreconcilable with intervening Supreme Court authority. . . .For these reasons, the district court erred in submitting the 'clearly established' inquiry to the jury. The district court did not determine as a matter of law what the 'established law' was nor did it offer the jury the opportunity to decide separately any factual determinations related to this prong of qualified immunity. . . .Here, the special verdict forms only asked the jury:

Question 1: Do you find for Plaintiff Maria Morales on her federal-law (§ 1983) claim for unlawful arrest against Defendant Sonya Fry?

Answer: _ (Yes) X (No)

Question 2: Do you find for Plaintiff Maria Morales on her federal-law (§ 1983) claim for excessive force against Defendant Sonya Fry?

Answer: _ (Yes) X (No)

Because the jury answered 'No' to both questions, we cannot determine if they found a constitutional violation. One possibility is that the jury believed Officer Fry's version of events, found no underlying constitutional violation, and so did not need to consider application of the clearly established rule set out in Jury Instruction Nos. 20 and 21. And even if the jury did so, whatever it found under these instructions would be surplusage. In that scenario, the jury would have found against Morales regardless. The district court's ability to make a contrary finding

would have been extremely constrained. However, another very realistic scenario is that the jury believed Morales's version of events, found one or more underlying constitutional violations, but also concluded that Fry reasonably believed her actions were in accordance with the law (although it was not defined for the jury). Had there been a jury finding of a constitutional violation, the question of clearly established law then would have been put to the district court on a Rule 50(b) motion. The district court could then have either granted or denied Fry qualified immunity. We have no way of divining which scenario actually happened. As a result, we cannot conclude that it is more probable than not that Morales would have lost her claims against Fry had the jury been properly instructed. Consequently, we must vacate the verdict with respect to Morales's unlawful arrest and excessive force claims against Officer Fry and remand for a new trial on these claims. On remand, the district court has discretion to employ either a general verdict form, or submit special interrogatories to the jury regarding the disputed issues of material fact. . . Either way, once the jury returns its verdict, the ultimate determination of whether Officer Fry violated Morales's clearly established rights is a question reserved for the court.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1013, 1016-17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) ("[V]iewing the facts in the light most favorable to plaintiffs, as we must at this stage of the proceedings, Gelhaus deployed deadly force while Andy was standing on the sidewalk holding a gun that was pointed down at the ground. Gelhaus also shot Andy without having warned Andy that such force would be used, and without observing any aggressive behavior. Pursuant to *Graham*, a reasonable jury could find that Gelhaus's use of deadly force was not objectively reasonable. . . . [T]he dissent's accusations are as seismic as they are unconvincing. Moreover, the dissent's analysis is flawed because it rests upon a misreading of the district court's factual finding regarding the movement of Andy's gun. It bears repeating: even though we must assume for purposes of this interlocutory appeal that the barrel 'began' to rise as Andy turned, we must also assume—as the district court expressly found—that it potentially rose, as an incident of Andy's turning motion, only 'to a slightly-higher level [that did not] pos[e] any threat to the officers.'. . Mindful of that possibility, and viewing the evidence in the light most favorable to the plaintiffs, the district court found that Andy did not 'point the weapon at the officers *or otherwise threaten them with it*.'. . And that is why, taking the facts as we must regard them, a reasonable jury could find that Gelhaus deployed deadly force while Andy was merely standing on the sidewalk holding a gun that was pointed down at the ground. This conclusion echoes the district court's findings, which govern this interlocutory appeal. By contrast, the dissent's version of the event violates a fundamental principle of our summary judgment jurisprudence—that 'all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor,'. . . and selectively accepts Gelhaus's word at face value with respect to the movement of Andy's gun, thereby contravening *Cruz*.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1017-21 & n.17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) ("[T]he district court asked whether the law was clearly established such that an officer on October 22, 2013, would have known that the use of deadly force was unreasonable 'where the suspect appears to be carrying an AK-47, but where [the] officers have received no

reports of the suspect using the weapon or expressing an intention to use the weapon, where the suspect does not point the weapon at the officers or otherwise threaten them with it, where the suspect does not "come at" the officers or make any sudden movements towards the officers, and where there are no reports of erratic, aggressive, or threatening behavior.'. . The district court held that the law was clearly established that under those circumstances, Gelhaus's use of deadly force was unreasonable. . . It did not identify a specific precedent that put Gelhaus on notice that his conduct was unconstitutional. The district court erred by failing 'to identify a case where an officer acting under similar circumstances as [Deputy Gelhaus] was held to have violated the Fourth Amendment.' *White*, 137 S. Ct. at 552. However, *George v. Morris* serves that function. *Harris* and *Curnow* were also on the books to provide Gelhaus with guidance. . . . The dissent conjures its own 'framing'—'that the use of deadly force without an objective threat is unreasonable'—and criticizes the use of that fictitious frame to the extent that it applies here. We employ no such frame. Nor do we rely on general excessive force principles. Rather, we ask whether the law was clearly established that the use of deadly force was unreasonable in a situation where the factual predicates enumerated in Part I.B are assumed to be true. Somewhat distilled, this is a situation where, among other things, the suspect appears to be carrying an AK-47, but where [the] officers have received no reports of the suspect using the weapon or expressing an intention to use the weapon, where the suspect does not point the weapon at the officers or otherwise threaten them with it, where the suspect does not 'come at' the officers or make any sudden movements towards the officers,' where the officers do not witness any 'erratic, aggressive, or threatening behavior,' and where the suspect was not warned that deadly force would be deployed despite the officers having ample opportunity to do so. . . . At bottom, taking the facts as we must regard them at this stage of the proceedings, Gelhaus, like the deputies [in *George v. Morris*], shot without warning, without objective provocation, and while the gun was trained on the ground. Because *George* 'squarely governs' the circumstances that Gelhaus confronted, Gelhaus violated Andy's clearly established right to be free of excessive force in this context. . . . Though *George* is sufficient, *Harris* and *Curnow* also gave Gelhaus warning that his use of deadly force was not objectively reasonable. [discussing cases] In light of *George*, *Harris*, and *Curnow*, and taking the facts as we must regard them at this stage of the proceedings, there is no room for Gelhaus to have made 'a reasonable mistake' as to what the law required. . . Qualified immunity may also apply, however, where the government official makes a reasonable 'mistake of fact.'. . Here, Gelhaus could not have reasonably misconstrued the threat allegedly posed by the position of Andy's gun because, on the facts as we must regard them, it never rose to a position that posed any threat to the officers. Accordingly, the only question is whether Gelhaus could have reasonably misconstrued Andy's turn as a 'harrowing gesture.'. . .Based on the present record, Gelhaus could not reasonably have misconstrued Andy's turn as a 'harrowing gesture.'. . . In short, prior to and during Andy's turn, Gelhaus simply did not witness *any* threatening behavior. Thus, the only reasonable inference is that Andy was turning naturally and non-aggressively to look at the person who shouted from behind. If anything, Gelhaus should have *expected* Andy's turn, for it did not contravene Gelhaus's command, and it may have been an effort to comply. . . .If the jury finds, for instance, that Andy briefly glanced backwards and was aware that the officers were following him, it may find that he intentionally disobeyed the order to drop the gun, that he

turned aggressively, and that his weapon was not pointed at the ground. On those facts, even if Gelhaus committed a Fourth Amendment violation, his conduct likely did not violate clearly established law given that 'a furtive movement, harrowing gesture, or serious verbal threat' can justify deadly force against someone who is armed. . . Conversely, if plaintiffs' version of the facts prevails and the jury concludes that Andy posed no imminent threat to the officers, then Andy's right to be free of excessive force in this context was clearly established at the time of Gelhaus's conduct. . . Because Gelhaus's entitlement to qualified immunity ultimately depends on disputed factual issues, summary judgment is not presently appropriate.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1022, 1025-32 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) (Wallace, J., dissenting) ("The facts of this case are tragic. A boy lost his life—needlessly, as it turns out. We know now that he was carrying only a fake gun, albeit a realistic-looking one. Deputies Gelhaus and Schemmel therefore never were in any real danger and deadly force was not necessary. In view of these facts, the inclination to hold Deputy Gelhaus liable for shooting Andy Lopez is understandable. But it is a well-settled rule that a court may do so only if precedent clearly established at the time of the shooting that the use of deadly force in the circumstances Deputy Gelhaus faced was objectively unreasonable. I do not agree with the majority that such a case existed on the day Andy died. Respectfully, I therefore dissent. The majority opinion exhaustively recounts the facts of the case, but for me, they are largely irrelevant. One critical fact—the upward motion of the fake gun—resolves the qualified immunity issue in Deputy Gelhaus's favor. . . . The majority says it is deferring to the district court's findings, but it is not. Rather than perform these interpretive changes, I would take the district court at its word and decide this appeal on the understanding that the gun was beginning to rise when Deputy Gelhaus committed to using deadly force. . . .I agree with the majority's conclusion that the district court erred by failing to conduct the necessary analysis identifying a precedential case or cases it believed would have put Deputy Gelhaus on notice that his conduct was unconstitutional. . . Rather than conclude there and decide the appeal, the majority attempts to perform on its own the district court's task by identifying three cases—not one of which appears anywhere in the district court's order—that purportedly served as notice to Deputy Gelhaus that he could not constitutionally use deadly force against Andy. More important than the district court's omission, which should require reversal, is that the plaintiffs themselves have never argued that these cases clearly established Andy's right, either in response to Deputy Gelhaus's motion for summary judgment or in their answering brief on appeal. . . . In my view, all of the cases cited are distinguishable on their facts from the one before us and therefore cannot perform the function the majority ascribes to them, even if it were appropriate for the majority to attempt to do so. . . .The disputed facts the majority points to—whether Andy looked backwards at the officers, whether Deputy Gelhaus yelled at Andy to drop the gun more than once, whether the patrol car chirped more than once, whether Andy held the gun in his right or left hand, and the angle between the ground and Deputy Gelhaus at which Andy pointed his gun—are simply not material to the qualified immunity analysis. Taking together the district court's findings and undisputed facts, this case involves the use of deadly force against a hooded individual armed with a replica assault rifle indistinguishable from a real one, who turned to face an officer while raising the rifle after

the officer had activated his patrol car lights and siren and yelled at the individual to drop the rifle. These facts are not sufficiently similar to the facts of *George*, *Harris*, or *Curnow* to have put Deputy Gelhaus on notice that his use of deadly force violated Andy's Fourth Amendment right to be free from excessive force. . . Without these cases, the majority is left only with the statement it cites at the beginning of its clearly established law analysis: that we may deny qualified immunity 'in novel circumstances.'. . It is doubtful how much of this statement, if any, has survived the Supreme Court's intervening decision in *White*. . . To the extent it retains any vitality, it likely would be confined to those cases where the officer's conduct is an 'obvious' violation of a constitutional right. . . This assuredly is not such 'an obvious case.'. . As shown by the majority's painstaking evaluation of the objective reasonableness of Deputy Gelhaus's use of force, this case is not obvious, but clearly quite close. Whether Deputy Gelhaus acted unreasonably turns on such minute details as how high the gun barrel had risen, whether it might have been feasible to give a warning, and just how aggressive Andy's turning motion was. By contrast, cases found to be 'obvious' involve much clearer constitutional transgressions. . . Our case is not the 'rare' one 'in which the constitutional right at issue is defined by a standard that is so "obvious" that we must conclude ... that qualified immunity is inapplicable, even without a case directly on point.'. . Accordingly, the district court's denial of immunity cannot be affirmed on this basis either. . . . Deputy Gelhaus misjudged the threat that Andy posed, and Andy's death is the heartbreaking result of that miscalculation. In circumstances like these, it is imperative that we do justice. But justice does not invariably require punishing the officer. A reasonable mistake of law or fact is not enough to impose liability. . . The law affords relief only when an officer transgresses a boundary clearly established by precedent at the time he acts. If no such case exists, the officer cannot be held liable even if his conduct, the court believes in retrospect, may be unreasonable. This is the situation that we face. The facts of the cases that the majority relies on to reach the opposite conclusion are materially different from the real facts before us. Those cases therefore could not have given Deputy Gelhaus notice that using deadly force against Andy would violate his constitutional right. Although all are sympathetic to Andy's family, as anyone should be, I am duty-bound to conclude that we must provide Deputy Gelhaus with the 'breathing room to make reasonable but mistaken judgments about open legal questions' that qualified immunity affords him. . . For these reasons, I dissent.")

TENTH CIRCUIT

Shimomura v. Carlson, 811 F.3d 349, 357 (10th Cir. 2015) ("According to Mr. Shimomura, the video recording shows that Mr. Shimomura did not push his roller bag into Agent Carlson. But from where Officer Davis was positioned, he could reasonably believe that (1) he had seen Mr. Shimomura push his roller bag into Agent Carlson and (2) the contact resulted in at least slight physical injury. . . The reasonableness of that belief made probable cause at least arguable. Thus, even when we consider the evidence in the light most favorable to Mr. Shimomura, we conclude that Officer Davis is entitled to qualified immunity on the Fourth Amendment claim of unlawful arrest. . . . In reaching a contrary conclusion, the partial dissent points to

• Mr. Shimomura's allegation in the complaint 'that [Officer Davis] could not reasonably perceive evidence of bodily injury, such as pain' and
• uncertainty about what Officer Davis would have seen from his angle.
Dissent at 1–2. In our view, these two points do not create a genuine fact-issue on whether probable cause was at least arguable. Because the issue involves summary judgment, we must rely on the summary judgment record rather than Mr. Shimomura's allegations in the complaint. In support of the summary judgment motion, Officer Davis stated under oath that he had seen the roller bag strike Agent Carlson in the legs. . . Mr. Shimomura responded to the motion, presenting affidavits by himself and Agent Carlson. Agent Carlson's affidavit said that Officer Davis had seen the contact between the roller bag and Agent Carlson. . . Mr. Shimomura's affidavit was silent about what Officer Davis could see. Thus, for purposes of summary judgment, we have undisputed evidence that Officer Davis was able to see the contact between Agent Carlson and Mr. Shimomura's roller bag.")

Shimomura v. Carlson, 811 F.3d 349, 362-63 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) ("I join the majority except as to its holding that Officer Davis is entitled to qualified immunity. . . .Just as a jury in *Tolan* should have decided whether the undisputed words, in context, seemed threatening, a jury here should decide whether the undisputed contact, in context, seemed intentional or capable of causing bodily injury. We do not know what Officer Davis saw from his angle. All we have is the video, Shimomura's complaint, and affidavits presented on summary judgment. Those materials do not definitively settle the facts in Officer Davis's favor. A jury could find that even given his angle and how little time he had to process what had happened, it was unreasonable to think the contact was intentional or reckless. And a jury most certainly could find that there was no evidence of bodily injury. Having watched the video, I find it dubious that anyone viewing the contact from *any* angle could have reasonably thought that Agent Carlson felt pain. Although she later reported pain, it appears that this was not until after Shimomura's arrest. For those reasons, I respectfully dissent as to the conclusion that Officer Davis is entitled to qualified immunity.")

Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1252-57 (10th Cir. 2013) ("Cavanaugh raises a more fundamental challenge to the jury instructions. She argues that the district court erred in submitting to the jury the question whether Officer Davis used excessive force. Cavanaugh contends the court should have given the jury special interrogatories to decide the factual disputes and made the legal determination itself whether Davis's conduct was reasonable under the circumstances. While the argument is not entirely without merit, the district court did not err in this case. . . .While Cavanaugh is correct that, generally, legal issues are for the court and factual issues for the jury, the excessive force question, like most Fourth Amendment inquiries, is a mixed question of law and fact. . . .As a general matter our cases hold that, where there are disputed issues of material fact, the question of reasonableness underlying a Fourth Amendment violation is for the jury. . . . Only where there are no disputed questions of historical fact does the court make the excessive force determination on its own, such as on summary judgment. . . . In this case, there were disputed issues of material fact relating to Officer Davis's use of the taser. . . . Due to these

disputes of material fact, it was proper for the district court to send the question of whether Officer Davis's use of force was reasonable to the jury. But Cavanaugh contends the district court should have given the jury special interrogatories tailored to the *Graham* factors—and then the court should have applied the jury's findings to make the excessive force determination itself. Yet the cases she relies on for this proposition concern either (1) the court's evaluation of the excessive force issue at the summary judgment stage, or (2) the issue of qualified immunity, which involves both whether there was a constitutional violation *and* whether the violation was clearly established. None of the cases support the broad rule she seeks. . . In short, the court may rule on summary judgment that an officer's conduct was reasonable (or unreasonable) if the undisputed facts support such a conclusion. But the court's resolution of an excessive force claim as a matter of law, where there is no genuine issue of material fact, does not mean a jury cannot decide the question where there *are* disputed issues of material fact. . . .While our cases allow courts to broadly submit the constitutional violation question to a jury where there are disputed historical facts, that practice is not without limits. In many cases, the better practice is for the district court to use special interrogatories, at least where qualified immunity is at issue. For example, had the jury found for Cavanaugh in this case, the Defendants may have filed a motion for judgment as a matter of law based on qualified immunity. Even though we previously held that under the version of facts presented by Cavanaugh, Officer Davis would not have been entitled to qualified immunity, there would have been no guarantee, without special interrogatories, that the jury found all the facts supporting such a determination. That is, the jury could have found there was a constitutional violation but nevertheless based that judgment on a set of facts less egregious than the one presented in Cavanaugh's case in chief—and thus the Defendants may have been entitled to qualified immunity. . . This is why, when qualified immunity is at issue, many courts have stated that the relevant disputed issues of fact must be resolved by the jury through special interrogatories, while the court must decide the qualified immunity question. . .We considered this question in some length in *Gonzales.* In that case, we endorsed two methods of submitting qualified immunity questions to the jury. The first was through special interrogatories, after which the 'court could then determine whether the defendant's conduct was objectively reasonable in light of the clearly established law.'. . The second method allows a court 'to instruct the jury to determine what the defendant actually did and whether it was reasonable in light of the clearly established law defined by the judge.'. . But we condemned a third method of 'simply allow [ing] the jury to determine what the clearly established law is, what the defendant actually did, and whether the defendant's conduct was objectively reasonable in light of the clearly established law found by the jury.'. .Even though *Gonzales* endorsed the second approach, it emphasized the approach should only be used 'rarely' in those circumstances 'when narrow issues of disputed material fact are dispositive of the qualified immunity inquiry.'. . '[T]he better approach,' we concluded, 'is for the court to submit special interrogatories to the jury to establish the facts.'. . And we emphasized that 'allowing the jury to evaluate the objective reasonableness of a defendant's conduct' would be done 'only because specific key, disputed facts were dispositive of the qualified immunity issue.'. . Other courts have noted that some factual disputes may go both to the constitutional violation question and to the qualified immunity question. What happens then? They have given the constitutional violation question to the jury through a general verdict, while also giving it special interrogatories

on factual issues that are crucial for determining qualified immunity. . . Or, as we noted in *Gonzales*, the court can submit only special interrogatories to the jury, and then '[o]nce the jury determines the purely historical facts, the judge then decides the three legal questions of qualified immunity: whether the actions violated the plaintiff's constitutional rights, whether those constitutional rights were clearly established, and whether the objectively reasonable defendant 'would have known that his conduct violated that right."'. . Thus, for example, in this case, the court could have given interrogatories to the jury that pinned down whether a knife was visible or whether Officer Davis asked Cavanaugh to stop, both of which would have been relevant to whether a constitutional violation occurred in the first place and, if it did, whether Officer Davis should have known that his conduct violated Cavanaugh's rights. . . And then, assuming qualified immunity had been reasserted, the court could have decided the legal questions itself. Regardless of what the better practice may be (and it undoubtedly depends on the case), it is clear the district court here did not abuse its discretion in refusing to submit special interrogatories to the jury. Where qualified immunity is not at issue, a court may submit the excessive force question to the jury. Accordingly, we reject this basis for challenging the district court's judgment.")

ELEVENTH CIRCUIT

Prosper v. Martin, 989 F.3d 1242, 1245-54 (11th Cir. 2021) ("Ordinarily, we would be required to decide a case of this posture on the plaintiff's version of the facts. In this case, however, Plaintiff's account is based on a blurry surveillance video that depicts little more than two persons engaged in a two-minute-long struggle in the dark beside a busy highway. We must therefore take the facts as told by the only living eyewitness of those critical two minutes—Defendant Martin. On those facts, we affirm the District Court's decision to grant summary judgment. . . .We agree with the District Court that Martin acted as an objectively reasonable officer both in tasing and in using deadly force on Prosper. But before we explain why, we must determine the contours of the particular right alleged to have been violated, taking the facts in the light most favorable to Plaintiff. . . . If Plaintiff is correct about what the Biscayne Air Video shows, then the question before us is whether Martin violated Prosper's Fourth Amendment rights by tasing and shooting him without provocation while he slowly retreated, and all before he ever bit Martin's finger. We believe Plaintiff makes too much of the video. Where there are 'varying accounts of what happened' on summary judgment, we are required to adopt the account most favorable to the nonmoving party. . . This principle, though, is subject to the caveat that the nonmoving party's version of events must be sufficiently supported by the record that a reasonable jury could find it to be true. . . .Plaintiff's interpretation of the Biscayne Air Video amounts to mere speculation, and the video therefore fails to create the issues of fact that Plaintiff says it does. Plaintiff herself described the video as 'far from a model of clarity,' and the expert witness she retained to interpret it said '[you] can barely make out their bodies. ... You can't make out really much of anything other than some very gross movements.' A blurry video that does not depict much of anything cannot give rise to issues of fact about what did or did not happen on a particular occasion. As the District Court noted, the video 'does not *contradict* [Martin]'s statements; at best, it fails to *corroborate* them.' Martin's version of events thus remains unrebutted and controls our

analysis. Accordingly, the question before us is whether Martin violated Prosper's Fourth Amendment rights by using deadly force after Prosper struck him in the face, resisted arrest through three taser discharges, and bit down on his finger while 'twisting and turning' with unabating intensity. Since Plaintiff also challenges Martin's use of the taser as excessive, we must decide whether that violated Prosper's Fourth Amendment rights, as well. We are convinced the District Court committed no error in finding that Martin acted as an objectively reasonable officer in both respects. The critical inquiry on the deadly force claim is whether an officer in Martin's position reasonably could have believed that Prosper posed a serious threat of physical harm at the time Prosper had Martin's finger in his mouth. . . In making this assessment, we must consider the 'totality of the circumstances,' including the events leading up to the point at which deadly force was used and the impressions a reasonable officer would have gleaned from them. . . .In this 'tense, uncertain, and rapidly evolving' situation, . . . it was reasonable for Martin to believe that Prosper posed an imminent threat of serious physical harm to his person and that deadly force, without any further warning, was necessary to prevent that harm. Therefore, the District Court properly concluded that Martin's use of deadly force did not violate Prosper's Fourth Amendment rights. We also have no doubt that Martin's use of his taser on Prosper was reasonable under the circumstances. We have held that 'the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force.'")

Stryker v. City of Homewood, 978 F.3d 769, 775-77 (11th Cir. 2020) ("In conclusion, all of the *Graham* factors indicate that, under Stryker's version of events, the initial use of the taser by Officer Davis was objectively unreasonable. Moreover, at the time of the incident it was clearly established that using violent force generally, and a taser specifically, on a compliant, nonaggressive, and nonthreatening misdemeanant violates the Fourth Amendment. . . . Stryker also contends that Officer Davis (along with Officers Waid and Blake) beat, kicked, and choked him once he was out of the truck and after they had control over his body and hands. Assuming this to be true, we have no hesitation concluding that such conduct amounts to a well-established constitutional violation. We have consistently held that 'gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.'. . And there was no doubt at the time of this incident that, in this Circuit, striking a compliant and nonthreatening suspect constitutes excessive force. . . .Very little is clear about exactly what happened in the early morning hours after Stryker arrived at Walmart. The officers articulate a version of events that justifies their use of force. Stryker tells a story that presents a clear constitutional violation. Resolving that dispute is for a trial, not summary judgment. The district court thus erred by resolving disputes of fact against the plaintiff and by granting the officers qualified immunity on that basis. And because of this error, the grant of summary judgment to the City of Homewood and the dismissal of Stryker's state law claims are due fresh consideration. Accordingly, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings.")

Cantrell v. McClure, 805 F. App'x 817, ___ (11th Cir. 2020) ("Given the circumstances, the force McClure used to arrest Cantrell was not excessive. This conclusion is not, as Appellant contends,

premature or better left to a jury. Courts are to 'ascertain the validity of a qualified immunity defense as early in the lawsuit as possible,' because qualified immunity 'is a defense not only from liability, but also from suit.'. . An evaluation of the reasonableness of the force used is appropriate at this stage because 'the question of whether the force used by the officer in the course of an arrest is excessive is a pure question of law, decided by the court.'. . The district court had before it all the information necessary for a judgment on the pleadings.")

Simmons v. Bradshaw, 879 F.3d 1157, 1164-67 & n.7 (11th Cir. 2018) ("[T]he question of what circumstances existed at the time of the encounter is a question of fact for the jury—but the question of whether the officer's perceptions and attendant actions were objectively reasonable under those circumstances is a question of law for the court. . . . The facts of the instant case involved contested factual issues bearing on Defendant's entitlement to qualified immunity. In its order disposing of the parties' motions for summary judgment, the district court expressly reserved the qualified immunity question for later determination:

If it were to credit Stephens' account of these events, a reasonable jury clearly could find that Deputy Lin violated his constitutional rights by employing excessive force. Yet, Deputy Lin would still be entitled to qualified immunity if the law were not clearly established. . . .Even though this Court has concluded that Deputy Lin is not entitled to qualified immunity on Stephens' excessive force claim at the summary judgment stage, Deputy Lin is not precluded from pursuing the qualified immunity defense at the trial. . . Should the jury choose not to credit (in whole or in part) Stephens' version of the facts, or should the facts not be presented at trial as alleged here on summary judgment, the qualified immunity analysis may change.

Simmons v. Bradshaw, No. 14-80425, 2014 WL 11456548, at *8-9 (S.D. Fla. Dec. 31, 2014). Rather than submitting the contested factual issues—*i.e.*, the historical facts—to the jury at trial, however, the Court opted to give the following instruction:

Whether a specific use of force is excessive or unreasonable depends on factors such as the nature of any offense involved, whether a citizen poses an immediate violent threat to others, including the police officer, and whether the citizen resists or flees. In assessing these factors, you should consider whether an officer's belief that a citizen is posing an immediate violent threat is an objectively reasonable belief under the circumstances, notwithstanding that it is a mistaken belief. Where an officer's mistaken belief that a citizen poses an immediate and deadly threat is objectively reasonable under the circumstances, then that officer's use of deadly force is not excessive or unreasonable. On the other hand, where an officer's mistaken belief that a citizen poses an immediate and deadly threat is not objectively reasonable under the circumstances, then that officer's use of deadly force is excessive or unreasonable.

This instruction is problematic not only because it is an incorrect statement of the law, but moreover because it effectively delegated resolution of the issue of qualified immunity to the jury—presumably as to both facts and law—and thus the district court never decided whether Deputy Lin was entitled to his claimed defense of qualified immunity. . . Consistent with Supreme Court precedent, we have noted that the factual issues bearing on the excessive force inquiry are distinct from the legal issues bearing on a defendant's entitlement to qualified immunity. . . . In this case, however, the excessive force inquiry was not sufficiently divorced from

the qualified immunity inquiry in that the instruction improperly conflated the two inquiries and presented the jury with both together. The jury was thus essentially forced to find either that Deputy Lin used excessive force and therefore was not entitled to qualified immunity, or that Deputy Lin did not use excessive force at all. . .This instruction was erroneous for two reasons. First, it is not the province of the jury to decide a defendant's entitlement to qualified immunity. . . Evidently, the district court believed that the jury instruction at issue properly covered both excessive force and qualified immunity. In its order denying in part the defendants' motion for a new trial, the district court stated that, '[i]n light of the jury instructions given in this case—which the jury is presumed to have understood and followed—the jury's verdict reflects an implicit finding that Deputy Lin did not commit an objectively reasonable mistake when he shot Dontrell Stephens.'. . This 'implicit finding' recognized by the district court, however, does not necessarily answer the qualified immunity question, which must be considered and resolved by the court as a legal issue. . . Because of these errors, Deputy Lin was not afforded the opportunity to have his claimed defense of qualified immunity determined by the court, as he was entitled to have. Furthermore, the errors were not harmless because this is not a case in which 'the jury verdict itself, viewed in the light of the jury instructions, and any interrogatories that were answered by the jury, indicate without doubt what the answers to the refused interrogatories would have been, or make the answers to the refused interrogatories irrelevant to the qualified immunity defense.'. . Because the jury instructions did not accurately reflect the law, and moreover because Deputy Lin was improperly deprived of the opportunity to have his defense of qualified immunity considered by the district court, it was an abuse of discretion for the district court to have denied Deputy Lin's motion for a new trial. . . Accordingly, we will reverse and order a new trial. . . .Had the jury been afforded the opportunity to make specific factual findings relevant to the qualified immunity inquiry—including, for example, whether Stephens had committed a traffic infraction on his bicycle; whether Stephens dismounted from his bicycle and complied with Deputy Lin's commands following the stop; and whether Stephens possessed any weapons, threatened Deputy Lin, or attempted to flee—the district court could (and should) have then determined, as a matter of law, 'whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.'")

Simmons v. Bradshaw, 879 F.3d 1157, 1169-72 (11th Cir. 2018) (Wilson, J., dissenting) ("I would not disturb the jury's verdict on Dontrell Stephens' excessive force claim brought pursuant to 42 U.S.C. § 1983. The jury determined that Deputy Adams Lin used excessive force against Stephens in violation of the Fourth Amendment by shooting him four times at close range—rendering him a paraplegic—after stopping him for riding his bicycle on the wrong side of the road. Appealing the denial of their motion for a new trial, Deputy Lin and Sherriff Bradshaw argue that the district court abused its discretion by improperly instructing the jury in two ways: (1) by not allowing them to present a special interrogatory to the jury, asking whether Deputy Lin made a reasonable mistake; and (2) by refusing to give the jury a '20/20 hindsight' instruction, to let the jury know that it must judge the officer's reasonableness 'at the time of the events, not from hindsight.' But rather than address these specific issues, the majority opinion sets aside the jury's verdict for a different reason—that the jury instructions given did not accurately reflect the law, and that Deputy

Lin was deprived of the opportunity to have his qualified immunity defense considered by the district court. Although the panel questioned counsel at oral argument about whether qualified immunity was improperly presented to the jury, the issue was neither briefed, nor appealed. I dissent because the jury instructions did properly state the law. And I disagree with the majority's determination that the district court improperly relinquished consideration of Deputy Lin's entitlement to qualified immunity to the jury rather than retain it for consideration by the district court judge himself. . . .The majority finds this instruction 'problematic not only because it is an incorrect statement of the law, but moreover because it effectively delegated resolution of the issue of qualified immunity to the jury—presumably as to both facts and law—and thus the district court never decided whether Deputy Lin was entitled to his claimed defense of qualified immunity.'. . I disagree on both accounts. The instruction is not an incorrect statement of the law, nor can it reasonably be construed as an improper delegation of the qualified immunity determination to the jury. Whether Officer Lin made an objectively reasonable mistake in believing that Stephens posed a threat is for the jury to decide in making its excessive force determination. . . .Qualified immunity's clearly-established-law requirement, however, looks at whether 'the *officer's mistake as to what the law requires* is reasonable, [and when it is reasonable] the officer is entitled to the immunity defense.'. . . Here, the trial court did not ask the jury whether the officer made a reasonable mistake as to the law. The court merely asked the jury to determine whether excessive force was used. The trial court could not have separated the question of whether a mistake was reasonable from the question of whether the force was excessive. Doing so would contravene Supreme Court precedent. . . If Deputy Lin's mistake about whether Stephens posed a threat was reasonable, the force he used would not be considered as excessive. And if Deputy Lin's mistake about whether Stephens posed a threat was unreasonable, the force he used would be considered excessive. . . That is exactly what the given instructions said.

The court did not err in submitting the factual reasonableness determination to the jury because it *had* to submit it to the jury for it to determine whether there was excessive force. It is up to the jury to determine whether an officer's conduct was reasonable in light of the factual circumstances. Here, the jury determined that the force used by Deputy Lin was unreasonable. It is then up to the trial judge to decide whether qualified immunity is applicable by asking whether the officer's conduct was reasonable in light of clearly established law. . . As the majority states, the trial judge 'uses the jury's factual findings to render its ultimate legal determination as to whether it would be evident for a reasonable officer, in light of clearly established law, that his conduct was unlawful in the situation he confronted.'. . Here, the trial judge did just that. The judge relied on the jury's factual determination—that Deputy Lin's conduct was unreasonable and excessive—to find that Deputy Lin violated Stephens' Fourth Amendment right to be free from excessive force. The court, not the jury, determined that Stephens' right to be free from excessive force was clearly established under existing law. In any event, the district court had already considered, and rejected, Lin's qualified immunity claim—twice—when the defendants raised it in their motion for judgment as a matter of law and again in the renewed judgment as a matter of law. Therefore, I have no quarrel with the formalities of the district court's resolution of Deputy Lin's entitlement to qualified immunity. And taking the deferential nature of the abuse of discretion standard into

account, I see no reversible error. . . Nonetheless, the issues briefed were whether the district court abused its discretion by: (1) not allowing the defendants to present special interrogatories asking whether Deputy Lin made a reasonable mistake; and (2) not allowing the defendants to present the '20/20 hindsight' instruction in an effort to let the jury know that it must judge the officer's reasonableness at the time of the events, and not from hindsight. First, the district court did not err when it declined to provide the jury with a mistaken belief interrogatory, which would have asked: Do you find by a preponderance of the evidence that Deputy Adams Lin made an objectively reasonable mistake when he perceived that Dontrell Stephens threatened Deputy Adams Lin with a firearm and posed an imminent threat of death or serious physical harm at the time that Deputy Adams Lin shot Dontrell Stephens?

This proposed interrogatory was covered by the given instructions. And there can be no error when 'the trial court[ ] refus[es] to give a requested instruction ... where the substance of that proposed instruction was covered by another instruction which was given.'. . Here, the court instructed the jury that Deputy Lin's use of deadly force could not be excessive if Deputy Lin's mistaken belief that Stephens posed an immediate and deadly threat was objectively reasonable under the circumstances. Thus, for the jury to reach the conclusion that Deputy Lin's use of force was excessive, it necessarily had to determine that his mistake was objectively unreasonable. And because the jury found that Deputy Lin's use of force was excessive, it answered what would have been covered in the defendants' proposed instruction in the negative. The substance of the proposed interrogatory, then, was covered by the jury instructions delivered. And we do not have discretion to assume otherwise because we always assume the jury follows the instructions consistently with their verdict.")

Montero v. Nandlal, 682 F. App'x 711, 714-17 (11th Cir. 2017) ("In reaching its verdict, the jury considered both a general verdict form and a special interrogatory. The general verdict form asked: Do you find from a preponderance of the evidence: (1) That Carlos Montero, as personal representative of the Estate of Richard Montero, deceased, has proved that Ramesh Nandlal intentionally used excessive or unreasonable deadly force upon Richard Montero during his arrest? . . . The jury answered this first question in the affirmative. In the block for damages, the jury indicated that Plaintiff was entitled to $540,000 in compensatory damages. Given that response, the jury then proceeded to the special interrogatory, which asked: Do you find by a preponderance of the evidence that Deputy Nandlal made an objectively reasonable mistake when he perceived that Richard Montero posed an imminent threat of serious physical harm to the deputies or others at the time that Deputy Nandlal shot Richard Montero with his firearm? . . . The jury answered the special interrogatory in the affirmative. In response, Nandlal renewed his Rule 50 motion for judgment as a matter of law, arguing that insufficient evidence supported a finding of excessive force. He also argued that he was entitled to qualified immunity on the excessive force claim based on the jury's answer to the special interrogatory. Plaintiff argued that the evidence was sufficient to support the jury's finding of excessive force, and that the special interrogatory was improper and should not form the basis of judgment as a matter of law. The district court granted Nandlal's motion for judgment as a matter of law based on qualified immunity. Summarizing the trial

testimony, the court noted that immediately prior to the shooting, Montero had engaged in a prolonged physical struggle with the deputies during which he had violently resisted arrest, knocked the deputies to the ground, tried to bite Nandlal, and ignored repeated commands to surrender. The district court also pointed out that the deputies had been unable to control Montero with hand maneuvers or by tasing him, and that Nandlal had warned Montero that he was in danger of being shot prior to firing at him. . . Based on those facts, and on the jury's finding in the special interrogatory, the court concluded that, 'the evidence presented at trial supports the jury's finding that Nandlal used excessive force against Montero but that Nandlal made an objectively reasonable mistake in doing so and is therefore entitled to qualified immunity.'. . . Given the inconsistent verdicts, the district court properly entered judgment in favor of Nandlal on the basis of the jury's answer to the special interrogatory. Relatedly, the district court did not abuse its discretion when it determined sufficient evidence supported the jury's special interrogatory finding. Finally, with respect to the second issue, the district court did not abuse its discretion in submitting the special interrogatory to the jury. The district court did not ask the jury to make a legal finding on the ultimate issue of qualified immunity. Instead, the special interrogatory asked the jury to make a factual determination about whether Nandlal made an objectively reasonable mistake. . . .Here, it is clear that this case involves Rule 49 rather than Rule 50. . . . When the jury returned an answer to the special interrogatory that was inconsistent with the general verdict, the district court was required to exercise one of three options: approve the answer notwithstanding the general verdict, direct the jury for further consideration, or order a new trial. Because the jury's finding that Nandlal made an objectively reasonable mistake was supported by evidence in the record, the district court was well within the scope of its discretion to enter judgment according to the special interrogatory notwithstanding the general verdict. . . .Qualified immunity is a legal question to be decided by the court and cannot be submitted to the jury. . .It is improper to even mention the term qualified immunity in the jury interrogatory; the jury is 'restricted to the who-what-when-where-why type of historical fact issues.'. . Here, the special interrogatory did not ask the jury to decide a legal question, nor did it mention the term qualified immunity. Rather, it asked a factual question–whether Nandlal made an objectively reasonable mistake–albeit at a higher level of abstraction than the Plaintiff would have preferred. Although the district court could have framed the questions more narrowly, e.g., whether Montero grabbed Nandlal's gun belt, or whether Montero was subdued before the shooting, it was not required to. As such, we conclude that the district court did not abuse its discretion in propounding the special interrogatory.")

Montero v. Nandlal, 682 F. App'x 711, 718-20 (11th Cir. 2017) (Walker, J., concurring) ("I fully agree with the majority's decision to affirm the district court's grant of qualified immunity to Officer Nandlal. However, I arrive at that result by different reasoning. In short, I believe that (1) the district court abused its discretion by giving the jury what amounted to a question of law regarding Officer Nandlal's qualified immunity defense, and (2) that there is no inconsistency between the jury's general verdict and its answer to the special interrogatory. I ultimately conclude that no remand is required, however, because on the undisputed facts adduced at trial, Officer Nandlal was entitled to qualified immunity. . . The district court effectively gave the qualified immunity ruling to the jury by asking it to determine whether the officer made an objectively

reasonable mistake. The court should have asked the jury to resolve specific factual disputes, such as whether Montero was out of control, or reaching for Nandlal's gun. *See Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) (noting that special interrogatories relating to a qualified immunity defense should be limited to the "who-what-when-where-why type of historical fact issues"). Based on the jury's answers to those questions, the court should have determined for itself and without jury input whether Nandlal made an objectively reasonable mistake of fact in believing that Montero posed such a threat to him as to warrant the use of deadly force, and thus whether he had arguable probable cause to use such force. . . . This method of resolving Nandlal's qualified immunity defense is consistent with the weight of federal precedent, which holds that the 'objective reasonableness' of an officer's use of force is a question of law for the court alone to resolve. [collecting cases] This precedent makes perfect sense because, in the context of an alleged violation of the Fourth Amendment, whether an officer's conduct is objectively reasonable in light of the surrounding circumstances is a question of constitutional law that only a court can decide. The reasonableness of an officer's use of force is subject to the same analysis as the Fourth Amendment standard for 'reasonable' seizure. . . .Thus, the question of what circumstances existed at the time that the defendant effected a seizure is a question of fact for the jury. The question of whether the defendant's actions or perceptions were 'objectively reasonable' under those circumstances is a question of constitutional law for the court. . . .I believe that the Plaintiff Estate's proposed special interrogatory, which asked discrete factual questions such as whether Montero attempted to grab a gun during the struggle, more accurately reflected the role of special interrogatories in resolving a motion for judgment as a matter of law on qualified immunity grounds. My view is that it was error for the district court to submit to the jury the question of whether Officer Nandlal made an 'objectively reasonable mistake,' and then to rely upon that finding to conclude that there was qualified immunity. . . .I further believe that the jury's finding in the general verdict that Officer Nandlal used excessive force can be reconciled with a finding that he is entitled to qualified immunity. . . . In other words, there is nothing inconsistent in a court concluding that the officer's conduct violated the Constitution, but that the officer reasonably believed that it did not. That is precisely what happened here in the context of the use of excessive force. In such a case, the verdicts are not inconsistent, and Fed. R. Civ. P. 49 is not implicated. Rather, the defendant is entitled to seek judgment as a matter of law on his qualified immunity defense under Fed. R. Civ. P. 50. . . . To the extent that the majority believes the jury's verdicts were inconsistent because the general verdict form listed a specific dollar amount of damages to which the Estate was entitled, while the special interrogatory afforded Nandlal qualified immunity, I must disagree. The general verdict asked the jury whether Officer Nandlal intentionally used excessive force, and if so the amount of money in damages for which he was liable. The jury found that Nandlal did use excessive force, and calculated a damages amount. The jury then proceeded to answer in the affirmative what was (in the majority's interpretation) a question of fact: Whether Nandlal had made an 'objectively reasonable' mistake of fact as to Montero's dangerousness. Relying on that answer, the court (not the jury) confirmed that Officer Nandlal was entitled to qualified immunity, and therefore not liable. I believe the inconsistency issue would have been even easier to resolve had the jury simply been asked to determine discrete questions of narrative fact in the interrogatories, and the court alone had determined qualified immunity, but in any event

there is no inconsistency here. The *jury* found Officer Nandlal liable for damages, but it also made a (consistent) finding, on the basis of which the *court* confirmed that qualified immunity applied. Such results are routinely sustained by appellate courts.")

IX. Availability of Interlocutory Appeal

Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (denial of qualified immunity, **to the extent that it turns on an issue of law,** is an appealable "final decision"). The Court noted, *id.* at 528:

> An appellate court reviewing the denial of ... immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment ... on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Plumhoff v. Rickard, 134 S. Ct. 2012, 2019, 2020 (2014) ("The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden. The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris,* and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott,* we hold that the Court of Appeals properly exercised jurisdiction, and we therefore turn to the merits.")

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1946, 1947 (2009) ("[R]espondent contends the Court of Appeals had jurisdiction to determine whether his complaint avers a clearly established constitutional violation but that it lacked jurisdiction to pass on the sufficiency of his pleadings. Our opinions, however, make clear that appellate jurisdiction is not so strictly confined. . . . Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson,* it is a 'fact-related' legal inquiry. . . To conduct it, a court of appeals may be required to consult a 'vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.'. . That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment. . . Finding those concerns predominant, *Johnson* held that the collateral orders that are 'final' under *Mitchell* turn on 'abstract,' rather than 'fact-based,' issues of law. . . The concerns that animated the decision

in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings. True, the categories of 'fact-based' and 'abstract' legal questions used to guide the Court's decision in *Johnson* are not well defined. Here, however, the order denying petitioners' motion to dismiss falls well within the latter class. Reviewing that order, the Court of Appeals considered only the allegations contained within the four corners of respondent's complaint; resort to a 'vast pretrial record' on petitioners' motion to dismiss was unnecessary. . .And determining whether respondent's complaint has the 'heft' to state a claim is a task well within an appellate court's core competency. . . Evaluating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here. The District Court's order denying petitioners' motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction.")

Behrens v. Pelletier, 516 U.S. 299, 312, 313 (1996) ("Denial of summary judgment often includes a determination that there are controverted issues of material fact, . . . and *Johnson* surely does not mean that every denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*. [cite omitted] *Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity . . , typically, the issue whether the federal right allegedly infringed was 'clearly established[.] [cites omitted] Here the District Court's denial of petitioner's summary-judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' This argument was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal. And while the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, *Johnson* recognizes that under such circumstances 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'").

Johnson v. Jones, 515 U.S. 304, 319, 320 (1995) ("[W]e hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

Swint v. Chambers County Commission, 514 U.S. 35, 51 (1995) ("The Eleventh Circuit's authority immediately to review the District Court's denial of the individual police officer

defendants' summary judgment motions did not include authority to review at once the unrelated question of the County Commission's liability. The District Court's preliminary ruling regarding the County did not qualify as a 'collateral order,' and there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise.").

NOTE: In ***Johnson v. Fankell***, 520 U.S. 911 (1997), the Court held, in a unanimous opinion, that defendants have no federal right to an interlocutory appeal from a denial of qualified immunity in state court. In response to petitioners' argument that the Idaho rules were interfering with their federal rights, the Court noted:

> While it is true that the defense has its source in a federal statute (§ 1983), the ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.

Id. at 919, 920. In response to petitioners' further argument that the Idaho rule did not sufficiently protect their right to prevail before trial, the Court explained:

> In evaluating this contention, it is important to focus on the precise source and scope of the federal right at issue. The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in ' 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.

Id. at 921.

FIRST CIRCUIT

Norton v. Rodrigues, 955 F.3d 176, 184, 187 (1st Cir. 2020) ("The crucial distinction between appealable and nonappealable summary judgment orders denying qualified immunity is this: '[p]urely legal rulings implicating qualified immunity are normally reviewable on an interlocutory appeal,'. . . but rulings 'turn[ing] on either an issue of fact or an issue perceived by the trial court to be an issue of fact' are not. . . . Where, as here, the interlocutory challenge to a ruling denying qualified immunity invites us to 'choos[e] among conflicting facts,'. . . or 'to adopt a spin on the summary judgment record different from that taken by the district court,'. . . we lack jurisdiction to accept the invitation. . . . Because Rodrigues fails to pose the qualified immunity question 'in a manner that would permit us to conclude that "the answer to it does not depend on whose account of the facts is correct" ... we lack the authority to provide an

answer.'. . We therefore conclude that Rodrigues' discontentment with the district court is not reviewable by this Court at this juncture.")

McKenney v. Mangino, 873 F.3d 75, 83-84 (1st Cir. 2017) ("[T]he defendant makes a series of factbound arguments. Most notably, the defendant repeatedly insists—contrary to the inferences drawn by the district court—that he reasonably perceived McKenney as an imminent danger at the time of the shooting, such that he was left with no real choice but to fire his weapon. In turn, he urges reversal in light of evidence that he maintains the district court either overlooked or insufficiently considered. These facts include data points such as that McKenney had ignored police commands to drop his loaded weapon, had at one time raised his gun, and was approaching the defendant (and the unarmed civilian in the defendant's cruiser) at the time he was shot. But there is a rub: the defendant's characterization of the summary judgment record collides head-on with the district court's synthesis of the facts. The defendant either ignores or gives unduly short shrift to evidence that was central to the district court's conclusion that, on the version of the facts most hospitable to the plaintiff, the defendant had 'ample opportunity to observe [McKenney's] actions and movements' before pulling the trigger and that the defendant's decision to shoot McKenney was 'unreasonably precipitous.'. . These facts include McKenney's suicidality, the slowness of his gait, the clear visibility, the fact that six minutes had elapsed since any officer had last ordered McKenney to drop his weapon, the fact that nobody had warned McKenney that deadly force would be used if he failed to follow police commands, and the six-minute gap between when McKenney raised his gun skywards and when the defendant pulled the trigger. Rather than accept arguendo that McKenney never came close to pointing his gun in the defendant's direction, the defendant devotes much sound and fury to the proposition that he reasonably perceived McKenney to be aiming his weapon at him. In short, the defendant has woven factbound arguments regarding both the immediacy of the threat posed by McKenney and the feasibility of less drastic action into the warp and woof of his challenge to the district court's qualified immunity analysis. Such an intertwining of disputed issues of fact and cherry-picked inferences, on the one hand, with principles of law, on the other hand, places these arguments beyond our jurisdictional reach on interlocutory appeal. . . To sum up, the precedents make pellucid that the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action. . . Taking the facts in the light most amiable to the plaintiff (as the law required it to do), the district court concluded that a rational jury could reasonably infer both that McKenney did not pose an imminent threat and that viable remedial measures had not been exhausted. The court also concluded that these facts should have been obvious to an objectively reasonable officer in the defendant's position. Although the defendant invites us to adopt a spin on the summary judgment record different from that taken by the district court, we lack jurisdiction to accept that invitation under *Johnson* and its progeny. . . . Accordingly, we dismiss the defendant's factbound challenges to the district court's order for lack of jurisdiction.")

Morse v. Cloutier, 869 F.3d 16, 24-26 (1st Cir. 2017) ("The bottom-line question is not — as the defendants suggest — what a reasonable officer would have known. Rather, the bottom-line question is whether a reasonable officer would have thought, given the facts known to him, that

the situation he encountered presented some meaningful exigency. . . Here, the district court focused on what the officers actually knew and what they reasonably could have suspected when they reached Morse's doorstep. It concluded that '[a] reasonable juror could credit this evidence and find that there was no objective basis for the officers to believe that exigent circumstances existed.'. . In reaching this conclusion, the court applied the proper legal standard. . . . The defendants' second line of attack challenges the district court's determination that, on the summary judgment record, the exigent circumstances question is freighted with genuine disputes of material fact. . . The plaintiffs counter that this determination is factual in nature and, therefore, that we lack jurisdiction to review it in these interlocutory appeals. Because jurisdiction is both a legally and a logically antecedent question, . . . we address the plaintiffs' argument first. A defendant asserting a qualified immunity defense may obtain interlocutory review of a denial of his motion for summary judgment, even if the district court concluded that the record presented a genuine dispute of material fact, as long as he accepts as true the plaintiff's version of the facts and argues that he is entitled to qualified immunity on that version of the facts. . . The defendants insist that, for purposes of these appeals, they have accepted the plaintiffs' version of the facts and challenge only the application of the law to those facts. Here, however, the defendants say one thing and do another. The arguments that they raise on appeal attempt to contradict, in significant ways, the plaintiffs' version of the facts. . . . The short of it is that the defendants plainly rest their appeals on an alternative version of the facts, that is, a version different from that relied on by the plaintiffs. Each version has some factual support in the record and, in the last analysis, each depends on what inferences a factfinder elects to draw from among reasonable, but conflicting, alternatives. By suggesting that the district court did not choose appropriately from among these competing sets of inferences and by asking us to discount the plaintiffs' plausible rendition of the facts, the defendants are making a quintessentially factbound argument 'inextricably intertwined with whatever "purely legal" contentions' their briefs contain. . . It follows that the defendants' exigent circumstances argument entails a prototypical factual dispute, not eligible for interlocutory review.")

McCue v. City of Bangor, 838 F.3d 55, 61-65 (1st Cir. 2016) ("After reviewing de novo all of the magistrate judge's determinations, the district court adopted the Recommended Decision in full. This appeal followed. The only issue before us is the pretrial denial of qualified immunity as to the plaintiff's allegation that the officers used excessive force after McCue had ceased resisting, as well as the corresponding denial of immunity under the MTCA for the state law assault claim. . . . Johnson and its progeny foreclose assertion of appellate jurisdiction over the defendants' interlocutory appeal. The magistrate judge's opinion, fully affirmed by the district court, denied summary judgment precisely '[b]ecause the record includes factual disputes regarding Plaintiff's claim that Defendants used excessive force after Mr. McCue allegedly ceased resisting.'. . In particular, the record contains facts that, when viewed most favorably to the plaintiff, could support a finding that McCue stopped resisting at some point during his encounter with the officers, and that the officers should have realized that he had stopped resisting, but that the officers 'continued to exert significant force ... no longer necessary to subdue Mr. McCue or to reduce the threat that he posed to himself or others.'. . And they continued to use such force after McCue told them that

they were hurting his neck. In light of these remaining factual issues, we cannot assume jurisdiction over the defendants' interlocutory appeal. Maintaining that they do not dispute the facts for the purposes of their appeal, the defendants argue that we have appellate jurisdiction notwithstanding the district court's identification of material factual disputes. They repeatedly assert that they construe the facts in the light most favorable to the plaintiff and that even so construed, 'the videotape evidence conclusively establishes that there is at most a timeframe of 66 seconds for which the trial court could have concluded that Mr. McCue may have stopped resisting arrest and the Defendants may have continued to apply force.' They further argue that 'this momentary continuance of force' for up to 66 seconds did not violate McCue's Fourth Amendment right to be free from unreasonable seizure. Plaintiff disagrees and says that the record supports a finding that 4 minutes and 25 seconds is the true period involved. As a matter of law, our circuit has assumed interlocutory appellate jurisdiction where the defendant 'accepted as true all facts and inferences proffered by plaintiffs, and [where] defendants argue[d] that even on plaintiffs' best case, they [we]re entitled to immunity.' *Mlodzinski*, 648 F.3d at 28. Even 'a defendant who concedes arguendo the facts found to be disputed is not barred by *Johnson* from taking an interlocutory appeal on a legal claim that the defendant is nevertheless entitled to qualified immunity on facts not controverted.' . . But this avenue is not available to the defendants here because, contrary to their protests, they have not in fact accepted the version of the facts most favorable to the plaintiff. In at least four different places in their brief, the defendants stress that, construing the Car 22 video in the most plaintiff-favorable light, there was at most 66 seconds in which they might have continued to apply force after McCue had stopped resisting. The defendants appear to have arrived at this number by misconstruing a statement of fact by the magistrate judge. Explaining why Blanchard punched McCue's lower back, buttocks, or thigh region after the officers had secured both his wrists and ankles, the magistrate judge observed that Blanchard might have done so because McCue 'squeezed' Blanchard's injured hand 'extremely hard' or, alternatively, in order to 'facilitate bringing together Mr. McCue's ankles and wrists to complete the five-point restraint.'. . The defendants inaccurately characterize this observation, asserting that the magistrate judge found that Blanchard could have punched McCue because 'McCue was resisting the Defendants' efforts to put him in a five-point restraint.' Pinpointing this moment when Blanchard punched McCue as the last moment in which the magistrate judge found that McCue had resisted, the defendants count 66 seconds from that point to the point when McCue is lifted off the ground. This insistence on 66 seconds both mischaracterizes the magistrate judge's statements about the facts and fails to present those facts in the light most favorable to the plaintiff. First, neither reason that the magistrate judge cited to account for Blanchard's punch (to prevent McCue from squeezing his hand or to facilitate the five-point restraint) necessarily equates to resistance by McCue. At this point, McCue's wrists and ankles had already been cuffed, thus minimizing his range of movements and the danger that he posed to his own and others' safety. Simply put, there is no indication in the Recommended Decision that the hand squeeze should be construed as continued resistance, much less resistance justifying the force used. The defendants' inference as such, of course, also demonstrates their failure to accept the version of facts most favorable to the plaintiff. Second, our independent assessment of the Car 22 video, construed in the light most favorable to the plaintiff, discredits the defendants' 66-seconds theory. . .The video, from 2:18 to 2:22, captures

McCue resisting detainment by kicking his legs, thrashing his torso, and shouting an expletive at the officers. In contrast, from 2:22 until the officers lift him off the ground at 7:08, McCue periodically growls and makes other noises but does not kick or thrash his body again. He also complains that the officers are hurting his neck, but we cannot ascertain from the video if the officers adjusted their positions in response. Viewed in the light most favorable to the plaintiff, McCue's noises and slight movements after the 2:22 mark -- and even his squeezing of Blanchard's hand – 'may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress.'. . In short, McCue's movements after 2:22 of the Car 22 video are not dispositive of whether he continued resisting. And from this perspective, there could be close to five minutes -- not 66 seconds -- during which the officers continued to exert force on a nonresisting McCue. Because the defendants have not, in fact, accepted the plaintiff's best version of the facts, we hold that there remains a genuine dispute of fact that precludes appellate jurisdiction over the denial of summary judgment. Finally, this factual dispute is material to the question on the merits. Depending on the amount of time for which the officers exerted force on McCue after he had ceased resisting, a jury could find that the officers' actions were unconstitutional under law that was clearly established in September 2012, the month of McCue's fatal encounter with the officers. The defendants argue that they should win because there was no clearly established law on this point. They are wrong. We 'adhere[ ] to a two-step approach to determine whether a defendant is entitled to qualified immunity.' *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). First, we ask whether the facts as alleged by the plaintiff make out a violation of a constitutional right. If so, we next ask whether that right was 'clearly established' at the time of the alleged violation. . . In determining whether the law was clearly established, we 'ask "whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right," and then consider "whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right."'. . Here, we focus on the 'clearly established' prong of the qualified immunity analysis. This circuit has recognized that a 'First Circuit case presenting the same set of facts' is not necessary to hold that defendants 'had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive.'. . We have also looked to the case law of sister circuits in determining whether a right was clearly established. . . Even without particular Supreme Court and First Circuit cases directly on point, it was clearly established in September 2012 that exerting significant, continued force on a person's back 'while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.' *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (quoting *Champion v. Outlook Nashville, Inc*., 380 F.3d 893, 903 (6th Cir. 2004)). At least four circuits had announced this constitutional rule before the events in question here. . . .[A]s the abundant case law demonstrates, a jury could find that a reasonable officer would know or should have known about the dangers of exerting significant pressure on the back of a prone person, regardless of any lack of formal training. In sum, the disputed factual issue -- when McCue ceased resisting and for how long after that moment the officers continued to apply force on his back -- is material to the question of whether qualified immunity is proper.")

SECOND CIRCUIT

Franco v. Gunsalus, 972 F.3d 170, 174-76 (2d Cir. 2020) ("One may question whether in some circumstances a trial court's decision concerning the sufficiency of the evidence is so clearly wrong as to constitute a legal error and thus be appealable. And the Supreme Court itself may not always have given clear guidance as to this issue. . . Our court, however, has seemingly routinely followed *Johnson*'s rule and has observed, '[t]he Supreme Court has made it clear that we lack appellate jurisdiction to decide an interlocutory appeal from a district court's denial of a claim of qualified immunity to the extent that the denial involves only a question of evidence sufficiency.'. . In the case before us, the defendant officers do not argue that they are entitled to qualified immunity on the basis of stipulated facts or on the facts that Franco alleges are true. . . Nor does this appeal on its face seem to raise a 'purely legal question.'. . Indeed, the only possible legal issue before us is whether the district court here erred as a matter of law when it concluded that a genuine dispute of material fact existed as to 'whether Defendant Gunsalus gave verbal commands to disperse prior to his arresting Plaintiff' and therefore 'whether there was probable cause for that arrest.'. .The officers attempt to shoehorn the record into one that would confer jurisdiction by arguing that Franco does not dispute that a dispersal order was *given*, only that he did not *hear* such an order. But Franco clearly did assert that no order was given. . . And the only practical way in which Franco could support that assertion and challenge whether Officer Gunsalus gave a dispersal order was to testify, as he did, that he did not hear such an order. Elijah, who was sitting in the car's front passenger seat, testified to the same effect. Furthermore, during his deposition, Franco was asked whether, while he was standing next to his friend's car, 'a police officer was walking towards you and *told you* to leave the area.'. . Franco responded in the negative, thereby denying that he was told to leave. Had Franco entirely failed to allege that no dispersal order was given, that would be a different matter. But the record assures us that this is not the case here. As the district court recognized, by offering evidence that no dispersal order was heard under circumstances where such an order would have been heard had one been given, Franco both asserted that no order was given and created a genuine dispute of a material fact as to whether one had, in fact, been given. As a general matter, it would make little sense to require percipient witnesses to testify not only that they did not hear a dispersal order given but also to testify (as against merely asserting) that no such order was given. Indeed, we struggle to imagine what evidence Franco could have summoned to controvert defendants' testimony that a dispersal order was given other than the testimony that neither he nor Elijah heard a dispersal order. Defendants argue that we should follow the approach employed in *Muschette on Behalf of A.M. v. Gionfriddo*, 910 F.3d 65 (2d Cir. 2018), where the court focused on evidence demonstrating that there was a reasonable basis for the defendant officer to believe that an order was given, rather than heard. In *Muschette*, the parents of A.M., a 12-year-old student who is deaf and communicates primarily in American Sign Language, argued that the defendant officer used excessive force when he tased A.M. after a confrontation with a teacher at a school. . . But in that case, the plaintiffs did not dispute that the officer actually gave verbal instructions and warnings to A.M. . . .Accordingly, the district court did not err as a matter of law when it determined that plaintiffs' testimony establishes a genuine issue of material fact as to whether an order was given, and it is properly up to a jury—

not a court of appeals—to determine whether to believe that testimony. . . Defendants also argue that the relevant question is the officers' perception, rather than Franco's—in other words, whether there is enough evidence that a reasonable officer would have believed that other officers gave a dispersal order in a manner that Franco would have heard. And were we to conclude that appellate jurisdiction lies, we would indeed have to consider whether the officers had 'arguable probable cause' to arrest Franco. . . This in turn would involve determining whether '(a) it was objectively reasonable for the officer[s] to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'. . But defendants have not argued that even if no dispersal order was given, the circumstances were such that a reasonable officer would have believed that such an order was made so that the defendants had arguable probable cause to arrest Franco. . . For all these reasons, the district court did not err by concluding that genuine issues of material fact remain to be resolved at trial. Its decision therefore is not properly appealable.")

THIRD CIRCUIT

HIRA Educational Services North America v. Augustine, 991 F.3d 180, 187-88 (3d Cir. 2021) ("Denials of immunity are immediately appealable even if the denial is 'implicit.' When a district court refuses to rule on an immunity claim 'on the premise that the court is unable, ... or prefers not to, determine the motion without discovery' then it is making 'at least an implicit decision that the complaint alleges a ... claim on which relief can be granted.'. . Such delay vitiates immunity as government officials 'otherwise entitled to immunity [are] nonetheless subjected to "the burdens of such *pretrial* matters as discovery."'. .Here, the District Court made two errors when it deemed the Legislators' appeals improper. First, its order acted as an implicit denial of immunity—even though it was without prejudice—because it would require the Legislators to bear the burdens of discovery and other pretrial matters. . . Second, the Legislators' immunity claims depend on questions of law and not on factual disputes that would deprive us of jurisdiction. . . The Legislators do not, for purposes of this appeal, challenge the truth of HIRA's allegations. They argue instead that even if HIRA's allegations are true they are nonetheless entitled to absolute or qualified immunity. Besides, any factual challenge by the Legislators would be doomed because this appeal arises from the District Court's denial of their motions to dismiss. As previously noted, at this stage of the litigation we accept HIRA's well-pleaded allegations as true. . . Whether HIRA alleged conduct by the Legislators that falls outside the sphere of legitimate legislative activities or that violates clearly established law is a question of law over which we have jurisdiction.")

Williams v. City of York, Pennsylvania, 967 F.3d 252, 254-55, 258-64 (3d Cir. 2020) ("When a district court denies a public official qualified immunity at summary judgment and the official appeals, the scope of our review is limited. We can review 'whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right.'. . But generally, 'we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove.'. . In recognition of that limited jurisdiction, we have announced two supervisory rules that facilitate our review and enhance the

reliability of district courts' decisionmaking. First, in *Forbes v. Township of Lower Merion*, 313 F.3d 144 (3d Cir. 2002), we required district courts 'to specify those material facts that are and are not subject to genuine dispute and explain their materiality.'. . Second, in *Grant v. City of Pittsburgh*, 98 F.3d 116 (3d Cir. 1996), we required courts to 'analyze separately, and state findings with respect to, the specific conduct of each [defendant].'. . .Had the District Court followed the two supervisory rules that we emphasize today, it would have facilitated appellate review and enhanced the reliability of its decision. Because the District Court erred in concluding the officers are not entitled to qualified immunity for false arrest and the excessive force Williams alleges, we will reverse. . . . Since announcing these supervisory rules, we have also recognized a narrow exception to the limits that *Johnson* places on our jurisdiction: 'where the trial court's determination that a fact is subject to reasonable dispute is *blatantly and demonstrably false*, a court of appeals may say so, even on interlocutory review.' *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3d Cir. 2007) (emphasis added). This exception derives from the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007). . . .Williams claims excessive force arising out of the Officers' conduct at the scene of her arrest and at City Hall. As we shall explain, the District Court did not comply with our supervisory rules in conducting its qualified immunity analysis, and it erred in concluding that the Officers are not entitled to qualified immunity on this claim. So we will reverse. . . . Accepting the facts the District Court identified, Seitz did not violate Williams's constitutional rights by throwing her to the ground. The parties do not dispute that officers were responding to a shots-fired call, Williams was running in close proximity to the shooting, and when Figge ordered her to get on the ground, she ran to the porch of a house and started pounding on the door instead of complying with his order. Given these facts, it was not unreasonable for Seitz to throw Williams to the ground. . . So the District Court erred in concluding Seitz was not entitled to qualified immunity. . . . In this appeal, the District Court did not state whether it assumed Williams notified her arresting officers of her pain. Because this fact is plainly material, the Court's failure to state it violated the *Forbes* rule. Instead of remanding, though, we will exercise our authority under *Johnson* to 'undertake a ... review of the record to determine what facts the district court, in the light most favorable to [Williams], likely assumed.'. .On this record, Williams cannot show her arresting officers received notice of her pain. It's true that Williams denied the Officers' statement that she 'never complained at the scene of her arrest about being in pain from handcuffs or otherwise.'. . But her only support for that denial was the dashcam footage, which she said shows she 'complain[ed] vociferously about her abuse at the hands of the police.'. . We have reviewed the video footage. . . It shows Williams complained only about her 'wedgie.' She said nothing about pain from her handcuffs. Because this evidence is insufficient for a reasonable jury to conclude that the Officers received notice of Williams's pain . . . the District Court erred in denying them qualified immunity for failing to loosen Williams's handcuffs[.] . . . Finally, Williams's allegations that certain unidentified officers put a knee to her back, tripped her, and were 'forceful and rough' in handling her cannot survive summary judgment. We reiterate that a 'plaintiff alleging that one or more officers engaged in unconstitutional conduct must establish the 'personal involvement' of each named defendant to survive summary judgment and take that defendant to trial.'. . .*Jutrowski*'s central tenet—that 'a defendant's § 1983 liability must be predicated on his direct and personal involvement in the alleged violation'—is 'manifest in our

excessive force jurisprudence.'. . Yet the District Court did not state whether Figge, Monte, or Seitz could have been one of the unidentified officers that allegedly put a knee to Williams's back, tripped her, and were 'forceful and rough' in handling her. The Court's failure to address these factual disputes violated the *Forbes* rule, but we will once again 'undertake a ... review of the record to determine what facts the district court, in the light most favorable to [Williams], likely assumed.'. . . The record shows Williams cannot establish the personal involvement of any of the Officers. At summary judgment, Williams conceded she 'cannot specifically describe what each officer at the scene of her arrest did.' . . So the District Court erred in concluding that the Officers are not entitled to qualified immunity for allegedly putting a knee to Williams's back, tripping her, and being 'forceful and rough' in handling her. . . For all the reasons stated, we will reverse the District Court's denial of summary judgment as to Williams's excessive force claim insofar as it relates to the officers' conduct at the scene of her arrest. . . . For all these reasons, no reasonable juror could find the Officers failed to loosen Williams's handcuffs or twisted her arm, threw her against the wall, and threatened to break her arm. . . The District Court's contrary determination is unfounded. And because the record shows Williams cannot establish the personal involvement of any of the Officers, the Court erred in concluding they are not entitled to qualified immunity. . .Accordingly, we will reverse the District Court's order to the extent it denied summary judgment as to Williams's excessive force claim relative to the officers' conduct at City Hall. . . . This case falls in an uncertain space between *Stewart* and *Woody*. Like the officer in *Stewart*, Figge was in uniform and exhibited a show of authority by drawing his gun. And just as Stewart did not comply with the officer's order to put his hands on the dashboard, Williams did not comply with Figge's order to get on the ground. In fact, the parties do not dispute that she ran to the porch of a house and started pounding on the door. But if on-foot flight from a uniformed officer in a marked police vehicle was insufficient for a criminal escape conviction in *Woody*, it may be that probable cause did not exist here. That uncertainty in the law does not strip the officers here of qualified immunity; rather it insulates them from liability for their determination that a 'fair probability' existed that Williams committed escape. . . Accordingly, Figge and Monte are entitled to qualified immunity on Williams's claim for false arrest.")

FOURTH CIRCUIT

Campbell v. Florian, 972 F.3d 385, 392 n.6 (4th Cir. 2020) ("Deciding this appeal on the first prong of the qualified immunity analysis follows the Supreme Court's guidance in *Johnson v. Jones*[.] . . In *Johnson*, the Supreme Court held that, to the extent that the district court's order in a qualified immunity case rests on a sufficiency-of-the-evidence determination, that portion of an order lacks finality for an appeal. . . So *Johnson* prevents us from exercising jurisdiction 'over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred.'. . '[B]ut we [do] have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them.'. . Of course, where (as here), the district court 'fails to supply the factual basis for its legal decision,' this task is more difficult for us. . . And so we must determine 'what the evidence, viewed in the

light most favorable to the nonmoving party, demonstrated' to 'render [our] decision on the purely legal issues.'")

Hicks v. Ferreyra, 965 F.3d 302, 312 (4th Cir. 2020) ("We emphasize at the outset what the officers are *not* challenging on appeal. They do *not* argue that 'if we take the facts as the district court [gave] them to us,'. . . then the district court erred as a legal matter when it found that the alleged conduct violated the Fourth Amendment, because the officers unreasonably extended Hicks's first stop and conducted an immediate second stop without sufficient justification. Nor do the officers take issue with the second step of the district court's qualified immunity analysis, arguing that any Fourth Amendment violation they may have committed was not 'clearly established' at the time of the incident. Instead, the officers seek review of a question that we may not consider in this interlocutory posture: whether the district court properly assessed the factual record in front of it. . . With respect to the first stop, the officers' argument centers exclusively on the district court's finding that the lack of record support for a purported 'customary protocol' supporting Hicks's lengthy detention precluded the award of summary judgment. According to the officers, the district court misconstrued the record in making that determination, improperly refusing to consider evidence of an unwritten protocol. We tend to read the district court's carefully reasoned opinion differently, but that is 'of no moment' in this posture. . . Such '*fact*-related dispute[s] about the pretrial record' fall outside our limited jurisdiction.")

District of Columbia v. Trump, 959 F.3d 126, 130-32 (4th Cir. 2020) (en banc) ("A district court's actual refusal to rule on immunity is treated as a denial of immunity and is immediately appealable. In most cases in which courts have found a basis for appellate jurisdiction, the district court's refusal to rule on immunity was an explicit one, indicating that its decision was final and it would adjudicate nothing else at that point in time. An implicit refusal to rule on an immunity question can also provide a basis for appellate jurisdiction. But the implicit refusal must, like an explicit one, be clear, establishing that the ruling is the court's final determination in the matter. . . .When, however, it is clear that the district court *does* intend to rule on a motion asserting an immunity defense and has not unreasonably delayed in doing so, the lack of a ruling is neither an implicit nor effective denial of immunity. . . . Here, the district court neither expressly nor implicitly refused to rule on immunity. It did not make *any* rulings with respect to the President in his individual capacity. . . To the contrary, the district court stated in writing that it intended to rule on the President's individual capacity motion. Despite the President's suggestion, the district court's deferral did not result in a delay 'beyond reasonable limits.' Not even seven months had elapsed after the close of briefing on this question at the time the President noted this appeal. During these seven months, the district court, recognizing that the President in his individual capacity had moved to dismiss, again expressly stated in writing that it would address that motion. In these same seven months, in addition to managing all of the other cases on its docket, the district court managed the many aspects of this complex litigation against the President: the court held a second hearing on the President's motion to dismiss in his official capacity, issued a second, thorough written opinion explaining its ruling, and also issued a lengthy written opinion explaining its denial of the President's motion to certify an interlocutory appeal of the court's rulings. We

cannot conclude that the court's failure to also rule on the motion at issue here during this same seven-month period evinces an unreasonable delay or a desire to needlessly prolong this litigation. . . .At oral argument, the President's counsel conceded that the asserted denial of his claim of immunity provides the only jurisdictional basis for this interlocutory appeal. Because, as we have explained, the district court did not deny the President's immunity claim, we lack jurisdiction to consider the appeal.")

District of Columbia v. Trump, 959 F.3d 126, 133-34, 137-40 (4th Cir. 2020) (en banc) (Niemeyer, J., with whom Wilkinson, Agee, Quattlebaum, and Rushing, JJ., join, dissenting) ("[W]hen the district court issued its December 3, 2018 order directing the President to participate in six months of full fact discovery despite the President's assertion of absolute immunity and his objection to that discovery based on immunity, it effectively denied the President the benefits of immunity, thus entitling him to appeal the order. And the District and Maryland's attempt to moot the appeal by dismissing the individual capacity claim in the district court *after* the President had filed this appeal was ineffective. Accordingly, I would deny the District and Maryland's motion to dismiss this appeal and exercise appellate jurisdiction based on the denial of immunity. Having jurisdiction, I would then remand the case to the district court with instructions to dismiss the District and Maryland's complaint for the reasons given in the dissenting opinions in *In re Trump*, No. 18-2486. . . .The issue thus presented is whether the district court's December 3 order directing the parties to proceed with full fact discovery on the merits over the objection of the President and in rejection of his repeated requests to address immunity amounted to an order effectively denying the President's claim of immunity. Like claims of immunity generally, the invocation of absolute immunity is a claim to 'an entitlement not to stand trial or face the other burdens of litigation.'. . 'The entitlement is an *immunity from suit* rather than a mere defense to liability.'. . . In this case, the immunity issue is indisputably an important one that is completely separate from the merits of the action and, when denied, effectively becomes unreviewable on appeal, thus satisfying collateral order requirements (2) and (3). But requirement (1) remains contested — whether the district court's December 3, 2018 order 'conclusively determine[d] the disputed question' of immunity. . . I conclude that the district court's December 3 order did precisely that. It was an order directing the parties to engage in full fact discovery on the merits over the objection of the President based on immunity, and therefore it was entirely inconsistent with the benefit conferred by immunity to be spared the burden of pretrial discovery. Because the order denied the President the benefits of immunity, it was subject to immediate appeal. . . . In this case, I can only conclude that the district court's conduct was deliberately calculated to avoid appellate review on the immunity question — and in view of the majority's opinion, it has succeeded in doing so. . . . Of course, if the district court believed that it needed discovery in order to rule on the President's invocation of immunity, it would have been appropriate for the court to have deferred ruling on immunity until the completion of such limited discovery. In that case, the court's deferral order would not be an appealable order. . . But in this case, neither party suggested that discovery on immunity was required, and neither party requested it. The immunity question was clearly understood to be a pure question of law that did not require further factual development. . . . In sum, after deferring consideration of immunity for some nine months, the

district court ordered that the parties begin six months of fact discovery, thereby knowingly denying to the President one of the most important aspects of his asserted immunity — that he be spared the burdens of pretrial proceedings, including discovery. Accordingly, I would conclude that the December 3 order was immediately appealable.")

FIFTH CIRCUIT

Cunningham v. Castloo, 983 F.3d 185, 190 (5th Cir. 2020) ("In determining materiality, we take Cunningham's version of the facts as true and view those facts through the lens of qualified immunity. . . If Sheriff Castloo would still be entitled to qualified immunity under this view of the facts, then any disputed facts are not material, the district court's denial of summary judgment was improper, and we must reverse. . . These precepts are clear, though perhaps less so to Cunningham. She contends that we lack jurisdiction because the district court *said* that it found genuine disputes of material fact. Not so. The mere fact that the district court said that, in its view, material factual disputes preclude summary judgment does not deprive us of interlocutory appellate jurisdiction. . . We may of course decide whether the factual disputes the district court said were material are in fact material.")

Amador v. Vasquez, 961 F.3d 721, 728-31 (5th Cir. 2020), *on pet. for rehearing* ("[T]he district court found three genuine disputes of material fact that barred qualified immunity because resolving those facts in Plaintiffs' favor led the court to conclude that shooting Flores was objectively unreasonable. The district court found the relevant, genuine disputes of material fact to be: (1) 'whether Flores did open the door or did look inside to see the keys in the ignition or see the weapon that was inside the SUV'; (2) whether Flores tried to activate the taser against the officers; and (3) what occurred in the moments before the deputies shot Flores. Considering the totality of the circumstances, focusing on the act that led the officers to discharge their weapons, and without reviewing the district court's decision that genuine factual disputes exist, . . . we conclude that the genuine issues of material fact identified by the district court are material, and this case should proceed to trial. Relying on their version of the facts, yet purportedly relying on the video, the officers argue that they reasonably believed that Flores posed a threat of serious harm to the officers or to others. . . According to the officers, Flores 'opened the front passenger door of the Tahoe Patrol vehicle of Deputy Vasquez, [sic] said vehicle had the keys in the ignition and an AR-15 inside the vehicle.' They further contend that Flores 'picked up Deputy Vasquez' [sic] taser from the street and attempted to activate it against Deputy [sic] Vasquez and Sanchez but was unsuccessful.' Most significantly, the officers assert that 'Deputies Vasquez and Sanchez were in imminent fear of death or serious bodily injury by the actions of Gilbert Flores ***at the time of the fatal shots***.'. . However, Plaintiffs assert that at the time Flores was shot, Flores was not next to the patrol car, Flores had 'raised both of his hands directly above his head with the knife "palmed" in his left hand' and 'raised his hands in apparent surrender, stood still, his hands were not moving, his feet were not moving, he was not moving or advancing toward the Deputies and no family members of [sic] neighbors were outside or in the vicinity.' Collectively, these factual

disputes are material to resolving whether the officers reasonably believed that Flores posed a threat of serious harm at the time of the shooting. Construing the facts in Plaintiffs' favor, the district court found that a 'reasonable officer would have concluded that Flores, who was stationary for several seconds and put his hands in the air while remaining otherwise motionless, was no longer resisting and had signaled surrender.' We agree. Flores had a knife, not a gun; was several feet away from the officers, the house, and the vehicle; had his hands in the air in a surrender position; and stood stationary in the officers' line of sight. Under these facts taken in the light most favorable to Plaintiffs, we conclude that the district court correctly identified material factual disputes as to whether the officers violated Flores's Fourth Amendment rights. Accordingly, we must address the second question of the analysis. . . . The second question in the qualified immunity analysis is whether clearly established law prohibited the officers from shooting Flores in these circumstances. . . Again, the answer is yes. . . . A reasonable officer would have understood that using deadly force on a man holding a knife, but standing nearly thirty feet from the deputies, motionless, and with his hands in the air for several seconds, would violate the Fourth Amendment. The officers argue that they were justified in using deadly force because Flores posed an immediate threat at several instances before their ultimate use of deadly force. However, 'an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of the force has ceased.'. . To say otherwise would grant officers '"an ongoing license to kill an otherwise unthreatening suspect"' who was threatening earlier. . . .We find that if a jury accepts Plaintiffs' version of the facts as true, particularly as to what occurred in the moments before the deputies shot Flores, the jury could conclude that the officers violated Flores's clearly established right to be free from excessive force. *See Cole v. Carson*, 935 F.3d 444, 447, *as revised* (5th Cir. Aug. 21, 2019) (en banc) ("We conclude that it will be for a jury, and not judges, to resolve the competing factual narratives as detailed in the district court opinion and the record as to the ... excessive-force claim."). Accordingly, there are factual disputes that must be resolved to make the qualified immunity determination, disputes that are material, and we lack jurisdiction over this interlocutory appeal. . . .Because there are genuine issues of material fact that preclude summary judgment, we lack jurisdiction to review this appeal and DISMISS.")

SIXTH CIRCUIT

Kidis v. Reid, 976 F.3d 708, 719-20 (6th Cir. 2020) ("Because qualified immunity is a defense from trial, we afford a government official the right to take an interlocutory appeal to contest the denial of qualified immunity at summary judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). One who foregoes that right, however, has not forever forfeited his ability to further raise the issue. . . But the mechanics of preserving the defense are somewhat less clear. *Ortiz* held that a defendant forfeits appellate review of a sufficiency-of-the-evidence-based qualified immunity defense when he fails to raise the issue through a Rule 50 motion. . . At the same time, *Ortiz* expressly left open the question of whether this procedural requirement applies only to a defendant's evidence-based arguments, or also applies to a defendant who, like Moran, raises a 'purely legal' challenge regarding qualified immunity. . . The answer to that open question could have consequences for Moran, who did not file a Rule 50 motion here. Assuming

the issue is live, Moran's argument nonetheless fails. As the record before the jury reflected, when Moran discovered Kidis, Kidis was shirtless, shoeless, intoxicated, badly scratched, and on the ground, face down and with his hands out, having tired from a lengthy flight from the police. At that point, it was visually obvious that Kidis was not a threat or a flight risk. And while it was conceivable that Moran would need to apply some force to arrest Kidis safely, there was no conceivable need for Moran to knee strike, choke, and punch Kidis once Moran was on top of Kidis while Kidis was making no effort to resist arrest. Once Moran had physical control over the surrendering and unresisting Kidis, Moran's subsequent aggression violated Kidis's clearly established right to be free from excessive force.")

Estate of Matthews v. City of Dearborn, Michigan, 826 F. App'x 543, ___ (6th Cir. 2020) ("Because Hampton's legal arguments depend on factual disputes and credibility determinations, and Hampton has failed to concede the most favorable view of the facts to Matthews for purposes of the appeal, . . . or to show that any of these disputes are blatantly contradicted by the evidence, . . . we lack jurisdiction over this appeal.")

Estate of Matthews v. City of Dearborn, Michigan, 826 F. App'x 543, ___ (6th Cir. 2020) (Readler, J., concurring in the judgment) ("As the majority opinion correctly concludes, Officer Hampton is not entitled to qualified immunity. In reaching that conclusion, however, we should be careful in parsing factual and legal arguments. To be sure, purely factual challenges to the district court's findings are foreclosed on interlocutory review, except when the record blatantly contradicts a plaintiff's factual account. . . But simply because a party raises the factual aspects of a case does not automatically doom the appeal on jurisdictional grounds. Every advocate, after all, colors their case with their factual perspectives to some degree, reminding the reader that there are two sides to a story, even if, for legal argument's sake, a party ultimately must accept the other side's. . . Nor is it uncommon for a party to plead alternative arguments, perhaps one turning on facts, and another, should the fact-based argument fail, on law. . . And in the qualified immunity setting, the appellate courthouse doors remain open to that legal argument. . . Although Hampton disagrees with the district court's finding that Matthews was underneath Hampton at the time of the shooting, he expressly acknowledges his willingness to accept that factual conclusion for purposes of appeal. . . With that concession, Hampton argues that the district court erred as a legal matter by holding that his actions constituted excessive force in violation of clearly established Fourth Amendment precedent. We should answer that identifiable legal question, rather than dismissing Hampton's appeal entirely because it also has a factual dimension. That said, Hampton's legal argument lacks merit. Whether Hampton's use of deadly force was excessive turns on whether he had 'probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury to the officer or others.'. . Hampton justifies his conduct by contending that Matthews was reaching for the gun when Hampton fired his weapon, buttressing that point with the *legal* argument that in a deadly force case, a plaintiff cannot create a question of fact by asserting only speculative arguments as to why an officer's testimony is not believable[.] . . That argument may have some legal force. *Cf. Romo v. Largen*, 723 F.3d 670, 678 (6th Cir. 2013) (Sutton, J., concurring) (arguing that *Johnson* does not mean that parties who

claim qualified immunity must accept a district court's inferences from the facts). But even if Hampton has fairly characterized the legal standard, his claim nevertheless fails to meet it. With the factual uncertainties at play here, the district court did not err as a matter of law in concluding that there remained a genuine issue of material fact as to whether the plaintiff was trying to obtain the officer's gun. In these circumstances, in other words, the jury could find excessive force.")

Marvaso v. Sanchez, 971 F.3d 599, 604-05 (6th Cir. 2020) ("Reddy Sr. was not a public official either at the time of Plaintiffs' alleged constitutional injury or at present. Instead, as he explains in his motion to dismiss, he retired as the Wayne-Westland Fire Chief in 1998. Accordingly, although he is still subject to § 1983 liability, he is not entitled to qualified immunity from suit. *See, e.g., Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698 (6th Cir. 1996) ("[A] party who is not a public official may be liable under 42 U.S.C. § 1983 and yet not be entitled to qualified immunity because, if not a public official, the reason for affording qualified immunity does not exist." (citing *Wyatt v. Cole*, 504 U.S. 158 (1992))). Because the exception for qualified immunity appeals does not apply and no other basis for appellate jurisdiction exists, . . . we dismiss Reddy Sr.'s appeal for lack of jurisdiction.")

Marvaso v. Sanchez, 971 F.3d 599, 615 (6th Cir. 2020) (Nalbandian, J., dissenting) ("I agree that [Reddy Sr.] is not entitled to qualified immunity because he is not a public official, even though he qualifies as a state actor for § 1983 liability. . . That said, the district court still erred in denying his motion to dismiss because Plaintiffs fail to adequately plead a § 1983 conspiracy claim against him for the same reasons they fail to adequately plead the same claim against Adams and Reddy, Jr. . . . The majority concludes that we don't have jurisdiction over his appeal because qualified immunity isn't involved. . . But 'whether a particular complaint sufficiently alleges a clearly established violation of law ... is both "inextricably intertwined with," and "directly implicated by," the qualified-immunity defense,' so we have pendent jurisdiction over challenges to the sufficiency of the pleadings. . . The majority acknowledges this and says: 'Two claims are "inextricably intertwined" if deciding one necessarily decides the other.'. . Because resolution of Adams and Reddy, Jr.'s appeal also resolves Reddy, Sr.'s, we have jurisdiction over both. . . The standard to survive a motion to dismiss is admittedly a low bar. But that doesn't mean courts must bend over backwards to save a plaintiff's meritless claims. Yet that's what the majority does here. I respectfully dissent.")

Ouza v. City of Dearborn Heights, Michigan, 969 F.3d 265, 277-78 (6th Cir. 2020) ("Defendants attempt to turn the *Johnson* rule on its head in the present case by arguing that we are bound by the district court's findings of fact even where the district court improperly construed those facts against Plaintiff, the non-moving party. Defendants ask us to decide the purely legal question of whether red marks alone—without allegations of swelling, bruising, or numbness—can ever be enough to make out a viable excessive force claim based on tight handcuffing under the Fourth Amendment. But we do not need to decide whether red marks alone are sufficient to make out an excessive force claim under the Fourth Amendment because Plaintiff's version of the facts includes more than red marks: she demonstrated red marks *and* carpal tunnel syndrome (including

numbness and tingling) resulting from the tight handcuffing. To the extent that the district court failed to take those facts into account or construed them in Defendant's favor, it applied the wrong standard at the summary judgment stage. . . At bottom, Defendants' argument mischaracterizes the district court's ruling and misunderstands the *Johnson* rule. While this Court does not have jurisdiction to consider determinations of evidence sufficiency under *Johnson* (i.e., whether or not the plaintiff's allegations set forth a genuine issue for trial), we do have jurisdiction to review whether the district court properly adopted the plaintiff's version of the facts in assessing qualified immunity (i.e., whether it applied the correct summary judgment standard). Indeed, the precise scope of our appellate jurisdiction on interlocutory appeal from a denial of qualified immunity is whether 'the plaintiff's version of facts demonstrates a violation of clearly established rights.'. . In the present case, Plaintiff's version of the facts includes evidence of red marks and carpal tunnel syndrome. We have jurisdiction to review whether that version of the facts sets forth a violation of a clearly established right.")

Sevy v. Barach, No. 19-2038, 2020 WL 3564660, at *8-10 (6th Cir. July 1, 2020) (not reported) (Readler, J., concurring in part and in the judgment) ("Agreeing fully with the majority opinion's resolution of Anthony Sevy's First Amendment claim, I write separately to address Officer Philip Barach's challenge to Sevy's Fourth Amendment claim. Unlike the majority opinion, I would reach the merits of that challenge. In characterizing our interlocutory jurisdiction over the denial of qualified immunity, we sometimes say our mandate is to review law, but not facts. . . Consider an appeal challenging the legal determination that the plaintiff's facts demonstrate a violation of a clearly established constitutional right, meaning the defendant is not entitled to qualified immunity. . . These legal conclusions are the bread and butter of our interlocutory qualified immunity jurisdiction, and they are reviewable in the ordinary course. . . . In reality, however, most arguments in this setting include features of both law and fact. Take, for instance, a case in which a district court draws factual inferences in denying on legal grounds at summary judgment a claim for qualified immunity. What part of that decision is eligible for interlocutory review? We have sometimes said that any factual inferences are insulated from review, *Romo v. Largen*, 723 F.3d 670, 673–74 (6th Cir. 2015), yet we have acknowledged that this approach may be at odds with Supreme Court precedent. *See DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015) (acknowledging but declining to decide whether *Romo* is inconsistent with *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014)); *see also Romo*, 723 F.3d at 678 (Sutton, J., concurring) (construing Supreme Court precedent to permit interlocutory review of a district court's factual inferences). And we have routinely performed at least a perfunctory review of those factual inferences at summary judgment to ensure they are not 'blatantly contradicted by the record' such that 'no reasonable jury could believe [them].'. . Otherwise, we risk working from a fictitious version of events in assessing a defendant's entitlement to qualified immunity. . . Equally true, even in cases where there are genuine disputes over material facts, we do not dismiss the appeal on jurisdictional grounds merely because the defendant made some factual arguments or used aspects of her own factual account in mounting a legal argument for qualified immunity. . . Doing otherwise is a disservice to the Court and the parties. After all, more expansive jurisdiction maximizes qualified immunity protections for officials acting in good faith. It further guides and

develops the law surrounding the constitutional questions before us. And it focuses future proceedings by identifying the controlling law and key disputes for trial. . . All of this is to say that, at the very least, we must be careful on interlocutory appeal to separate reviewable arguments from non-reviewable ones. . . Yet to my eye, the majority opinion has not followed this sound approach. Deeming all of Barach's Fourth Amendment arguments as turning on purely factual disputes, the majority opinion concludes that we do not have jurisdiction over any of Barach's challenges to the district court's denial of qualified immunity. . . . Barach contends that he employed reasonable force in arresting Sevy, as measured by *Graham v. Connor*, 490 U.S. 386 (1989), even on Sevy's version of events. That bread-and-butter legal argument is one we should entertain. . .The majority opinion nonetheless denies jurisdiction over that claim because factual disputes are 'crucial' to Barach's appeal. . . Facts, of course, are crucial to every case. How crucial depends on context. Sometimes they are crucial because they are outcome-determinative. That was the case in *Johnson*. Where a defendant concedes that adopting the plaintiff's version of the facts demonstrates the violation of a clearly established constitutional right, the Court is left essentially with a factual dispute, making the facts crucial to the outcome. . . But in other cases, the facts are important, perhaps even crucial in a sense, yet leave for the Court a legal issue appropriate for interlocutory resolution. Consider that in nearly every qualified immunity appeal, the parties tell different stories. And each party's view of the facts often bleeds into her portrayal of the law. We in turn are left to resolve whether a clearly established constitutional violation occurred based upon the plaintiff's account of the facts, something the defendant rarely if ever concedes. If this run-of-the-mill scenario constitutes a 'crucial' factual dispute that extinguishes our interlocutory jurisdiction, the *Johnson* exception would quickly become the general rule. Rather than dismissing Barach's appeal for lack of jurisdiction, we should undertake the traditional qualified immunity analysis. Accepting *Adams*'s instruction to determine whether a factual dispute is 'crucial,' we should ask whether the plaintiff's version of events establishes the violation of a clearly established constitutional right, another way of asking whether accepting the plaintiff's version of events is outcome-determinative (or 'crucial'). If the defendant maintains that adopting the plaintiff's view of events is not outcome-determinative, as Barach does here, a 'pure question of law' remains for resolution. . . I would therefore reach the merits of Barach's *Graham* argument. . . . All told, assuming the truth of Sevy's record-supported account, Sevy was not actively resisting the officers. It follows that a reasonable jury could find that Barach violated Sevy's clearly established Fourth Amendment right not to be subjected to a takedown maneuver while offering no resistance to an attempted arrest. . . Sevy deserves the chance to make his case to a jury. . . e whether Sevy's account is correct. But it is our place, indeed our duty, to measure that account against the applicable legal standard. I would thus resolve Barach's appeal rather than dismiss it for purported jurisdictional defects.")

Franklin v. City of Southfield, Michigan, 808 F. App'x 366, ___ (6th Cir. 2020) ("In this case, both prongs of the qualified immunity analysis hinge on disputes of material fact that are not conceded and that remain unresolved by the video. If, in fact, Roeske's gesture was for Franklin to walk forward, a jury may find that, from the perspective of a reasonable officer, it was not objectively reasonable to tase him. Whether Franklin complied with instructions is also a dispute

of material fact, as is whether Roeske issued accompanying verbal instructions. Furthermore, we must assess the objective reasonableness of each taser deployment separately. . . And there remains a question of fact as to whether Franklin's actions after he was dropped by the first taser were sufficient to make the second and third use of the taser objectively reasonable. Additional factual clarity is also needed before we can assess whether Roeske violated clearly established law, as it is axiomatic (as it was in 2013) that tasing a person who complies with police instructions—or who is not resisting arrest—violates the Fourth Amendment. . . Because the resolution of facts in dispute is necessary to resolve either prong of the qualified immunity inquiry as a matter of law, we do not have jurisdiction to hear this appeal.")

Banas v. Hagbom, 806 F. App'x 439, ___ (6th Cir. 2020) ("[W]hen a defendant argues both his factual perspective and legal questions, we can disregard his factual contentions and only decide the legal issues. . . Yet if the defendant only argues factual questions, we lack jurisdiction. . .And besides ignoring a defendant's factual argument to assess his legal argument, we may also exercise jurisdiction over a case when the parties dispute the material facts if the plaintiff's version of the facts is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'. . In this circuit, a video, or audio recording may suffice to 'blatantly contradict' the plaintiff's facts. . . And, of course, if the facts are undisputed, we may evaluate the case in light of clearly established law. We lack jurisdiction to hear Hagbom's appeal because he only argues factual questions. Banas claims he did not resist Hagbom while on the ground. He said in his deposition that he could not put his arms behind his back because Hagbom was sitting on top of him at the time. Alternatively, Hagbom tries to explain why Banas was, in fact, resisting him on the ground after the body-slam. Hagbom construes his argument as conceding Banas's facts, but then Hagbom points to the parts of Banas's deposition and the Michigan Court of Appeals opinion that suggest Banas did resist while on the ground. So Hagbom ignores the fact that Banas says he did not resist while lying face down. Hagbom argues purely factual questions by saying that even viewing Banas's facts as Banas alleged, Banas *still resisted*. In so arguing, Hagbom seeks to convince us of his set of facts. He hasn't conceded Banas's allegations at all. Even so, we could ignore Hagbom's factual assertions that Banas resisted him and only decide the legal questions of qualified immunity that Hagbom presents. But Hagbom does not argue 'the legal issue of whether there was a violation of a clearly established constitutional right.'. . Hagbom cited the general propositions for qualified immunity and mentioned that *Graham v. Connor*, 490 U.S. 386 (1989), presents factors for assessing reasonable force. Yet rather than explain why he did not violate any of Banas's constitutional rights or why the violation of the right was not clearly established, Hagbom then only focuses his argument on why we should determine that Banas in fact resisted. Hagbom has only given us factual contentions. So we lack jurisdiction to hear his appeal.")

Adams v. Blount County, Tennessee, 946 F.3d 940, 948-51 (6th Cir. 2020) ("There are two narrow circumstances in which an interlocutory appeal record may contain some dispute of fact. First, we may overlook a factual disagreement if a defendant, despite disputing a plaintiff's version of the story, is 'willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'. . And second, in exceptional circumstances, we may decide an appeal challenging the

district court's factual determination if that determination is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'. .In determining the scope of our jurisdiction, we 'separate an appellant's reviewable challenges from its unreviewable.'. . We may still review 'pure question[s] of law, despite the defendants' failure to concede the plaintiff's version of the facts[.]'. . In doing so, we 'ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . We therefore defer to the district court's determinations of fact. . . And beyond those determinations, 'a defendant may not challenge the inferences that the district court draws from those facts, as that too is a prohibited fact-based appeal.'. . As a result, we 'need look no further than the district court's opinion,' and 'we often may be able merely to adopt the district court's recitation of facts and inferences.'. . We find the district court's opinion is this case to be well-reasoned and supported by the record, and therefore only briefly address the various arguments raised by Burns. . . .When raising his legal argument, however, Burns fails to concede the most favorable view of the facts to Plaintiffs and instead relies solely on his version of the facts, as addressed above. In *Phelps v. Coy*, we explained that we have jurisdiction to disregard defendants' attempts to dispute plaintiffs' facts only in cases where 'the legal issues are discrete from the factual disputes.'. . Similarly, in *Beard v. Whitmore Lake School District*, we held that interlocutory jurisdiction over appeals from denials of qualified immunity involving disputed facts only exists where 'some minor factual issues are in dispute' and 'it does not appear that the resolution of [such] factual issues is needed to resolve the legal issue' also presented. . . In such circumstances, we must 'separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine').'. . If, however, disputed factual issues are 'crucial to' a defendant's interlocutory qualified immunity appeal, we may not simply ignore such disputes; we remain 'obliged to dismiss [the appeal] for lack of jurisdiction.'. . The facts Burns disputes are 'crucial to' his qualified immunity appeal. Burns continues to insist on appeal that he did not use deadly force, to define his 'slam' as an action in which he 'pushed' Edwards's body 'out' and 'down' while they both were falling, and to argue that Edwards had fled when he attempted to place him in the SUV. The district court found that these issues are genuinely disputed and material to determining whether Burns exercised excessive force. As explained above, there is enough record evidence demonstrating that these findings of fact and inferences are not blatantly and demonstrably false. Moreover, these factual disputes are neither 'minor[,]'. . . nor 'immaterial to the legal issues raised by the appeal[.]'. . Rather, they serve as the basis for Burns's legal argument that he did not use excessive force and that his actions were objectively reasonable. . . . Because genuine issues of material fact regarding Defendant Burns's qualified immunity claim exist, and because the arguments raised by Burns concerning the denial of qualified immunity rely on disputed facts, this court is without jurisdiction and the case must be dismissed.")

Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *1 n.7 (N.D. Ohio Dec. 6, 2017) ("The Court's qualified immunity decisions seek 'to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'. .

And *Forsyth's* allowing some interlocutory appeals sought to reduce distracting discovery and trials. But, *Forsyth* wrongly assumed that qualified immunity defenses would limit the nonfinancial burdens associated with discovery. It has not. In an exhausting study, Professor Joanna Schwartz examined over 1,100 Section 1983 cases in five representative districts, including the Northern District of Ohio. She found 'just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds.' Joanna C. Schwartz, *How Qualified Immunity Fails* 127 Yale L.J. 2, 7 (2017). Important for deciding whether *Forsyth's* occasional grant of interlocutory appeal rights makes sense, Schwartz found that defendants almost always otherwise incurred defense and discovery costs before qualified immunity defenses become ripe. Regarding qualified immunity, 'available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and illsuited to shield government officials from discovery and trial in most filed cases. Qualified immunity may, in fact, increase the costs and delays associated with constitutional litigation.' . . Qualified immunity does not shield government officials from litigation headaches. And interlocutory appeals exacerbate governmental expenses. Here, this case will likely be tried in less than four days. Defendants may win. And even if defendants lose at trial, an appellate court can examine the same immunity issues, only on a more complete record. An interlocutory appeal worsens government expenses, it does not lessen them.")

Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *2-5 (N.D. Ohio Dec. 6, 2017) ("An appeal is frivolous when the defendant's argument for immunity refused to accept the plaintiff's version of the facts. . . When a court denies immunity because one version of disputed facts would allow a plaintiff to recover, it is because the court found that defendant's presented version of the facts was disputed, and a trial must settle these factual disputes. . .Plaintiffs argue that is what occurred here. They argue that both the City Defendants' and County Defendants' summary judgment immunity arguments refused to accept Plaintiffs' version of the facts, and so any interlocutory appeal is frivolous. The Court agrees. . . .The City Defendants solely argued that no constitutional violation occurred based on their version of the facts. Although Plaintiffs bear the burden of proving that a defendant is not entitled to qualified immunity, that burden only arises if the City Defendants actually raise the defense. The Court finds that the City Defendants failed to raise qualified immunity as a defense and that the Court's denial of their summary judgment was based on a finding that material disputes of fact existed. For these reasons, the Court GRANTS Plaintiffs' motion to certify the City Defendants' interlocutory appeal as frivolous. . . . Finally, this Court recognizes that courts often allow interlocutory appeals of qualified and absolute immunity decisions. . . However, years of experience and the exhaustive empirical study described above undermines the Supreme Court's reasoning for allowing this exception to the final judgment rule. Interlocutory appeals of immunity under *Forsyth* sought to reduce the disruption of governmental functions and to reduce litigation expenses caused by incorrect district court decisions. . .In *Mitchell v. Forsyth*, the case that created this final judgment rule exception, both of these justifications supported allowing an interlocutory appeal. The *Mitchell* plaintiff had sued the Attorney General of the United States. The Attorney General

raised immunity defenses at the start of the litigation, and before discovery. Allowing interlocutory appeal in *Forsyth* potentially saved both the Attorney General and the Department of Justice hundreds or thousands of hours of distraction and expense when the constitutional right was discreet. *Mitchell*, however, is wildly atypical. Typically civil rights lawsuits with immunity issues involve claims against relatively low-level government officers, such as a police officer with minimal supervisory authority. Law suit disruption to governmental functions is minimal. Additionally, and perhaps more importantly, few defendants raise immunity at early stages of the litigation, if they raise that defense at all. . . Because plaintiffs can plead a clearly established constitutional violation with relative ease, immunity is typically argued on summary judgment, which occurs near discovery's end. . . At that point, an interlocutory appeal saves only the distraction and expense associated with trial. These savings are minimal, however, because the Courts of Appeals affirm district courts' denials of immunity at astoundingly high rates. . . In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs. Additional expense and burden result because an 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 (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal. And importantly, Section 1983 defendants win many trials. These wins both vindicate the defendants and avoid the appeal's expense. In the Judiciary Act of 1789, the Founders considered and wisely adopted the final judgment rule with few exceptions. The final judgment rule is central to the efficient administration of justice and, absent important reasons, should control. This case provides an especially potent example of the imprudent nature of interlocutory appeals. Plaintiffs in this case were originally convicted in 1996, and an Ohio court overturned that conviction in 2014. In between those dates, Plaintiffs, the State of Ohio, the City of East Cleveland, the Ohio and federal courts, and numerous prosecutors, defense attorneys, and hired experts have spent an untold number of hours and dollars attempting to do justice both for these three men, and for Clifton Hudson, the victim of the crime Plaintiffs' were convicted of. An interlocutory appeal could delay this case for more than a year. Although the Defendants are all retired government officers, they are nevertheless represented by current city and state attorneys. This extra year of appellate litigation will undoubtedly consume considerable state and city resources. Moreover, no matter the outcome of the trial, an appeal will almost assuredly follow. As such, the court of appeals will likely have to address the issues in this case twice, potentially doubling the briefing, travel, and general preparation expenses of both the parties and the Sixth Circuit. . . For the preceding reasons, the Court **GRANTS** Plaintiffs' motions to certify Defendants' appeals as frivolous. The Court **DECLINES TO STAY** the trial of this matter pending appeal.")

See also ***Wheatt v. City of East Cleveland***, No. 1:17-CV-377, 2018 WL 4501053, at *1–2 (N.D. Ohio Sept. 20, 2018) ("On November 9, 2017, the Court held that the City Defendants had waived their right to assert a qualified immunity defense. Defendants appealed, and successfully moved to stay trial proceedings during the pendency of the Sixth Circuit appeal. On July 12, 2018, the Sixth Circuit affirmed the Court's holding that the City Defendants had forfeited their claim

to qualified immunity. The Sixth Circuit issued its mandate on August 6, 2018. On the same day, Plaintiffs moved the Court to set a trial date. On July 20, 2018, the City Defendants filed a petition for a writ of certiorari with the Supreme Court of the United States. This petition was docketed on August 30, 2018. Defendants did not move to stay the Sixth Circuit's mandate under Federal Rule of Appellate Procedure 41(d)(2), nor have they moved the Supreme Court to stay proceedings under 28 U.S.C. § 2101(f) and Supreme Court Rule 23. . . Defendants now argue that the filing and docketing of the cert petition deprives the Court of jurisdiction to conduct a trial.
Defendants are incorrect. The issuance of a mandate 'transfer[s] jurisdiction of the case back to the District Court,' and the filing of a cert petition does not automatically stay district court proceedings. Unless the Sixth Circuit recalls its mandate, or the City Defendants obtain a stay, the Court enjoys the jurisdiction it reacquired upon issuance of the mandate to proceed to trial. . . .For the forgoing reasons, the Court GRANTS Plaintiffs' motion to set a trial date. Trial is set for November 13, 2018 at 8:00 a. m.")

SEVENTH CIRCUIT

Taylor v. Ways, 999 F.3d 478, 486-87 (7th Cir. 2021) ("Ernst raises both legal and factual arguments to invoke qualified immunity. The legal arguments give us jurisdiction over his appeal, but at this stage of the case, we may not consider his factual arguments. For example, Ernst argues that his actions were not the proximate cause of Taylor's termination, and he contends that he did not exert any influence on the decisions of Ways or Whittler. He also argues that the Merit Board, following a formal, adversarial hearing, terminated Taylor based on the evidence presented, independent of any racial animus on his part. Ernst acknowledges that proximate cause is generally an issue of fact, but he argues that the facts surrounding the cause of Taylor's firing are not in dispute. We read the record differently. Leaving aside the broader question whether an issue of proximate cause is ever suitable for an interlocutory appeal of a denial of qualified immunity, the facts surrounding the cause of Taylor's firing are disputed, as the district court found. We may not decide as a matter of law and in an interlocutory appeal that Ernst and his (presumed) racial animus did not influence Ways' or Whittler's recommendations or the Merit Board's decision to terminate Taylor. We thus lack jurisdiction over Ernst's causation arguments. . . Next, in a variation on the proximate cause argument, Ernst argues that none of the evidence concerning his alleged racial animus against Taylor could transform his 'reasonable' termination recommendation into an equal protection violation. This is a non-starter. The evidence of Ernst's racial slurs during the OPR investigation and just before the Merit Board hearing would allow a reasonable jury to infer that he acted out of racial animus. The district court found disputed issues of fact on whether Ernst's (presumed) racial animus caused Taylor's termination. We lack jurisdiction to consider this variation on a factual argument. . . Ernst argues that none of the evidence of his racial animus undermines his reasonable belief that Taylor committed the crimes of aggravated battery and criminal damage to property. He argues that the Holbrook memo, at most, catalogues 'subjective investigative deficiencies' that he had no constitutional duty to investigate once he had probable cause to arrest Taylor. This argument both misses the mark and falls outside our jurisdiction in this interlocutory appeal. For purposes of summary judgment, the district court assumed that Ernst had

probable cause to arrest Taylor on March 9, 2011, the day after the reported shooting incident. We assume so as well. But the relevant legal question in this appeal is whether probable cause to arrest Taylor on March 9 provides Ernst a complete defense for racially discriminatory actions in the later OPR investigation of Taylor and the proceedings that led to Taylor's termination. That question is embedded in the larger issue of qualified immunity for Ernst discussed below.")

Estate of Davis v. Ortiz, 987 F.3d 635, 640-41 (7th Cir. 2021) ("Ortiz has not fully accepted the Estate's version of the facts, and so he cannot defend our appellate jurisdiction on that basis. Indeed, he comes closer to asking us to accept his version of the facts over the Estate's. He characterizes the district court and the parties as 'unequivocally agree[ing] that Deputy Ortiz did not intend to shoot Davis, but instead that [Ortiz] was focused on the driver of the vehicle.'. . That is not what the record shows. The district court specifically found that at 'no time did Ortiz state that he was aiming his weapon solely at [the driver] in such a manner as to eliminate all potential inferences otherwise.'. . And Davis maintains that Ortiz 'intended to shoot at the vehicle to stop it,' without regard to any particular occupant. Ortiz replies that these competing accounts are not 'mutually exclusive' because when Ortiz fired his gun, he '"was focused on Lara as the driver," *and* he intended to stop the vehicle.' Given the fact that this is a Fourth Amendment case, all this talk of intent is largely beside the point. The Supreme Court has made it clear that 'Fourth Amendment reasonableness is predominantly an objective inquiry.'. . The pertinent question is whether a jury could find that Ortiz's actions—firing repeatedly at a moving vehicle as it was leaving the parking lot—were objectively unreasonable under all the circumstances, and thus amount to a Fourth Amendment violation. There is evidence to support a finding that Ortiz was aiming at the car as a whole. As part of that effort, he discharged four bullets, one of which fatally injured Davis. At trial, Ortiz will have an opportunity to convince the jury that his actions were objectively reasonable, but we cannot resolve that question at this stage. . . Just as in *Johnson*, the record on summary judgment in this appeal reveals issues that must be resolved by the trier of fact. Ortiz has not raised 'a question that is significantly different from the questions underlying plaintiff's claim on the merits,'. . . ; rather, he raises the same fact-based question about the objective reasonableness of his seizure of Davis that the jury must resolve. We DISMISS the appeal for lack of jurisdiction.")

Campbell v. Kallas, 936 F.3d 536, 543-44 (7th Cir. 2019) ("The Supreme Court has not had occasion to decide whether an order denying qualified immunity may be immediately appealed when the suit also seeks injunctive relief. . . We have done so, however. In *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987), the plaintiff sought money damages and injunctive relief in a suit against public university officials. . . He argued that the collateral-order doctrine is inapplicable to suits seeking injunctive relief as well as damages because the case could still proceed to trial regardless of the outcome of an interlocutory appeal of a qualified-immunity ruling. . . Acknowledging a circuit split on this question, we followed the majority rule and held 'that a pending request for an injunction does not defeat jurisdiction of interlocutory appeals based on claims of immunity.'. . . Every circuit to address this question agrees. [collecting cases] The Fourth Circuit—the outlier when we decided *Scott*—has since reversed course. *See Young v. Lynch*, 846 F.2d 960 (4th Cir.

1988). As we've noted, the Supreme Court hasn't squarely re-visited the question left open in *Forsyth*. But in *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court came quite close to embracing the rule we adopted in *Scott*. The plaintiff there raised multiple claims, including *Bivens* claims against which the defendant unsuccessfully sought qualified immunity. . . The plaintiff argued that the defendant's interlocutory appeal was inappropriate because he would still 'be required to endure discovery and trial on matters separate from the claims against which immunity was asserted.'. . The Court clarified that a qualified-immunity appeal 'cannot be foreclosed by the mere addition of *other claims* to the suit.'. . Then, venturing beyond the specific facts of the case, the Court expressed the same concern we identified in *Scott*: under the plaintiff's reasoning, the qualified-immunity right not to be subjected to pretrial proceedings' or 'to trial itself [would] be eliminated, so long as the complaint seeks *injunctive relief.*'. . . Campbell urges us to reconsider *Scott*, a step that would revive a long-dormant circuit split and come close to contradicting *Behrens*. . . . She cites recent scholarship criticizing qualified immunity and marshals policy arguments focused on judicial resources. And she draws our attention to separate opinions by some Supreme Court justices raising questions about the doctrine. We have no authority to depart from the Supreme Court's qualified-immunity jurisprudence. And while some justices have questioned qualified immunity, those misgivings haven't stopped the Court from vigorously applying the doctrine. . . Campbell's fallback argument asks us to carve out an exception to *Scott* for cases involving a substantial risk of harm. But in true emergencies, a plaintiff can seek preliminary injunctive relief. . . We proceed to the merits.")

Koh v. Ustich, 933 F.3d 836, 843-44, 848 (7th Cir. 2019) ("For purposes of appeal, an appellant may take all facts and inferences in plaintiff's favor and argue '*those* facts fail to show a violation of clearly established law.'. . "When the district court concludes that factual disputes prevent the resolution of a qualified immunity defense, these conclusions represent factual determinations that cannot be disturbed in a collateral order appeal,' such as this one. . . Our review is further limited in that we may not 'make conclusions about which facts the parties ultimately might be able to establish at trial, nor may [we] reconsider the district court's determination that certain genuine issues of fact exist.'. . To establish jurisdiction, appellants must present purely legal arguments, but if those arguments 'are dependent upon, and inseparable from, disputed facts,' we do not have jurisdiction to consider the appeal. . . Finally, we will 'consider[ ] only the facts that were knowable to the defendant officers.'. . .Because these appeals present factual challenges that are outside of our jurisdiction over an appeal of an order denying qualified immunity on summary judgment, we dismiss these appeals for lack of jurisdiction.")

Gant v. Hartman, 924 F.3d 445, 449-51 (7th Cir. 2019) ("There is . . a narrow, pragmatic exception allowing appellants to contest the district court's determination that material facts are genuinely disputed. In *Scott v. Harris*, the Supreme Court found the defendant police officer could dispute the district court's finding that a genuine factual dispute existed because a video recording of the incident 'utterly discredited' the plaintiff's testimony that he was driving carefully. . . The video recording of the plaintiff driving erratically during a high-speed chase was irrefutable evidence that he posed an actual and imminent threat to the lives' of others and that, as a matter of

pure law in light of that incontestable fact, the defendant used reasonable force to stop him. . . We recently applied this reasoning in *Dockery v. Blackburn*, finding that the plaintiff's version of the facts was discredited by video evidence. . . The plaintiff in *Dockery* argued that the video of his arrest was subject to multiple interpretations and that he did not intend to resist the officers. We found, however, that the video plainly showed that Dockery was 'uncooperative and physically aggressive toward the officers and 'wildly kicked' in their direction as they attempted to handcuff him. . . Other courts applying this narrow *Scott* exception have stressed that it applies only in the rare case at the 'outer limit' of the principle established by *Johnson*. . . . While the video in *Dockery* demonstrated facts reaching this outer limit, it should be considered a rare case. It does not apply where the video record is subject to reasonable dispute. In this case, Officer Hartman has not satisfied any of the routes to interlocutory appellate jurisdiction under § 1291. He accepts neither the facts most favorable to the plaintiff nor the facts assumed by the district court; in fact, he has openly contested the facts throughout his briefs and oral argument. . . Officer Hartman has consistently relabeled certain facts as 'undisputed,' and he asks this court to challenge the district court's determination that material facts are genuinely disputed. Officer Hartman has asserted repeatedly that it is undisputed that Gant was not attempting to surrender. That is correct, but Gant contends that he was not resisting arrest when he was shot and that he was either attempting to comply with orders or did not have time to respond to those orders when Officer Hartman shot him in that critical second, as we described above. Officer Hartman cannot pursue an interlocutory appeal by arguing that the evidence is insufficient to support the district court's conclusion or by relabeling the disputed facts as 'undisputed.' These add up to 'a back-door effort to contest the facts.'. . Absent irrefutable evidence, we may not use an interlocutory appeal to second-guess the district court's conclusion that material facts are disputed. We have watched the videos of Gant's shooting and arrest, and we have reviewed the frame-by-frame analysis by Hartman's expert witness. Unlike the footage in *Scott* and *Dockery*, the videos in this case do not 'utterly discredit' Gant's contentions that he was trying to comply with orders or did not have time to respond to Officer Hartman's commands. The recordings show Gant standing in the doorway, his arm extended holding the door, and then his arm lowering slightly before Officer Hartman fired. All of this occurs within a single second. This is not comparable to *Dockery* where the plaintiff actively pushed and kicked at officers, thus 'utterly discrediting' his claim that he had not resisted arrest. Nor do the videos here provide irrefutable proof that it was reasonable for Officer Hartman to believe Gant was holding a gun when he was shot. Outside of irrefutable evidence like that in *Scott* and *Dockery*, an appellate court is not in the position to decide on interlocutory appeal what facts may eventually be established at trial by a reasonable fact-finder. . . Officer Hartman claims that he is entitled to qualified immunity because his actions did not violate Gant's constitutional rights and, even if they did, those rights were not clearly established on or before August 23, 2015. To make this argument, however, Officer Hartman asks in effect that we resolve facts that the district court treated as disputed. . . . Because Officer Hartman's appellate argument relies on disputed facts and he has not presented sufficient evidence to 'utterly discredit' the district court's findings, this court lacks jurisdiction over this interlocutory appeal.")

Stinson v. Gauger, 868 F.3d 516, 522-28 (7th Cir. 2017) (en banc) ("Regarding the due process claim of fabrication of evidence, the district court concluded that 'Stinson has sufficient evidence to get to trial' and explained its conclusion that sufficient evidence in the record existed. The district court also stated that qualified immunity did not apply because the law as of 1984 and 1985 clearly established that an investigator's fabrication of evidence violated a criminal defendant's constitutional rights. As for Stinson's claim of failure to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the opinions were fabricated, the district court ruled that there was enough evidence to go to a factfinder on this claim as well. The court also stated that it was clearly established by 1984 that the withholding of information about fabricated evidence constituted a due process violation, citing among others our decision in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012). Gauger, Johnson, and Rawson appealed. A panel of our court concluded that the defendants were not entitled to absolute immunity, that we had jurisdiction to consider appeals of the denial of qualified immunity at summary judgment, and that the defendants were entitled to qualified immunity. We granted rehearing en banc. . . . The defendants here, invoking a qualified immunity defense, seek to appeal the district court's summary judgment order that concluded the pretrial record set forth a genuine issue of fact for trial. While *Johnson* might seem to end matters, we examine whether any subsequent Supreme Court decisions limit *Johnson*'s reach. [court discusses *Scott, Plumhoff,* and *Mullenix* and finds those cases consistent with *Johnson*, because in each of those cases, "the Court decided a purely legal issue, not a question of evidentiary sufficiency."] If what is at issue in the sufficiency determination is whether the evidence could support a finding that particular conduct occurred, 'the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell.*' [citing *Behrens*] So appeal is possible only if 'the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[ ] a violation of "clearly established" law.'. . *Johnson*'s distinction between appeals of evidentiary sufficiency determinations and those of legal issues also makes practical sense, as the principle helps keep qualified immunity interlocutory appeals within reasonable bounds. Our basic question in determining whether we have jurisdiction over this appeal, then, is whether our case is one of evidentiary sufficiency or one of a question of law. Stinson maintained in this suit that Gauger, Johnson, and Rawson violated his due process right to a fair trial by: (1) fabricating the principal evidence of his guilt (the opinions that his dentition matched the bite marks on Cychosz), and (2) failing to disclose, as required by *Brady*, the defendants' agreement to fabricate this opinion evidence. . . .On appeal, the defendants assert that they are crediting Stinson's account and asking only for a legal determination of whether Stinson's version of the facts means they violated a clearly established constitutional right. Accepting a plaintiff's version of the facts in the summary judgment record can help allow us to consider a defendant's legal arguments in a qualified immunity appeal. . . Here, however, the premise of the defendants' assertion is not true; rather, the defendants fail to take as true Stinson's version of the facts, and they fail to do so on significant matters. . . .[D]espite their statements to the contrary, the defendants on appeal have not asked us to view the record in the light most favorable to Stinson. That means that although they try to suggest otherwise, the defendants are not asking us for review of an abstract question of law, but rather they seek a reassessment of the district court's conclusion

that sufficient evidence existed for Stinson to go to trial. . . The nature of the defendants' appeals further demonstrates that they do not present the requisite abstract questions of law. Johnson and Rawson maintain they did not intentionally fabricate their opinions and so did not fail to turn over *Brady* material. But whether their opinions were intentionally fabricated or honestly mistaken is a question of fact, not a question of law. *Johnson* itself explains that we lack jurisdiction over factual questions about whether there is sufficient evidence of intent. . . . The district court concluded that the evidence in the record meant that a reasonable jury could find that Johnson and Rawson fabricated their opinions. The district court recounted that, taking the record in the light most favorable to Stinson, Johnson altered the missing tooth identification only after meeting with the detectives, after they interviewed Stinson and observed his dentition. Johnson did not have any new information before making the switch, and he has never said the change was a matter of reevaluation. The district court also stated Johnson and Rawson had to have known that Stinson was excluded from causing the bite marks because of obvious differences between Stinson's teeth and the bite mark patterns. Bowers, Stinson's expert in the current case, opined that Johnson and Rawson knowingly manipulated the bite mark evidence and Stinson's dentition to make them appear to match. Both the four-odontologist panel and Bowers found no empirical or scientific basis for finding a bite mark on Cychosz's body where Stinson has a missing tooth. They also found inexplicable Johnson's and Rawson's conclusion that Stinson's upper second molars made a bite mark because molars are located so far back in the mouth. And if Stinson's version of the facts is accepted, there was also a cover up of the switch in tooth identification, as no police report accounts for it. From all of this evidence, the district court concluded there was sufficient evidence for a factfinder to draw an inference that the defendants were lying. . . .Rarely will there be an admission of subjective intent. The intent to fabricate is a question of fact that the district court concluded could be inferred in Stinson's favor by the evidence in the record at summary judgment, and the defendants' challenge to whether that is true is the type of appeal forbidden by *Johnson.* Whether Gauger knew that Johnson and Rawson fabricated their opinions that the bite mark evidence matched Stinson's dentition was a related, and important, factual dispute at summary judgment. Gauger argued that because he is not a dentist, he cannot be blamed for Johnson's and Rawson's expert conclusions. The district court determined that taking the facts in Stinson's favor, 'Gauger was cognizant of Johnson's shifting view of which tooth was missing' and 'was fully aware' of the 'contents of his conversations with Johnson and what he implied in their second meeting, following his and Jackelen's interview of Stinson,' namely that Gauger implied a desired result in the expert opinions. . . But on appeal, Gauger argues that the evidence in the record does not support a conclusion that Gauger knew the dentists were producing false opinions. . . This challenge to the sufficiency of the evidence is again precluded by *Johnson.* We note that the district court's conclusion that circumstantial evidence might prove intentional collusion between Gauger and the two experts is the kind of finding of historical fact that implicates *Johnson*, not an 'abstract question of law.' Evidence in the summary judgment record supporting an inference that there was an agreement included that there was an opportunity to agree (the detectives met with Johnson after interviewing Stinson, and Johnson called Rawson), and that later experts say no competent odontologist could have possibly concluded that Stinson was the assailant. In short, the appeals here are not like *Harris* and *Plumhoff* where the facts are clear and the only question is the legal

implication of those facts. Instead, the defendants' appeals fail to take all the facts and inferences in the summary judgment record in the light most favorable to Stinson, and their arguments dispute the district court's conclusions of the sufficiency of the evidence on questions of fact. With *Johnson* still very much controlling law, we lack jurisdiction over the defendants' qualified immunity appeals in this case.")

Stinson v. Gauger, 868 F.3d 516, 529-30 (7th Cir. 2017) (en banc) (Sykes, J., joined by Bauer, Flaum, and Manion, JJ., dissenting) ("My colleagues have misread the district judge's decision and failed to recognize the limits of jurisdictional principle announced in *Johnson v. Jones*[.] . . To the first point, the judge's decision denying summary judgment actually contains two rulings. The judge held that (1) the evidentiary record reveals genuine factual disputes about whether certain key events occurred; and (2) the defendants are not entitled to qualified immunity because the evidence in the record, when construed in Robert Stinson's favor, would permit a reasonable jury to find that they violated his right to due process by fabricating evidence used to wrongly convict him, *see Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012), and suppressing evidence of the fabrication, *see Brady v. Maryland*, 373 U.S. 83, 83 (S.Ct. 1194, 10 L.Ed.2d 215 1963), both of which are clearly established constitutional violations. The judge's order does not neatly separate rulings (1) and (2), which I confess makes it more difficult to correctly apply the *Johnson* principle. But the absence of clean lines in the judge's reasoning does not make the entire decision unreviewable. Our task is to determine whether the decision below contains a legal ruling about qualified immunity. If it does, then we may review it. Here, there's no question that the judge's decision *does* contain a legal ruling about qualified immunity. For the reasons explained in my opinion for the panel, *Johnson* does not block jurisdiction over this appeal. *Stinson v. Gauger*, 799 F.3d 833, 838–40 (7th Cir. 2015). . . .The lesson of this part of the Court's opinion in *Johnson* is that a 'mixed' qualified-immunity order is immediately reviewable, at least in part. If the district court holds that the summary-judgment record, viewed in the plaintiff's favor, shows a violation of clearly established law—that is, would permit a reasonable jury to find for the plaintiff on his constitutional claim—then the defendant may take an immediate appeal to obtain review of *that* determination *even if* the order also identifies a genuine factual dispute.")

Nettles-Bey v. Williams, 819 F.3d 959, 961-62 (7th Cir. 2016) ("Appellants' brief makes it clear that they think that the district judge got the facts wrong. Their summary of argument tells us: '[T]he record is devoid of evidence to support the inference that religious discrimination led to Plaintiff's arrest and detention'. The first caption in the argument section of their brief begins: 'The district court erred in concluding that a triable fact issue existed as to whether the Defendant officers were motivated by discriminatory animus toward Moors'. From beginning to end, appellants' brief is about what the record shows and what inferences a reasonable juror could draw. That's the domain of *Johnson;* appellants' line of argument has nothing to do with uncertainty in federal law. Appellants' reply brief tells us that *Johnson* is irrelevant. They observe that whether to grant summary judgment is a question of law, at least in the sense that a district judge does not make any findings of fact (but must take matters in the light most favorable to the party opposing

the motion) and that a court of appeals decides without deferring to the district court's view. They add that immunity likewise is about questions of law. It follows, they believe, that they are entitled to contend in a pre-trial qualified-immunity appeal that the district judge erred in evaluating the record and that, as a matter of law, they are entitled to immediate decision in their favor. If that is right, however, then *Johnson* itself is wrong. The question posed by the Supreme Court for qualified-immunity appeals is whether legal uncertainty affected the *primary conduct* of which the defendants are accused. That's the qualified-immunity issue: Whether it is clearly established that federal law (statutory or constitutional) forbade the public employees to act as they did. *Johnson* holds that, when addressing this question about the propriety of the defendants' behavior, the court of appeals must accept as given the district court's reading of the record. If the district judge concludes that a reasonable jury could resolve a particular factual dispute in the plaintiff's favor, the court of appeals must address the question about legal uncertainty on that understanding. Appellants insist that *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), and *Plumhoff v. Rickard*, —— U.S. ——, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014), modify the approach of *Johnson* and entitle them to contest the district court's factual understanding. Whether, and if so how far, that may be true when there is *also* a dispute about the nature of and uncertainty in the federal legal principles that govern the public officials' primary conduct is an interesting question, which this court may address in *Stinson v. Gauger*, No. 13–3343 (7th Cir. argued en banc Feb. 9, 2016). Neither *Scott* nor *Plumhoff* allows an appeal whose *sole* goal is to upset how the district judge understood the record. We have nothing more to say about *Scott* and *Plumhoff*, because there is no uncertainty at all about the rules of federal law that govern the question whether police may hold a person's religion against him when deciding whether to make an arrest. That they cannot has been established for a long, long time—and appellants do not argue otherwise. They do say that there is uncertainty about a different issue that they call a dispute of law: Whether standing orders to police in South Holland require an arrest for criminal trespass whenever the owner demands. This is not a dispute about federal law—and it does not concern 'law' at all. There is a factual dispute about whether Clark *did* demand Nettles–Bey's arrest, and a further dispute about whether officers in South Holland are obliged to honor the owner's wishes in the face of exculpatory information such as Nettles–Bey's contention that he was present at the invitation of someone he honestly (and reasonably) thought to be the owner. The chief of police himself testified by deposition that officers have discretion. These are among the issues that may be explored at the impending trial. The appeal is dismissed for want of jurisdiction.")

EIGHTH CIRCUIT

Watson v. Boyd, No. 20-1743, 2021 WL 2671317, at *2-6 (8th Cir. June 30, 2021) ("Whether the district court upheld 'its threshold duty to make "a thorough determination of [a law enforcement officer's] claim of qualified immunity"' is a legal question that we may review even under our limited jurisdiction. . . . [A] district court cannot deny summary judgment by merely finding that genuine issues of fact exist; those issues must also be material—that is, affecting the outcome of the suit under the applicable law. . . While Officer Boyd asks this Court to review the district court's materiality determination on the merits, we find that the district court's order failed to

address materiality in a manner 'sufficient to permit meaningful appellate review of the qualified immunity decision.'. . . When, as here, the district court stops short of addressing the materiality of the genuine issues of fact, it essentially fails to carry out its 'threshold duty,' and remand for additional explanation is most appropriate. . . .When analyzing the first prong of the qualified immunity inquiry—whether Officer Boyd's actions violated Watson's constitutional rights—the district court set forth in detail the parties' numerous factual disputes, and we are without jurisdiction to determine whether these disputes are genuine. . . However, the district court did not test Watson's version of the facts against the substantive law to determine whether these disputes are material. When discussing Watson's Fourth Amendment seizure claim, the district court commenced its analysis by citing case law that outlined the general legal standards for probable cause and reasonable suspicion, but it largely failed to apply this case law, or more analogous cases, to Watson's version of the facts. . . . The district court also failed to conduct the materiality inquiry by framing legal questions as factual ones. For example, on multiple occasions the district court held that genuine fact disputes existed as to whether Officer Boyd had probable cause or reasonable suspicion. However, whether probable cause or reasonable suspicion existed is a legal question that the district court must resolve, construing the genuine fact disputes in the light most favorable to the non-moving party. . . . Additionally, while the district court's Fourth Amendment excessive force analysis does not hinge on the existence of probable cause or reasonable suspicion, it nonetheless contains errors. The district court does not discuss analogous case law, nor does it explain how subjective facts, such as Watson's purpose of calling the police on his cell phone, are material to the objective qualified immunity analysis. . . Accordingly, we find that the district court failed to reach the materiality of the genuine disputes and thus failed to fulfill 'its threshold duty to "make a thorough determination"' of Officer Boyd's claim. . . . Second, Officer Boyd claims that even if the district court did not err in its first-prong analysis, the district court failed to determine whether Watson's rights were clearly established at the time of the stop. While a district court may address the prongs in any order, it 'may not deny qualified immunity without answering both questions in the plaintiff's favor.'. . As such, a district court 'should [not] deny summary judgment any time a material issue of fact remains on the [constitutional violation] claim [because to do so] could undermine the goal of qualified immunity.'. . .While the district court's 43-page order cannot be described as 'truncated,'. . . we find that this analysis is so 'scant' that we are unable to discern whether the district court applied the clearly established prong at all, much less conducted a 'thorough determination[.]' . . . Our conclusion is not predicated on the analysis's brevity alone but also on the application of incorrect legal standards. Although the district court may have been incorporating its earlier constitutional violation analysis by reference, this analysis is not pertinent to the clearly established inquiry. . . . Finally, the district court's excessive force analysis fails to identify a specific right or factually analogous cases. . . . Accordingly, because of the district court's incomplete analysis on both the constitutional violation and clearly established prongs, we can neither affirm nor reverse the denial of qualified immunity. . . .We pass no judgment on whether Officer Boyd is entitled to qualified immunity because the district court failed to undertake the necessary analysis. Accordingly, we vacate the district court's order and remand the case for a more detailed consideration and explanation of the validity, or not, of Officer Boyd's

claim to qualified immunity in a manner consistent with this opinion, and we dismiss the City's appeal for lack of jurisdiction.")

Garang v. City of Ames, No. 20-1050, 2021 WL 2672124, at *4-5 (8th Cir. June 30, 2021) ("The record supports the conclusion that the officers had arguable probable cause to arrest Garang for the assault based on Graves's identification of Garang as one of his attackers. Although the district court determined that this was a fact in dispute, upon our review, we conclude that the district court's determination is 'blatantly contradicted by the record' and is thus within the scope of our review. . . The district court's conclusion that this fact is disputed is premised on the deposition testimony given by Graves roughly two years after the incident stating that he did not remember making an identification and the affidavit Garang submitted in opposition to defendants' summary judgment motion stating that at no time did Graves physically or verbally identify Garang as one of his attackers. However, this record evidence does not create a factual dispute. First, Graves's deposition testimony does not actually dispute that he made the identification; instead, Graves merely stated that he had no recollection of making the identification but had no reason to challenge the officers' statements that he identified Garang. . . . Second, while Garang's affidavit avers that Graves at no point identified Garang, this is inconsistent with Garang's prior deposition testimony during which he stated that he could not hear what Graves and Sergeant Congdon were speaking about at the time Graves made the identification, and thus would have been unable to conclusively state whether Graves identified him. . . .[W]e conclude that the district court's conclusion that it was disputed whether Graves identified Garang as one of his attackers is blatantly contradicted by the record. Considering the totality of the circumstances, primarily Graves's identification of Garang, coupled with Garang's behavior during the encounter—which included showing an unusual amount of interest in the officers' investigation, initially providing a name that could not be verified because it was not Garang's legal name, and attempting to leave the lobby after making contact with Officer McPherson—provided the officers with at least arguable probable cause to arrest Garang. To the extent that Garang asserts the later-obtained surveillance tape and other exculpatory evidence detracts from the officers' claim of arguable probable cause to arrest him, '[a]s probable cause is determined "at the moment the arrest was made," any later developed facts are irrelevant to the probable cause analysis for an arrest.'. . Accordingly, in the absence of a constitutional violation, the officers are entitled to qualified immunity on the unlawful arrest claim.")

Thurmond v. Andrews, 972 F.3d 1007, 1013 (8th Cir. 2020) ("If we had held that no constitutional violation occurred here, then Faulkner County may be correct in asserting that we would also have to conclude that the 'inextricably intertwined' claim against the County fails as a matter of law. . . But that is not our holding. Rather, we hold only that the individual jail employees are immune from suit because their actions did not violate clearly established law. This conclusion does not necessarily mean Faulkner County did not violate the rights of the plaintiffs, and so the determination of liability does not flow from the resolution of the qualified immunity issue. . . Because the determination of Faulkner County's liability does not 'flow ineluctably from a resolution of the qualified-immunity issue, the question of whether [the County] is liable for failing

to train its officers is not inextricably intertwined with the matter of qualified immunity.'. . As such, we lack jurisdiction to hear the County's appeal.")

Ivey v. Audrain Cty., Missouri, 968 F.3d 845, 851 (8th Cir. 2020) ("The county maintains that we may resolve its appeal because our conclusion that the officers are entitled to qualified immunity means that the county cannot be liable. That would be correct if we had held that no constitutional violation occurred here. *See Mogard v. City of Milbank*, 932 F.3d 1184, 1192 (8th Cir. 2019). But that is not our holding. We hold only that the officers are immune from suit because they did not violate Ivey's clearly established rights. That does not mean that they did not violate the constitution, *see Webb v. City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir. 2018), which would absolve the county from responsibility for their unconstitutional acts, if any. . . When the determination of the county's liability does not flow ineluctably from a resolution of the qualified-immunity issue, the question of whether it is liable for failing to train its officers is not inextricably intertwined with the matter of qualified immunity. . . So we lack jurisdiction to decide the county's appeal.")

Curtis v. Christian County, Missouri, 963 F.3d 777, 789 (8th Cir. 2020) ("Because Curtis and Bruce, in their role as Missouri deputy sheriffs, held 'policymaking positions for which political loyalty is necessary to an effective job performance,' Cole was permitted to 'take adverse employment actions against [them]' and did not violate their constitutional rights. . .The district court, therefore, erred in denying Cole qualified immunity on their wrongful-discharge claims. . .We also have pendent jurisdiction over the municipal claims against Christian County because they are 'inextricably intertwined' with the qualified immunity issue. . . Bruce and Curtis seek to hold Christian County liable under a theory that Cole was the final policymaker for Christian County. '[T]here must be an unconstitutional act by a municipal employee before a municipality can be held liable.'. . Because we hold that Cole did not violate Curtis's and Bruce's constitutional rights, Christian County is entitled to summary judgment on the claims against it.")

Mogard v. City of Milbank, 932 F.3d 1184, 1192 (8th Cir. 2019) ("This court's limited jurisdiction to review the denial of qualified immunity does not include the authority to review every issue in the summary judgment order. . . However, this court may exercise 'pendent appellate jurisdiction' over claims 'inextricably intertwined' with the qualified immunity question. . . As discussed in Section III, Mogard has not demonstrated the deprivation of a property or liberty interest. This conclusion also resolves Mogard's related claims against the City. . . This court's ruling has not, however, 'necessarily resolved' the City's liability in the retaliation claim. . . This case is remanded for further proceedings about the retaliation claim against the City.")

Thompson v. Dill, 930 F.3d 1008, 1013-15 (8th Cir. 2019) ("Since there is no dispute Gerry was unarmed when Dill shot and killed him, the critical question is this: viewing the evidence in the light most favorable to the Plaintiffs, was it objectively reasonable for Dill to believe Gerry posed a threat of serious physical harm to anyone as he fled from his house? If so, then Dill is entitled to qualified immunity and thus summary judgment. If not, then the case must proceed to trial. The

district court answered this question in the negative, reasoning that under the summary judgment standard it could not conclude Gerry 'reached for his waist, or otherwise behaved in a manner that would have justified the perception that [Gerry] was behaving in a threatening manner.' Dill argues this was error because, at the moment he employed deadly force, he had reason to believe Gerry was about to cause death or serious bodily injury to the officers inside the residence by reaching for a gun to shoot back into the house at the officers. Dill contends this belief was reasonable considering the totality of the circumstances, including the fact Gerry reached for his waist and turned back toward the officers inside the house. Dill may ultimately be able to show his split-second decision to shoot Gerry was objectively reasonable considering the chaotic circumstances. But we do not have jurisdiction to decide whether or not we disagree with the district court as to whether there was sufficient evidence to find a genuine issue of material fact for resolution at trial. . . That question is beyond our limited jurisdiction unless Dill can show the record plainly forecloses the district court's finding that a material factual dispute existed as to whether Gerry was acting in a threatening manner. . .Dill cannot show such a one-sided record here. It is true nothing in the record *directly* contradicts Dill's testimony that Gerry reached for his waistband and turned back toward the door as he exited. At the same time, there is evidence that could indicate Gerry did not act as Dill described. For example, the body-camera recording . . . taken from inside the house demonstrates that Dill shot Gerry *immediately* upon exiting the house. Considering this, one could question whether Gerry even had time to reach toward his waist and turn back toward the house. . . There are also photographs and an autopsy report in the record clearly showing the entry wound was on Gerry's right side, which Plaintiffs argue casts doubt on whether Gerry turned back to the house as Dill testified. . .This evidence does not necessarily mean it was unreasonable for Dill to believe Gerry posed a threat justifying his use of deadly force. But it does mean the record does not plainly foreclose the district court's finding of a factual dispute as to whether Gerry's actions just prior to the shooting were consistent with Dill's testimony. And resolution of whether the evidence is sufficient to make that dispute 'genuine' is beyond our limited jurisdiction.")

NINTH CIRCUIT

Young v. Hauri, No. 19-36098, 2021 WL 2206520, at *2–3 (9th Cir. June 1, 2021) (not reported) ("Defendants nonetheless argue that the right in question was not clearly established because there is no case describing these precise factual circumstances. Their argument is unpersuasive for two reasons. First, we have 'not hesitated to deny qualified immunity to officials in certain circumstances, even without a case directly on point.'. . Second, Defendants mistake the qualified immunity analysis for a Fourth Amendment search with that of a Fourth Amendment seizure when a plaintiff alleges excessive force. Only the latter requires the fact-specific balancing test from *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *See Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1152, 200 L.Ed.2d 449 (2018) (per curiam) (holding that, under *Graham*, "the question whether an officer has used excessive force 'requires careful attention to the facts and circumstances of each particular case' " (citation omitted)). But searches—at least in places where society recognizes a strong interest in privacy—require more

bright lines. Because police conduct searches so frequently, they need clear, easy-to-apply rules that notify all officers which searches are not permissible. *See United States v. Winsor*, 846 F.2d 1569, 1578 (9th Cir. 1988) (en banc) (holding that "a fact-specific case-by-case approach would plunge courts into a neverending and essentially standardless assessment of every search"). Thus, under binding precedent from this court and the Supreme Court, any reasonable officer would have known that Defendants' suspicionless and warrantless search of Katzenjammer's body, while she lay unconscious in a hospital bed, violated the Fourth Amendment. . .We therefore affirm the district court's denial of qualified immunity and denial of summary judgment on Katzenjammer's 42 U.S.C. § 1983 claim.")

Estate of Anderson v. Marsh, 985 F.3d 726, 731-34 (9th Cir. 2021) ("We have understood *Johnson* to mean '[a] public official may not immediately appeal "a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial."'. . Our interlocutory review jurisdiction is limited to resolving a defendant's 'purely legal ... contention that [his or her] conduct "did not violate the [Constitution] and, in any event, did not violate clearly established law."'. . These cases instruct that whether jurisdiction is lacking under our court's interpretation of *Johnson* ultimately turns on the nature of the defendant's argument on appeal. If the defendant argues only that the evidence is insufficient to raise a genuine issue of material fact, we lack jurisdiction. If the defendant's appeal raises purely legal questions, however, such as whether his alleged conduct violated clearly established law, we may review those issues. In other words, we have jurisdiction to review an issue of law determining entitlement to qualified immunity—even if the district court's summary judgment ruling also contains an evidence-sufficiency determination—but not to accede to a defendant's request that we review that evidence-sufficiency determination on appeal. Our dissenting colleague describes the Supreme Court's caselaw on the scope of interlocutory appeals in the qualified immunity context as having spawned 'persistent confusion,' and understands the prevailing rule to be different than the one we have outlined above. . . Specifically, the dissent interprets the discussion of *Johnson* in *Plumhoff* as indicating that we always have jurisdiction over an interlocutory appeal from the denial of qualified immunity, with one narrow exception:

Only when officers provide disputed evidence showing that they were not present, and were in no way involved in the challenged conduct [as the defendant officers in *Johnson* were not], is an appellate court without jurisdiction to hear the officers' interlocutory appeal.

. . . In other words, the dissent reads *Plumhoff* as implicitly restricting *Johnson* to its facts. . . We agree with the dissent that the Supreme Court's explication of the relevant jurisdictional principles has not always been clear, and that *Plumhoff* contains language that supports the dissent's reading. But there is also language in *Plumhoff* that suggests the Court did not read *Johnson* so narrowly. *Plumhoff* reiterated that *Johnson* barred an interlocutory appeal from a summary judgment order that turned on 'a question of "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial.'. . The Court also emphasized the difference between 'legal issues' and 'purely factual issues that the trial court might confront if the case were tried,' explaining with approval that *Johnson* had held that 'forcing appellate courts to entertain

[interlocutory] appeals' concerning factual determinations of 'evidence sufficiency' would 'impose an undue burden.'. . Those passages have already persuaded our court to adopt a different interpretation of the limits on interlocutory appellate jurisdiction than the dissent's. Our post-*Plumhoff* decisions have continued to understand *Johnson* as setting forth a jurisdictional rule about challenges to evidence sufficiency, without confining the rule to situations in which officers deny having been involved in the challenged conduct. . . . Applying the rule articulated in *Foster*, *Pauluk*, and *Advanced Building & Fabrication*, we conclude that we lack jurisdiction over this appeal because—in light of his concessions at oral argument—Marsh challenges only the district court's determination that there is a genuine factual dispute as to whether Anderson appeared to reach for a weapon before Marsh shot him. . . . In other words, rather than 'advanc[ing] an argument as to why the law is not clearly established that takes the facts in the light most favorable to [the Estate],' which we *would* have jurisdiction to consider, Marsh contests 'whether there is enough evidence in the record for a jury to conclude that certain facts [favorable to the Estate] are true,' which we do *not* have jurisdiction to resolve. . . Indeed, Marsh conceded at oral argument that he would have no claim to qualified immunity if the Estate's version of events were found to be true. Because we may not review on interlocutory appeal the question of evidence sufficiency Marsh raises, we must dismiss his appeal for lack of jurisdiction.")

Estate of Anderson v. Marsh, 985 F.3d 726, 735-42 (9th Cir. 2021) (W. Fletcher, J., dissenting) ("*Johnson* strikes again. Officer John Marsh brought an interlocutory appeal after the district court, viewing disputed evidence in the light most favorable to the plaintiff, denied his motion for summary judgment based on qualified immunity. The district court determined, based on plaintiff's version of the disputed evidence, that there was sufficient evidence to defeat Marsh's motion and go to trial. Relying on *Johnson v. Jones*, 515 U.S. 304 (1995), and its progeny, the panel majority holds that we do not have appellate jurisdiction. I respectfully dissent. I am sympathetic with the panel majority, for the law in this area is extraordinarily confused. . . . Under my reading of *Johnson*, a court of appeals has jurisdiction only when a district court denies a defendant's motion for summary judgment based on evidence that the defendant does not dispute. A court of appeals does *not* have jurisdiction when a district court denies a defendant's motion for summary judgment based on evidence it assumes to be true but that a defendant disputes. By far the majority of denials of summary judgment motions are entered in such cases. That is, the vast majority of cases are those in which the district court determines a question of 'evidentiary sufficiency,' assuming plaintiff's evidence to be true and determining whether that evidence is sufficient to defeat defendant's motion. The purpose of qualified immunity is to protect officers from having to go to trial. Qualified immunity is 'an *immunity from suit* rather than a mere defense to liability.'. . *Johnson* frustrates the purpose of qualified immunity in cases where the district court, relying on plaintiff's view of the evidence, mistakenly holds as a matter of law that an officer is not entitled to qualified immunity. . . . *Johnson* has created persistent confusion as courts of appeals, including our own, have struggled to reconcile its apparent holding with the purpose of qualified immunity. [citing cases] The confusion in our sister circuits is matched in our own circuit. In some cases, we have exercised appellate jurisdiction where genuine issues of material fact existed and the district court viewed the evidence in the light most favorable to the plaintiff.

[collecting cases] In other cases, including the case now before us, we have denied appellate jurisdiction. [collecting cases] In some cases, we have tried to have it both ways. [collecting cases] We wrote in *Pauluk v. Savage*, 836 F.3d 1117, 1121 (9th Cir. 2016):

Because we do not have jurisdiction over a district court's determination that there are genuine issues of material fact, we cannot review [defendants'] arguments that there was insufficient evidence to show [a violation of clearly established law]. But we do have jurisdiction, construing the facts and drawing all inferences in favor of Plaintiffs, to decide whether the evidence demonstrates a violation by [defendants], and whether such violation was in contravention of federal law that was clearly established at the time.

I wrote the opinion in *Pauluk* and now confess error. I tried to find daylight between deciding (a) defendant's motion for summary judgment based on 'evidentiary insufficiency' (resulting in no jurisdiction), and (b) deciding that same motion after viewing disputed evidence in the light most favorable to plaintiff (resulting in jurisdiction). But, as I read *Johnson*, there is no daylight between (a) and (b). They are different ways of saying the same thing. 'Evidentiary sufficiency' is what a court determines when it views disputed evidence in the light most favorable to the non-moving party and then decides a summary judgment motion based on the evidence so viewed. The Supreme Court has largely ignored *Johnson*. In the post-*Johnson* era, the Court initially heard interlocutory appeals without mentioning *Johnson*. The Court decided appeals on the merits, without addressing jurisdiction, in three cases in which two district courts and one court of appeals had denied officers' motions for summary judgment based on qualified immunity after having made determinations of 'evidentiary sufficiency.' [discussing *Saucier*, *Brosseau v. Haugen*, and *Scott v. Harris*] In none of these three cases, including *Scott*, did the Court cite, or in any way acknowledge, its holding in *Johnson* that there is no appellate jurisdiction in a case in which the district court decides a '*fact*-related dispute,' determines a question of evidentiary sufficiency,' and denies summary judgment based on the plaintiff's version of disputed evidence. In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the Court finally acknowledged the tension between *Johnson* and its post-*Johnson* practice. . . . *Johnson* was different, according to the Court in *Plumhoff*, because the three police officers in *Johnson* contended that they had not been present at the beating and had been in no way involved. By contrast, the Court wrote in *Plumhoff*, 'Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law.'. . Just as in *Saucier*, *Haugen*, and *Scott*, the Court in *Plumhoff* never acknowledged *Johnson*'s holding that there is no appellate jurisdiction when a court, relying on plaintiff's disputed evidence, determines a question of 'evidentiary sufficiency.' In the four post-*Johnson* cases just cited, the Supreme Court heard appeals in cases where the courts below (three district courts and one court of appeals) denied summary judgment based on plaintiff's version of disputed evidence. All four cases are inconsistent with *Johnson*'s holding that there is no appellate jurisdiction where a court determines 'evidentiary insufficiency' based on plaintiff's version of disputed evidence. After *Plumhoff*, in a case where the district court has denied a motion for summary judgment based on qualified immunity, the rule now appears to be the following: When a district court relies on plaintiff's version of disputed evidence in denying the motion for summary judgment, a court of appeals may generally exercise interlocutory appellate jurisdiction. Only when officers provide

disputed evidence showing that they were not present, and were in no way involved in the challenged conduct, is an appellate court without jurisdiction to hear the officers' interlocutory appeal. It is distinctly counterintuitive that this should be the remnant of *Johnson* that survives. Officers who present evidence that they were not even at the scene are among the officers who most deserve the protection of interlocutory appeals. But I have difficulty reading the combination of *Johnson*, *Saucier*, *Haugen*, *Scott*, and *Plumhoff* any other way. . . . In neither *Mullenix* nor *Pauly* did the Supreme Court refer to *Johnson*. The Court referred to *Plumhoff* in both cases, but only with respect to its holding on the merits. . . In neither case did the Court express any doubt about the appellate jurisdiction of the Fifth and Tenth Circuits. And in neither case did any of the defendant officers dispute that they were present at the scene. The case now before us does not belong in the narrow category of cases still apparently governed by *Johnson*. The panel majority accurately recounts the factual dispute. Viewing the disputed evidence in the light most favorable to plaintiff, the district court denied qualified immunity to Officer Marsh. Marsh does not dispute that he was at the scene. Indeed, he concedes that he shot Anderson. Therefore, under *Plumhoff* (as well as *Mullenix* and *Pauly*) we have jurisdiction to hear this appeal. I close with a plea to the Supreme Court. As is evident from this case and countless others, the Court's *Johnson* jurisprudence has confused courts of appeals for twenty-five years. *Plumhoff* is the only case in which the Supreme Court has even acknowledged the confusion. Unfortunately, *Plumhoff* and post-*Plumhoff* cases have only perpetuated it. I respectfully ask the Supreme Court to tell us clearly, in an appropriate case, whether and in what circumstances an interlocutory appeal may be taken when the district court, viewing disputed evidence in the light most favorable to plaintiff, has denied a motion for summary judgment based on qualified immunity.")

Hanson v. Shubert, 968 F.3d 1014, 1018-19 (9th Cir. 2020) ("Neither the Supreme Court nor this court. . . has addressed the situation here: the appeal of an order denying a motion to reconsider the earlier denial of qualified immunity, which had not itself been timely appealed. . . . We agree with the reasoning in *Powell* [10th Cir.] and *Lora* [2d Cir.], and today hold that we lack jurisdiction over an order denying a Rule 59(e) motion for reconsideration of a denial of qualified immunity, where we do not have jurisdiction over the appeal of the underlying order. Shubert and Gonzalez 'cannot use [their] motion for reconsideration,' filed nearly one year after the underlying order, 'to resurrect [their] right to appeal the district court's order denying [them] qualified immunity.'. . Furthermore, they have 'failed to make any showing that the order denying [their] motion to reconsider is otherwise immediately appealable.'. .Based on the foregoing, we must dismiss this appeal because we lack jurisdiction.")

Tuuamalemalo v. Greene, 946 F.3d 471, 479-85 (9th Cir. 2019) (W. Fletcher, J., concurring) ("I fully concur in the court's opinion. I write separately to address the continuing confusion over the proper standard for determining appealability of interlocutory orders denying motions for summary judgment based on qualified immunity under § 1983. . . .The most natural reading of the passages just quoted is that a court of appeals has interlocutory appellate jurisdiction over an order denying summary judgment only when a district court denies a defendant's motion for summary

judgment based on the defendant's version of the facts. A court of appeals does not have jurisdiction if a plaintiff's version of the facts would defeat qualified immunity but that version of the facts is disputed. This is a very odd understanding of *Mitchell*, for it would rarely result in an appealable interlocutory order. Defendant police officers asserting qualified immunity rarely provide versions of the facts that would result in interlocutory orders denying their motions for summary judgment. Almost all interlocutory orders denying defendants' motions for summary judgment are based on plaintiffs' versions of the facts, viewing the evidence in the light most favorable to plaintiffs. That is, almost all orders denying summary judgment to police officer defendants are entered in cases where there are disputed questions of fact. Yet, it is in precisely such cases that *Johnson*—under the most natural reading of the passages just quoted—tells us that courts of appeals do not have jurisdiction. The Court's decision in *Johnson* has created persistent confusion in the courts of appeals. On the one hand, the courts of appeals understand the purpose of *Mitchell*. They understand the importance of interlocutory appellate jurisdiction in cases where, in the view of the district court, plaintiff's version of the facts, construed in the light most favorable to plaintiff, would defeat qualified immunity. On the other hand, they are confronted with the language of *Johnson* that appears to preclude the exercise of appellate jurisdiction in exactly those cases. A sample of appellate cases reveals the analytic chaos that has resulted. [collecting cases] The Supreme Court did not at first appear to understand the problem it had created in *Johnson*. In several cases, it reviewed without comment court of appeals decisions in cases where the district court had denied motions for summary judgment using plaintiffs' versions of the facts, viewing the evidence in the light most favorable to plaintiffs—in other words, in cases where plaintiffs' evidence was disputed. . . . In *Plumhoff v. Rickard*, . . . the Court finally addressed the tension between *Johnson* and its own post-*Johnson* practice. . . . Instead of explaining—or, better yet, abandoning—*Johnson*, the Court distinguished it. The Court wrote, 'The District Court order in this case is nothing like the order in *Johnson*.'. . In *Johnson*, the three police officers appealing the interlocutory order denying summary judgment contended that they had not been present when the beating took place and had had nothing to do with it. By contrast, the Court wrote in *Plumhoff*, 'Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law.'. .In deciding the officers' interlocutory appeal, the Court in *Plumhoff* accepted plaintiff's version of the facts, viewed in the light most favorable to the plaintiff. . . .We have recently recognized that *Plumhoff* has modified *Johnson*. . . But we have not done more than that. We have not interpreted *Plumhoff* as restricting *Johnson* to its facts. But if we are to be faithful to what the Court wrote in *Plumhoff*, that is what we should do. Under *Plumhoff*, when a district court holds in summary judgment that a plaintiff's version of the facts, construed in the light most favorable to the plaintiff, shows that a defendant officer has used excessive force, we generally may exercise interlocutory appellate jurisdiction under *Scott*. Only when an officer provides evidence in the district court showing that he or she was not present and in no way participated in or authorized the challenged conduct, and when the district court nonetheless denies the officer's motion for summary judgment because plaintiff presents evidence to the contrary, are we without jurisdiction to hear the officers' interlocutory appeal. It is distinctly counterintuitive that this should be the remnant of *Johnson* that survives. Officers who present

evidence that they were neither present nor in any way involved in the use of allegedly excessive force, and who contend that plaintffs' evidence, though contested, construed in the light most favorable to them, does not show the contrary, are those officers who most deserve the protection of interlocutory appeals when their motion for summary judgment is denied. But I have difficulty reading the combination of *Johnson* and *Plumhoff* any other way. As to these officers, the district court's denial of summary judgment 'was not a "final decision" within the meaning of the relevant statute.'. . I hope that the Supreme Court will revisit the issue soon and will disavow *Johnson* entirely. But until that happens, I believe that we are, unfortunately, bound to follow what remains of *Johnson.*")

TENTH CIRCUIT

Frasier v. Evans, 992 F.3d 1003, 1029-33 (10th Cir. 2021), *pet. for cert. filed*, No. 21-57 (U.S. July 8, 2021) ("[L]ike *Cox*, even if we were to assume that the officers were 'obliged to marshal particularized arguments in support of the clearly-established-law question' and therefore forfeited such arguments by not making them before the district court, we would 'exercise ... our discretion to overlook the assumed forfeiture' on these facts and 'elect here to reach the merits of [the officers'] qualified-immunity arguments based on the absence of clearly established law.'. . In sum, even if the officers forfeited their clearly-established-law arguments, we would exercise our discretion to consider them. . . .In contending that we should not reach the merits, Mr. Frasier makes one last jurisdictional argument in the following terms: 'Defendants' argument about whether the law was clearly established at the time (as to conspiracy to violate ... Fourth Amendment rights) assumes facts favorable to them. This deprives this Court of jurisdiction to consider the argument.' . . In this regard, Mr. Frasier asserts that he 'presented evidence that after the Defendants surrounded him in a circle and demanded the video from him, implying arrest if he refused, he acquiesced and retrieved his tablet [computer] for Evans,' but that 'Defendants reject this view of the facts.'. . Mr. Frasier's last jurisdictional argument is mistaken and otherwise without merit. It is quite true that, under our 'limited jurisdiction' to review interlocutory, qualified-immunity appeals, our review is restricted to 'the district court's abstract legal conclusions,' and 'we are not at liberty to review a district court's factual conclusions.'. . Thus, where a district court 'concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.'. . But this well-settled prohibition against review of the district court's factual conclusions relates to the district court's factual findings based on the summary-judgment record. That is, the bar pertains to revisiting the court's factual conclusions concerning what facts a reasonable jury could find based on the evidence in that record—construing that evidence in the light most favorable to the plaintiff. That prohibition, however, does not prevent appellate courts—and defendants asserting qualified immunity on interlocutory appeal—from challenging the district court's legal analysis of the facts it has found nor, relatedly, the court's ultimate resolution of the abstract legal questions before it. . . We believe that Mr. Frasier's jurisdictional argument here reflects a mistaken reading of the substance and thrust of the officers' briefing. Regarding the substance, though they

sometimes use more muted language in describing the relevant events, we discern no indication from their briefing that the officers contest the evidence that Mr. Frasier 'presented' about the officers surrounding him and demanding that he turn over the video contained on his tablet computer and about Mr. Frasier's contention that he submitted to the officers' demands because he harbored concerns regarding being arrested and going to jail. . . Moreover, Mr. Frasier has not suggested that the district court did not construe the summary-judgment record in the light most favorable to him. This is significant because the officers leave no doubt, for purposes of this interlocutory appeal, that they accept the facts that the district court found to be supported by the record. . . Therefore, in doing so, the officers have necessarily accepted the version of the record that is construed in the light most favorable to Mr. Frasier. . . .[T]he thrust of the officers' argument is that—because of the district court's allegedly flawed approach to the facts that it did find—the court erred in reaching the legal conclusion that the facts were sufficient to establish that the officers engaged in a conspiracy to search Mr. Frasier's tablet computer that violated his clearly established Fourth Amendment rights. We conclude that, irrespective of the merits of the officers' arguments—and we do not opine on their merits now—these arguments do not dispute the facts found by the district court, but instead, raise the sort of legal questions that we have jurisdiction to resolve. . . Accordingly, we reject Mr. Frasier's last jurisdictional argument and proceed to the merits.")

Crowson v. Washington County State of Utah, 983 F.3d 1166, 1185-86, 1192-93 (10th Cir. 2020) ("If resolution of the collateral qualified immunity appeal '*necessarily* resolves' the County's issues on appeal, then those otherwise nonappealable issues are 'inextricably intertwined' with the appealable decision. . . But 'if our ruling on the merits of the collateral qualified immunity appeal [would] not resolve all of the remaining issues presented by the [County],' then we lack jurisdiction to consider the County's appeal. . . . To frame our prior decisions, it is important to begin with the Supreme Court's direction in *Collins v. City of Harker Heights* that 'proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.'. . The absence of an affirmative answer to either of these questions is fatal to a claim against the municipality. With respect to the first question, a claim under § 1983 against either an individual actor or a municipality cannot survive a determination that there has been no constitutional violation. . . . Our conclusion that Nurse Johnson did not violate Mr. Crowson's constitutional rights does not completely resolve Mr. Crowson's claims against the County. The absence of a constitutional violation by Nurse Johnson forecloses Mr. Crowson's failure-to-train claim. However, it does not resolve the broader claim that the County's policy of failing to properly train nurses and guards, combined with its policy of relying on a largely absentee physician, evidenced deliberate indifference to Mr. Crowson's serious medical condition. Because this claim is not inextricably intertwined with the claim against any individual defendant, we lack jurisdiction over it in this interlocutory appeal. We therefore dismiss the County's appeal with respect to the systemic failure claim, and we remand for proceedings consistent with this opinion. In doing so, we express no view as to the merits of this claim. We simply decide we lack jurisdiction to consider it.")

Estate of Valverde by & through Padilla v. Dodge, 967 F.3d 1049, 1059 (10th Cir. 2020) ("[T]he mere existence of controverted factual issues does not necessarily divest us of jurisdiction. 'We need not ... decline review of a pretrial order denying summary judgment solely because the district court says genuine issues of material fact remain; instead, we lack jurisdiction only if our review would require second-guessing the district court's determinations of evidence sufficiency.'. . Thus, 'our jurisdiction is clear when the defendant does not dispute the facts alleged by the plaintiff and raises only legal challenges to the denial of qualified immunity based on those facts.'. .Also, when the district court expresses no view on the sufficiency of the evidence regarding an essential element of a claim or defense, we may assume that task. . . The only bar to our review in this regard is that we are required 'to accept as true the facts the district court expressly held a reasonable jury could accept.'. .We must note, however, that the appellate court is not always bound by a district court's ruling that the evidence presented would support a particular fact-finding. [citing *Scott v. Harris*] In sum, we have jurisdiction if the defendant's appeal seeks qualified immunity based on incontrovertible facts, facts that the district court has declared to be supported by the record, and—to the extent that the district court has not expressed its view—the remaining evidence as seen in the light most favorable to Plaintiff. Under this standard, we believe we have jurisdiction to consider the issues raised by Dodge on appeal.")

Estate of Ceballos v. Husk, 919 F.3d 1204, 1221 (10th Cir. 2019) ("Officer Husk's permissible interlocutory appeal raised the legal question of whether the district court erred in identifying clearly established law that put the officer on notice that his use of force, as Ceballos alleges it, was excessive and in violation of the Fourth Amendment. The City's interlocutory appeal involves, instead, the City's training of its officers. . . . On appeal, the City reasserts its argument that there is no evidence that its training was inadequate, but that if its training was inadequate, there is no evidence that any inadequacy rose to the level of deliberate indifference or caused any unconstitutional use of force against Ceballos. These issues do no overlap with the issue Officer Husk permissibly raised in his interlocutory appeal. Moreover, in resolving Officer Husk's interlocutory appeal, we concluded there was clearly established law that put the officer on notice that the alleged force he used against Ceballos was unconstitutional. But that determination does not '*necessarily* resolve[ ]'. . . the training issues that the City raises in its appeal. We, therefore, decline to exercise pendent jurisdiction over the City's interlocutory appeal.")

ELEVENTH CIRCUIT

Hall v. Flournoy, 975 F.3d 1269, 1276-79 (11th Cir. 2020) ("Since *Johnson*, the Supreme Court has reiterated that when legal questions of qualified immunity are raised -- either to determine whether any constitutional right was violated or whether the violation of that right was clearly established -- interlocutory appellate jurisdiction exists. But if the only question before the appellate court is a factual one, review must wait for a later time. . . . To be sure, the presence of a factual dispute on appeal does not automatically foreclose interlocutory review; rather, jurisdictional issues arise when the *only* question before an appellate court is one of pure fact.

Thus, as the Supreme Court made clear in *Behrens v. Pelletier*, when a defendant challenges the conclusion that an alleged act violated clearly established law -- a question of law -- an appellate court may also consider factual questions that are inherently tied into such an evaluation. . . Similarly, in *Scott v. Harris*, the Supreme Court exercised jurisdiction over an excessive force case raising the legal question of whether ramming a car off the road constituted a violation of the Fourth Amendment. . . Notably, that case also raised fact questions, including how to view the facts at the summary judgment stage when videotape evidence 'quite clearly contradicts the [plaintiff's] version of the story.'. . Nevertheless, because a legal question was involved too, an appellate court had the power to review the matter on an interlocutory basis. Our Circuit's precedents are consistent. . . .The long and the short of our case law is clear: if there is no legal question to review -- like whether the officer's conduct violated a plaintiff's constitutional rights or whether those constitutional rights were clearly established by the Supreme Court, this Court or the highest court of the state in which the cause arose -- we cannot review a trial court's determination of the facts alone at the interlocutory stage. As explained further, in this appeal, Flournoy does not present a legal question such as whether her alleged conduct violated Hall's rights or whether the constitutional right in question was clearly established by the Supreme Court. Rather, she only asks us to review the factual sufficiency of the district court's decision classifying the dispute at issue -- whether the marijuana found in Hall's accessory building was planted -- as genuine. . . . Flournoy's fear that we are creating precedent for arrestees to claim that evidence was planted, destroying qualified immunity en masse, is itself unfounded. District courts have the authority to decide in the first instance whether a claim of planted evidence is supported by enough to move the case to trial. Even if a rush of plaintiffs begin to make specious arguments in opposition to summary judgment, we have every reason to believe that the district courts will reject these claims where the plaintiffs have failed to create a genuine issue of material fact, as set forth in the summary judgment rules and our case law. . . . In short, Flournoy challenges no legal issue we can find. Rather, she simply asks us to review whether the evidence presented supports the trial court's determination that there was a genuine dispute of material fact over whether the marijuana was planted. Because we are asked to resolve no more at this preliminary stage, we are required to DISMISS Flournoy's appeal for lack of jurisdiction.")

X. Note on Qualified Immunity and Private Actors

A. *Richardson v. McKnight*

In ***Richardson v. McKnight***, 117 S. Ct. 2100, 2102 (1997), the Court held that "prison guards who are employees of a private prison management firm are [not] entitled to a qualified immunity from suit by prisoners charging a violation of . . . § 1983." The opinion was five-four, with Justice Breyer writing for the majority (joined by Justices Stevens, O'Connor, Souter and Ginsburg).

The majority concluded that "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards." *Id*. at 2104. Furthermore, the Court

found the public policy concerns underlying immunity for government officials (discouragement of "unwarranted timidity," reduction of threat of damages suits as a deterrent to talented candidates pursuing careers in public service and elimination of "distraction" from duty) were not implicated in the context of prison employees of the large, multistate private prison management firm. *Id.* at 2105-08.

B. *Filarsky v. Delia*

The Supreme Court distinguished *Richardson* in ***Filarsky v. Delia***, 132 S.Ct. 1657, 1665-68 (2012) ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis. . . .*Wyatt* is plainly not implicated by the circumstances of this case. Unlike the defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are 'principally concerned with enhancing the public good.'. . Whether such individuals have assurance that they will be able to seek protection if sued under § 1983 directly affects the government's ability to achieve its objectives through their public service. Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity. . . .*Richardson* was a self-consciously 'narrow[ ]' decision. . . The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. . . Instead, the Court emphasized that the particular circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms'—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. . . Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work. A straightforward application of the rule set out above is sufficient to resolve this case. Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under § 1983. New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.")

C. Recent Post-*Filarsky* Cases

FIFTH CIRCUIT

Sanchez v. Oliver, 995 F.3d 461, 466-67 (5th Cir. 2021) ("Here, there is no question that Oliver, as a medical professional treating a pretrial detainee on behalf of a governmental entity, was acting under color of state law for purposes of § 1983. . . As a private actor, Oliver may be liable for acting under color of state law under § 1983, but 'it does not necessarily follow that [she] may assert qualified immunity.'. . . In holding that Oliver was entitled to assert the defense of qualified immunity, the district court relied heavily on this court's ruling in *Perniciaro* that two private mental health providers employed by the state through Tulane University were entitled to qualified immunity. However, the *Perniciaro* court took pains to emphasize that Tulane University 'is not "systematically organized" to perform the "major administrative task" of providing mental-health care at state facilities.'. . By contrast, Oliver's employer, CHC, is—according to its marketing materials—a major corporation 'in the business of administering correctional health care services.' . . Our sister circuits unanimously agree that employees of such entities—including, specifically, CHC in two cases—are not entitled to assert qualified immunity. [collecting cases] After considering the historical tradition of immunity at common law around the time § 1983 was enacted and the policy considerations underlying qualified immunity, we agree with our sister circuits that Oliver—as an employee of a large firm systematically organized to perform the major administrative task of providing mental healthcare at state facilities—is categorically ineligible for qualified immunity.")

Perniciaro v. Lea, 901 F.3d 241, 251-53 & nn. 9, 11 (5th Cir. 2018) ("Circuits are divided on whether privately employed doctors who provide services at prisons or public hospitals pursuant to state contracts are entitled to assert qualified immunity. *Compare McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012) (no immunity for privately paid physician working at county prison), *Jensen v. Lane Cty.*, 222 F.3d 570 (9th Cir. 2000) (no immunity for privately employed psychiatrist providing services at public psychiatric hospital), *and Hinson v. Edmond*, 192 F.3d 1342 (11th Cir. 1999) (no immunity for privately employed physician providing services at county jail), *with Estate of Lockett ex rel. Lockett v. Fallin*, 841 F.3d 1098 (10th Cir. 2016) (immunity for privately employed physician providing services at state penitentiary). . . After considering the facts of this case in light of the history and purposes of immunity, we find the cases disallowing immunity distinguishable and hold that Drs. Thompson and Nicholl may assert the defense of qualified immunity. . . . Here, as in *Filarsky*, . . . Drs. Thompson and Nicholl are private individuals who work in a public institution and alongside government employees, but who do so as something other than full-time public employees. And here, as in *Filarsky*, . . . it is clear that their public counterparts would be entitled to assert qualified immunity[.] . . Accordingly, as in *Filarsky*, general principles of immunity at common law support the right of Drs. Thompson and Nicholl to raise the defense of qualified immunity. . . .We note that while the Ninth and Eleventh Circuits reached contrary conclusions in *Jensen* and *Hinson*, respectively, they did so before the Supreme Court decided *Filarsky*. Accordingly, they followed *Richardson*'s lead and

framed the relevant question as whether there was a firmly-rooted tradition of immunity for private doctors performing some government-related function. . . Finding no tradition of immunity even for doctors working directly for the state, the Ninth and Eleventh Circuits concluded that history did not support immunity for the privately employed doctors there at issue. . . But *Richardson* considered only the issue of qualified immunity for prison guards employed by and working at a private prison; it explicitly did not consider the more nuanced question of whether a person 'briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision' would be entitled to assert immunity. . . That reserved question was then expressly taken up in *Filarsky*, resulting in a different focus to the necessary historical excavation. As described above, the Court in *Filarsky* suggests that where the defendant at issue worked in a governmental entity and alongside government employees, the relevant historical question asks whether someone bearing that relationship to the state would have had immunity at common law, not whether immunity was accorded to purely private persons performing some governmental function. . . The Court's deep dive into the common law yielded an answer in the negative. . . The Sixth Circuit decided *McCullum* just months after the Supreme Court decided *Filarsky*. With respect for our sister circuit's deep historical analysis of whether doctors had any special immunity at common law, . . . we read *Filarsky* to require a different focus. . . . [T]he market forces assumed in *Richardson*'s reasoning are much weaker here. First, the state, not Tulane, oversees the operation of ELMHS and the services that Drs. Thompson and Nicholl provide there. ELMHS is a state-run facility, operated pursuant to state policies and overseen by a state employee. Dr. Thompson reports directly to Lea, not to anyone at Tulane. Similarly, issues pertaining to patient safety and the quality of care provided by the Tulane psychiatrists are reviewed by state employees, including Lea. . . Whereas the Supreme Court in *Richardson* concluded that the private prison guards there at issue "resemble those of other private firms and differ from government employees," 521 U.S. at 410, 117 S.Ct. 2100, here we conclude just the opposite. When Drs. Thompson and Nicholl go to work at ELMHS, they act within a government system, not a private one. The market pressures at play within a purely private firm simply do not reach them there. . . Furthermore, their direct employer, Tulane University, is not 'systematically organized' to perform the 'major administrative task' of providing mental-health care at state facilities. . . Unlike the private entities at issue in cases denying qualified immunity, . . . the university's primary function is not providing health-care services, whether by contract or directly. The professors it employs have many duties, including research and teaching, and their pay, as well as other means of incentivization, are likely determined by factors besides the quality of care they provide to any patients they may see at ELMHS. Any marketplace pressures influencing the performance of the university's employees, therefore, are likely not fine-tuned to preventing overly timid care at ELMHS. Finally, it does not appear that the pressures created by the threat of replacement are at play here. Unlike in *Hinson*, where the firm responsible for providing health services in a county jail had recently been replaced in light of performance concerns, . . . Tulane has held the contract to provide psychiatric services for the state since 1992. There is no indication in this record of any other private entities vying for the contract. Under these circumstances, it is unlikely that, absent immunity, market forces would swiftly intervene to discipline overly timid performance. .

. . This level of state involvement and supervision sets this case apart from the Ninth and Eleventh Circuit cases denying qualified immunity to privately employed doctors. . . .In sum, considering the history and purposes of immunity in conjunction with the facts of this case, we hold that Drs. Thompson and Nicholl may raise the defense of qualified immunity.")

SIXTH CIRCUIT

McCullum v. Tepe, 693 F.3d 696, 697, 699-704 (6th Cir. 2012) ("There does not seem to be a history of immunity from suit at common law for a privately paid physician working for the public, and the policy rationales that support qualified immunity are not so strong as to justify our ignoring this history, or lack of history. . . . The issue in this appeal is whether Tepe, a physician employed by an independent non-profit organization, but working part-time for the County as a prison psychiatrist, can invoke qualified immunity in a lawsuit arising out of his activities at the prison. A physician who contracts to provide medical services to prison inmates, the Supreme Court has held, acts under color of state law for purposes of § 1983. *West v. Atkins*, 487 U.S. 42, 54 (1988). But a party is not entitled to assert qualified immunity simply because he is amenable to suit under § 1983. *Harrison v. Ash*, 539 F.3d 510, 521 (6th Cir. 2008). . . . We cited both *Hinson* and *Jensen* with approval in our published *Harrison* opinion, relying on both for the conclusion 'that there is no "firmly rooted" common law practice of extending immunity to private [nurses working at a county jail].'. . . After *Filarsky*, however, *Hinson* and *Jenson*'s historical analyses—which rested on Twentieth Century law—are suspect, at best. . . . [W]hile *Filarsky* did not impose a rigid date limit, it does illustrate the scope of the relevant inquiry: whether a person in the same position as the party asserting qualified immunity would have been immune from liability under the common law of the late Nineteenth Century. . . . With this in mind, we consider whether a private doctor working for a state institution would have been immune from a suit for damages at common law. . . . [Court examines cases from late 19th Century] These cases, as well as the American and English cases involving private physicians in private practice, and the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law, convince us that there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983. The first piece of the *Richardson* analysis, then, suggests that we should not allow Tepe to assert qualified immunity. . . . We acknowledge that it is somewhat odd for a government actor to lose the right to assert qualified immunity, not because his job changed, but because a private entity, rather than the government, issued his paycheck. But just as market pressures, a private firm's ability to 'offset any increased employee liability risk with higher pay or extra benefits,'. . . the 'continual . . . need for deterring constitutional violations[,] and . . . [the] sense that the [private] firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms,'. . . vitiated any policy-based concerns in *Richardson*, these same factors suggest that immunity would be inappropriate here. . . . Despite the Supreme Court's somewhat cryptic comment in *Richardson* that a doctor may have had immunity from damages at common law, there does not appear to be any history of immunity for a private doctor working for

the government, and the policies that animate our qualified-immunity cases do not justify our creating an immunity unknown to the common law.")

SEVENTH CIRCUIT

Estate of Clark v. Walker, 865 F.3d 544, 550-51 (7th Cir. 2017) ("The Court in *Filarsky* reached its conclusion on the part-time lawyer through an historical inquiry, asking whether the person asserting qualified immunity would have been immune from liability under the common law in 1871 when Congress passed the law later codified as § 1983. . . In a detailed opinion, the Sixth Circuit applied *Filarsky*'s historical method and held that a privately employed doctor working for a state prison could not invoke qualified immunity. *McCullum v. Tepe*, 693 F.3d 696, 697 (6th Cir. 2012). After examining numerous nineteenth-century sources, the Sixth Circuit concluded that 'the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law, convince[s] us that there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983.'. . We found the Sixth Circuit's reasoning persuasive in *Currie*, 728 F.3d at 632, and have held in other post-*Filarsky* cases that private medical personnel in prisons are not afforded qualified immunity. See, e.g., *Rasho*, 856 F.3d at 479; *Petties*, 836 F.3d at 734. Because Kuehn was a privately employed nurse working at the Green Lake County Jail, she is ineligible for qualified immunity.")

Meadows v. Rockford Housing Authority, 861 F.3d 672, 677-78 (7th Cir. 2017) ("Of particular importance to the Court in *Richardson* was that the defendants worked 'independently' of 'ongoing direct state supervision,' 521 U.S. at 409; indeed, it repeated this requirement at several points in its opinion, *see id*. at 413 (noting that the case before it arose in the context of a private firm 'with limited direct supervision by the government,' and that it did not involve 'a private individual ... acting under close official supervision'). Moreover, in *Filarsky*, the Court explained that providing qualified immunity to defendants performing specific tasks at the instruction of government officials implicated '[t]he public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits.'. . Such distractions not only affected a defendant's ability to perform his or her duties, but also 'affect[ed] any public employees with whom they work by embroiling those employees in litigation' as well. . . Here it is undisputed that Hodges and Novay were working under the direct supervision of RHA officials when they carried out the actions that Meadows challenges. Doyle, RHA's Security Support Manager, instructed Hodges that the locks on the door should be changed, and Novay was present in the apartment for that purpose. . . Meadows does not dispute that qualified immunity would protect Doyle if he had changed the lock himself. Here, given the 'purposes that underlie government employee immunity,' *see Richardson*, 521 U.S. at 404, Novay and Hodges should be afforded the same protections. As in *Richardson*, our holding is a narrow one. It should, by no means, be read to guarantee qualified immunity to all employees of private security companies that provide contractual security services to governmental entities. The circumstances presented here, however,

establish that the defendants were operating at the direct instruction of a supervising government official. Under these circumstances, qualified immunity is available to the defendants.")

Rasho v. Elyea, 856 F.3d 469, 479 (7th Cir. 2017) ("This Court has construed the Supreme Court's holding that employees of privately-operated prisons may not assert a qualified-immunity defense also to deny that defense to employees of private corporations that contract with the state to provide medical care for prisoners. *Zaya*, 836 F.3d at 807 (citing *Richardson v. McKnight*, 521 U.S. 399, 412, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)). Thus, Dr. Massa, as an employees of the private contractor Wexford, cannot assert qualified immunity as a defense to Rasho's claims. *See Petties*, 836 F.3d at 734 ("[Q]ualified immunity does not apply to private medical personnel in prisons.") (citing *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 794 (7th Cir. 2014)); *see also Currie v. Chhabra*, 728 F.3d 626, 632 (7th Cir. 2013) (citing with approval the Sixth Circuit's holding in *McCullum v. Tepe,* 693 F.3d 696 (6th Cir. 2012), that "a [private] doctor providing psychiatric services to inmates at a state prison is not entitled to assert qualified immunity").")

TENTH CIRCUIT

Tanner v. McMurray, 989 F.3d 860, 864-74 (10th Cir. 2021) ("This appeal presents the question of whether employees of a national private corporation providing medical services in a correctional institution can assert qualified immunity. In the past, we have declined to address the issue in cases where the plaintiff overcame qualified immunity even if available. . . However, we recently allowed a sole practitioner doctor who was engaged part time by a county jail to assert the defense. *See Estate of Madison Jody Jensen v. Tubbs*, No. 20-4025, —— F.3d ——, 2021 WL 787451 (10th Cir. Mar. 2, 2021). Other circuits that have considered the question presented in this appeal have concluded with near uniformity that corporate medical contractors are not entitled to assert qualified immunity. *See Estate of Clark*, 865 F.3d 544, 551 (7th Cir. 2017); *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012*); Jensen v. Lane Cty.*, 222 F.3d 570, 580 (9th Cir. 2000); *Hinson v. Edmond*, 192 F.3d 1342, 1347 (11th Cir. 1999). *But see Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018). . . . We conclude that neither late 19th century common law nor present-day policy considerations counsel in favor of extending qualified immunity in the manner Appellees seek. We therefore hold that the employees of private corporations providing medical care in correctional facilities under circumstances similar to those presented in this case are not entitled to assert qualified immunity. . . Our analysis is framed by Supreme Court cases that discuss when a private party is eligible to assert qualified immunity. Principal cases are *Wyatt v. Cole*, . . . *Richardson v. McKnight*, . . . and *Filarsky v. Delia*[.] . . . We extract from the above cases that availability of qualified immunity to private parties performing governmental functions depends on (1) 'the common law as it existed when Congress passed § 1983 in 1871,' and (2) the policy reasons the Supreme Court has 'given for recognizing immunity under § 1983.'. . We interpret this as a disjunctive test: Private individuals are entitled to assert qualified immunity if their claim is 'supported by historical practice or based on public policy considerations.'. . . All available authorities thus point to the historical availability of tort remedies against physicians regardless of whether they were employed by a government entity. Availability of tort remedies against private

correctional employees led the Supreme Court to deny qualified immunity in *Richardson*. . . Appellees do not cite to any case law to gainsay the conclusion reached by our sibling circuits that similar remedies were historically available to those who suffered mistreatment at the hands of government-employed private medical practitioners. Given our own inability to find any cases to the contrary, we conclude that the common law at the time § 1983 was passed supports holding that qualified immunity is unavailable to Appellees. . . . We thus turn to the policy justifications of 'avoid[ing] unwarranted timidity in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions' of litigation. . . . In sum, neither 19th century common law nor modern policy considerations support allowing private medical professionals who are employees of a contractor that provides healthcare in jails or prisons to avail themselves of qualified immunity. . . . Endorsing the district court's conclusion that Appellees are entitled to qualified immunity under *Filarsky* simply because they worked for the government through a contractor would establish a de facto functional test for qualified immunity. Any individual who is working full-time for the government through a contractor would be entitled to the same protections as if they were directly working for the government. This simple functional test could have appeal, but it was unequivocally rejected by *Richardson*. . . *Richardson* observes that while the Court occasionally applies a functional test to determine whether a public official is entitled to absolute or qualified immunity, it has never held 'that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction.'. . . *Filarsky* took care to acknowledge that *Richardson* remained good law for situations involving 'a private firm, systematically organized to assume a major lengthy administrative task ... with limited direct supervision by the government, undertaking that task for profit and potentially in competition with other firms.'. . *Filarsky* was eligible to assert qualified immunity because 'nothing of the sort [was] involved' in his case. . . By comparison, *Richardson* provides a close factual analogue to this appeal. The factors in *Richardson* that counseled *against* allowing the defense of qualified immunity for guards working at a private prison are all present in this case. As were the prison guards in *Richardson*, Appellees are full time employees of a large private corporation that is 'systematically organized' to provide contract healthcare services in government facilities. *Richardson*'s explanation of how the pressures of a competitive market ameliorate the qualified immunity-justifying concern of unwarranted timidity by providing 'strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or "nonarduous" employee job performance'. . . applies unerringly to the facts of this appeal. First, the firm in *Richardson* was 'a large, multistate ... firm ..., systematically organized to perform a major administrative task for profit.' . . Similarly, CCS is a nationwide company that is systematically organized to profit from providing medical care in detention facilities. Its sole business is to contract with government entities to provide medical care in correctional facilities. Its business is extensive: In 2016, CCS operated in roughly 200 local and county jails in 38 states. Second, as did the prison guards in *Richardson*, Appellees perform their tasks 'independently,' with only minimal 'ongoing direct state supervision.'. . .Neither historical justifications of special government immunity nor modern policy considerations support the extension of a qualified immunity defense to Appellees—private

medical professionals employed full-time by a multi-state, for-profit corporation systematically organized to provide medical care in correctional facilities. Both Appellees' arguments on appeal and the district court's decision stretch the holding of *Filarsky* well beyond its breaking point. Their faulty reasoning would functionally overturn *Richardson*.")

Estate of Jensen by Jensen v. Clyde, 989 F.3d 848, 855-57 & n.2 (10th Cir. 2021) ("Dr. Tubbs was carrying out government responsibilities — namely, providing medical services to inmates — but was merely doing so on a part-time basis. He was working alongside the jail's officers and LPN, Ms. Clyde, whose full-time job was to monitor and provide some care for the inmates. In fact, had Dr. Tubbs been working as a doctor for the county on a full-time basis (e.g., like Ms. Clyde does as an LPN), he would have certainly been able to raise a qualified-immunity defense. . . Thus, common law principles support Dr. Tubbs' ability to raise a qualified-immunity defense. Turning next to the policy considerations, three objectives guide our analysis: (1) protecting against 'unwarranted timidity on the part of public officials;' (2) ensuring 'that talented candidates are not deterred by the threat of damages suits from entering public service;' and (3) guarding against employees being distracted from their duties. . . Given the unique facts of this case, these concerns support our conclusion that Dr. Tubbs may raise the defense. . . .Dr. Tubbs essentially ran a two-man shop (including his subcontract with PA Clark) when providing a discrete function to the prison. While Dr. Tubbs had some leeway in his decisions, it was the county that was in charge of implementing policies and training its officers. Dr. Tubbs was required to provide care in accordance with Utah Department of Corrections and Utah Medicaid guidelines, the county had to authorize any elective care, and Dr. Tubbs could only prescribe medication from the prison's formulary. . . Even though Dr. Tubbs had agreed to supervise and train Ms. Clyde, he still had no ability to discipline or fire her. . . In this capacity, Dr. Tubbs does not resemble a private doctor working in a private firm. . . As observed by the Fifth Circuit, private doctors providing services at a jail 'act within a government system, not a private one,' and 'market pressures at play within a purely private firm simply do not reach them there.' *Perniciaro v. Lea*, 901 F.3d 241, 253 (5th Cir. 2018). . . . The Estate relies heavily on *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012), to argue that qualified immunity does not apply to Dr. Tubbs.[2] **[fn. 2:** The Estate also points to other circuits concluding that qualified immunity is not available to a private medical professional providing services to a jail. *See Estate of Clark v. Walker*, 865 F.3d 544, 551 (7th Cir. 2017) (denying qualified immunity to private nurse); *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012) (denying qualified immunity to private psychiatrist); *Jensen v. Lane Cnty.*, 222 F.3d 570, 577 (9th Cir. 2000) (same); *Hinson v. Edmond*, 192 F.3d 1342, 1347 (11th Cir. 1999), *amended*, 205 F.3d 1264 (11th Cir. 2000) (denying qualified immunity to private physician). *But see Perniciaro v. Lea*, 901 F.3d 241, 255 (5th Cir. 2018) (allowing private psychiatrists to assert the qualified-immunity defense). As the Fifth Circuit points out, many of these cases were decided pre-*Filarsky* and may not align precisely with *Filarsky*'s mode of analysis. *See Perniciaro*, 901 F.3d at 252 n.9.**]** . . . . Although *Tepe* provides persuasive support for the Estate's argument, we believe the circumstances of this case — i.e., an individual doctor with limited control over policy working alongside government employees — compel a different result. We also question whether *Tepe*'s historical analysis fully comports with the Supreme Court's analysis in *Filarsky*. .

. The *Filarsky* Court was clear that the common law provided individuals with 'immunity for actions taken while engaged in public service on a temporary or occasional basis.'. . That determination controls the outcome of this case. Therefore, given the common law principles and underlying policy concerns, we conclude that Dr. Tubbs may claim qualified immunity. However, we highlight the unique circumstances of this case that led to allowing Dr. Tubbs to raise the defense.")

Crowson v. Washington County State of Utah, 983 F.3d 1166, 1181 n.9 (10th Cir. 2020) ("Mr. Crowson asserts that Dr. LaRowe is a private contractor who is not entitled to assert a defense of qualified immunity under *Richardson v. McKnight*[.] . . Although Mr. Crowson concedes he did not raise this argument before the district court, he requests we consider it as an argument for affirmance on alternate grounds. Not only did Mr. Crowson fail to raise this argument before the district court, his briefing on appeal treats it only perfunctorily. . . . Mr. Crowson's one-sentence argument not only overlooks the limited nature of the Supreme Court's holding in *Richardson*, but also does not address the rule outlined in *Richardson* and reiterated in *Filarsky v. Delia*, . . . for determining when a private party may assert a qualified immunity defense. Mr. Crowson also does not acknowledge that other circuits are split on whether private health care providers hired by the state may assert a qualified immunity defense. If we were to consider this argument, the result would be deepening a circuit split without the benefit of adequate adversarial briefing on the issue. We therefore decline to reach this argument.")

Estate of Lockett v. Fallin, 841 F.3d 1098, 1108-09 (10th Cir. 2016) ("Dr. Doe is entitled to assert qualified immunity because the purposes of qualified immunity support its application here: carrying out criminal penalties is unquestionably a traditional function of government, exactly the sort of activities that *Richardson* reasoned qualified immunity was meant to protect. If participants in an execution could be held liable for problems during the execution, that would necessarily implicate *Filarsky*'s concerns about '[t]he public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits,' which the Court noted 'is also implicated when individuals other than permanent government employees discharge these duties.'. . The attorney in *Filarsky* received qualified immunity largely because a permanent government attorney doing the same acts would receive it. The *Filarsky* Court determined that denying a temporarily retained attorney the same defense as a full-time government attorney would undermine the purposes of the doctrine. The same is true here—for instance, had a state employee performed the same duties as Dr. Doe did here, qualified immunity would apply. We see no sense in depriving a private doctor the same protection. Here, Dr. Doe stands in the same position as the attorney in *Filarsky*—he was a private party hired to do a job for which a permanent government employee would have received qualified immunity. Thus, we conclude that qualified immunity applies to Dr. Doe.")