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QUALIFIED IMMUNITY: TIME TO CHANGE THE MESSAGE

*Karen M. Blum**

INTRODUCTION

If messages sent by the Supreme Court to the lower federal courts were in the form of tweets, there would be a slew of them under #welovequalifiedimmunity. Since *Harlow v. Fitzgerald*,¹ the Supreme Court has confronted the issue of qualified immunity in over thirty cases.² Plaintiffs have prevailed in two of those cases: *Hope v. Pelzer*³ and *Groh v. Ramirez*.⁴ In eight of the cases, including *Kisela v. Hughes*,⁵ the Court reversed denials of qualified immunity in per curiam summary dispositions.⁶ Five of the eight per curiam

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1 457 U.S. 800 (1982).

2 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (listing thirty cases since *Harlow*). Professor Baude's list does not include *Scott v. Harris*, 550 U.S. 372 (2007), a case in which the Court disposed of qualified immunity on the first prong of the analysis, holding that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386. Nor does his list include cases denying qualified immunity that were granted certiorari, reversed, and remanded for reconsideration. See *infra* notes 13–14 and accompanying text. The Court added two more decisions this term. See *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

3 536 U.S. 730, 745–46 (2002).

4 540 U.S. 551, 563–66 (2004).

5 138 S. Ct. 1148. In *Kisela*, the Court held that "even assuming a Fourth Amendment violation occurred[.]" Officer Hughes, who shot a woman holding a large kitchen knife while she was walking down her driveway towards another woman, did not violate clearly established law and was entitled to qualified immunity. *Id.* at 1152–53.

6 See *Kisela*, 138 S. Ct. 1148; *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015)

decisions were unanimous.⁷ Justice Sotomayor, joined by Justice Ginsburg, dissented in *Kisela*.⁸ In *Mullenix v. Luna*,⁹ there was a lone dissent by Justice Sotomayor, and in *Brosseau v. Haugen*,¹⁰ only Justice Stevens dissented. In eleven cases between 2012 and 2018, the Court exercised its discretion to jump to the second prong of the qualified immunity analysis,¹¹ granting qualified immunity because the law was not clearly established and leaving unresolved the “merits” question of prong one.¹² In four cases, the Court granted certiorari, vacated, and remanded for reconsideration of the quali-

(per curiam); *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam).

7 See *White*, 137 S. Ct. 548; *Taylor*, 135 S. Ct. 2042; *Carroll*, 135 S. Ct. 348; *Stanton*, 134 S. Ct. 3; *Ryburn*, 565 U.S. 469.

8 138 S. Ct. at 1155–62.

9 136 S. Ct. at 313–16.

10 543 U.S. at 202–08.

11 See *Kisela*, 138 S. Ct. at 1152; *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 312; *Taylor*, 135 S. Ct. at 2045; *Carroll*, 135 S. Ct. at 352; *Stanton*, 134 S. Ct. at 4; *Ryburn*, 565 U.S. at 474; see also *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015); *Wood v. Moss*, 134 S. Ct. 2056, 2068 (2014); *Reichle v. Howards*, 566 U.S. 658, 663 (2012); *Messerschmidt v. Millender*, 565 U.S. 535, 556 (2012).

The qualified immunity analysis is viewed as two-pronged, with the first prong focusing on whether the plaintiff has alleged a violation of a constitutional right under current law and the second prong examining whether such right was clearly established at the time of the challenged conduct. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Until *Pearson*, lower courts were told that addressing the first prong was mandatory. See *id.* (“A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.”). In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court abandoned the *Saucier* “fixed order-of-battle rule” and allowed lower courts discretion to jump to the second prong of the analysis first. See *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., concurring); see also *Pearson*, 555 U.S. at 234.

12 While the Court in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), resolved the merits question, holding the officers had probable cause to arrest and thus did not violate the Fourth Amendment, there was a reminder “that lower courts ‘should think hard, and then think hard again,’ before addressing both qualified immunity and the merits of an underlying constitutional claim.” *Wesby*, 138 S. Ct. at 589 n.7 (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)). Justice Sotomayor, while agreeing with the Court’s conclusion that the officers were entitled to qualified immunity on the clearly established prong, would not have reached the merits question given the “heavily factbound nature of the probable-cause determination” in the case. *Id.* at 593 (Sotomayor, J., concurring in part and concurring in the judgment). She suggested that the only reason for doing so was to dispose of the remaining state-law claims, which she thought should be left in the first instance to the lower federal courts. *Id.*

fied immunity determination in light of *Mullenix* or *Pauly*.¹³ In three of those cases, the respective circuits granted immunity on reconsideration.¹⁴

In short, the Court that once criticized the Eleventh Circuit for putting a “rigid gloss” on the qualified immunity analysis by insisting on a case that was “materially similar” to the situation before the court in order to defeat immunity,¹⁵ is now “tweeting” through per curiam opinions (e.g., *Brosseau* and *Mullenix*) that plaintiffs best produce precedent that “squarely governs”¹⁶ in the “specific context”¹⁷ of this case if they hope to get by summary judgment.¹⁸ The message is clear. As Judge Browning recently observed, “the Supreme Court has crafted their recent qualified immunity jurisprudence to effectively eliminate § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong.”¹⁹

13 See *McKnight v. Petersen*, 137 S. Ct. 2241 (2017) (mem.); *Hunter v. Cole*, 137 S. Ct. 497 (2016) (mem.); *Piper v. Middaugh*, 136 S. Ct. 2408 (2016) (mem.); *Pickens v. Aldaba*, 136 S. Ct. 479 (2015) (mem.).

14 *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 [the 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, 879–80 (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”). As of this writing, there is no decision reported on remand in *Hunter v. Cole*.

On remand from the Supreme Court, the Tenth Circuit, in *Pauly v. White*, found that on the record viewed in the light most favorable to the plaintiffs, Officer White’s use of deadly force was not objectively reasonable, but concluded that the officer was entitled to qualified immunity because there was “no case ‘close enough on point to make the unlawfulness of [Officer White’s] actions apparent.’” 874 F.3d 1197, 1223 (10th Cir. 2017) (alteration in original) (quoting *Pauly v. White*, 814 F.3d 1060, 1091 (10th Cir. 2016) (Moritz, J., dissenting)). Plaintiffs have filed a petition for certiorari from the decision in *Pauly III*. See *Petition for Writ of Certiorari, Pauly v. White*, No. 17-1078 (U.S. Jan. 29, 2018).

15 *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (second quotation from *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), *rev’d*, 536 U.S. 730).

16 *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

17 *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Brosseau*, 543 U.S. at 198); *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

18 In its latest qualified immunity decisions, the Court has continued with the same message. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (“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.’” (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014))); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590–91 (2018) (relying on *Brosseau*, *Saucier*, *Reichle*, *Plumhoff*, *Mullenix*, and *Pauly* and concluding that “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’” (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam))).

19 *Nelson v. City of Albuquerque*, 283 F. Supp. 3d, 1048, 1107 n.44 (D.N.M. 2017). Judge Robert Pratt (S.D. Iowa), sitting by designation, has likewise noted that “because

Judge Lynn Adelman has been similarly outspoken about the impact of the Court's qualified immunity jurisprudence on civil rights litigation, noting that "[t]he Supreme Court's message to lower courts is clear: think twice before allowing a government official to be sued for violating an individual's constitutional rights. As a result, the lower federal courts are disposing of cases based on qualified immunity at an astonishing rate."²⁰ Professor William Baude has questioned the legal justification for the doctrine,²¹ 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,²² and has highlighted its failure in achieving the stated goal of shielding government officials from burdens of pretrial discovery and trial.²³ Also noteworthy is the

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." *Easley v. City of Riverside*, 890 F.3d 851, 851 (9th Cir. 2018) (Pratt, J., dissenting). Judge Weinstein has also joined the chorus of critics, devoting much discussion in a recent opinion to highlighting concerns he and others have about the Supreme Court's qualified immunity jurisprudence. *See generally* *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 2997415 (E.D.N.Y. June 11, 2018).

20 Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017), <https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983>.

21 *See generally* Baude, *supra* note 2.

22 *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

23 *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). It should be noted that Professor Schwartz's conclusion that qualified immunity is not doing its job of protecting officials from burdens of discovery and trial is not necessarily inconsistent with the views of Judges Browning and Adelman that qualified immunity has stifled Section 1983 litigation. As Professor Schwartz has admitted, her study does not account for the cases that are not even filed because of the prospect of qualified immunity. *See id.* at 50. Nor does it account for cases where qualified immunity may have been unsuccessful in getting the whole case dismissed, but may have served to eliminate the Section 1983 claims while leaving state-law claims in suit, or may have limited the scope of discovery, reduced the number of claims or parties being sued, or encouraged settlement. In writing this Essay, I reached out to a number of experienced defense attorneys who practice in both the Northern and Southern Districts of Ohio and asked why, given Professor Schwartz's findings, they still regard qualified immunity as an important defense for their individual defendants. Many thanks to Elizabeth Miller, County Risk Sharing Authority Claim and Litigation Manager, for putting me in touch with J. Stephen Teetor, Mark Landes, and Andrew Yosowitz, Isaac Wiles Burkholder & Teetor, L.C., Columbus, Ohio; Daniel Downey, Fishel Hass Kim Albrecht Downey, LLP, New Albany, Ohio; and Frank Scialdone and John McLandrich, Mazanec, Raskin & Ryder, Cleveland, Ohio. I appreciate the time these attorneys took to speak or email with me. From conversations and communications with them, I summarize some of the observations, concerns, and reasons given for supporting qualified immunity as a useful defense in Section 1983 litigation.

All essentially agreed that qualified immunity does little work at the motion to dismiss stage, and few of these attorneys raise the defense prior to summary judgment unless there is clearly no merit to the plaintiff's claim as alleged. Even then, plaintiffs are afforded at least one opportunity to amend the complaint and most can plead enough to get by the motion to dismiss stage. But, raising qualified immunity after the pleadings stage will often serve to narrow the scope of discovery, cutting down on time and expense in the litigation.

fact that the Cato Institute, a conservative, libertarian think tank, has launched a full blown assault on the doctrine of qualified immunity.²⁴ And, in *Ziglar v. Abbasi*, Justice Thomas has called on the Court to reconsider its qualified immunity jurisprudence, “shift[ing] the focus of [its] inquiry to whether immunity existed at common law.”²⁵ The call for reconsideration is well taken, but this author would like to see the focus shift to align the doctrine more with common sense than with common law. The Court’s policy-driven qualified immunity approach 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.

In 1999, this Law Review devoted its *Federal Courts, Practice & Procedure Issue* to articles analyzing and criticizing the much overused *Rooker-Feldman* doctrine.²⁶ It may have seemed strange to concentrate so much time and

Concerning the expense and delay caused by interlocutory appeals, defense attorneys explained that the costs of trying a case are a lot greater than the costs of taking an appeal. Delay, of course, works to the defendant’s advantage, and a typical interlocutory appeal will delay proceedings by roughly one year. The threat of appeal and delay also works to leverage a settlement with the plaintiff. On indemnification, one common concern was that officers who are sued for punitive damages may not be indemnified and, even in cases where indemnification is forthcoming, an officer who is a named defendant in a civil suit will be burdened and suffer emotionally and psychologically, even if not ultimately held accountable financially. Finally, there is a universe of cases that are not even brought because plaintiffs’ attorneys understand that individual defendants will prevail on the qualified immunity defense, even though a constitutional violation might be established. The bottom line is that while qualified immunity may not operate to dispose of cases at the motion to dismiss or summary judgment stages, the defense often works to prevent suits from being filed, serves to limit the costs and burdens of discovery, and provides incentives for settlement in many cases.

24 On March 1, 2018, Cato hosted a panel webinar entitled “Qualified Immunity: The Supreme Court’s Unlawful Assault on Civil Rights and Police Accountability.” Judge Adelman and Professor Baude were joined by two civil rights litigators, Victor M. Glasberg and Andrew J. Pincus. Clark Neily, Vice President for Criminal Justice at Cato, moderated the program. The program can be viewed at <https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability>. Furthermore, Cato has filed an amicus brief supporting the petition for certiorari in *Pauly III*. See Jay Schweikert, *Qualified Immunity: The Supreme Court’s Unlawful Assault on Civil Rights and Police Accountability*, CATO AT LIBERTY (Mar. 5, 2018, 11:16 AM), <https://www.cato.org/blog/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability> (promising that “[t]his brief will be the first of many in an ongoing campaign to demonstrate to the courts that [the qualified immunity] doctrine lacks any legal basis, vitiates the power of individuals to vindicate their constitutional rights, and contributes to a culture of near-zero accountability for law enforcement and other public officials”).

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

26 The doctrine takes its name from two Supreme Court decisions. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Tr. Co.*,

attention on an obscure limitation on federal court subject matter jurisdiction. But, in 2005, the Supreme Court followed with *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,²⁷ a decision reining in the lower courts' expansion of the doctrine and restoring the jurisdictional limitation to its proper function and place in our federal system. For those unfamiliar with the qualified immunity defense, it might likewise seem odd to dedicate an entire issue to a *defense* available only to *certain defendants*²⁸ in a *limited category*²⁹ of civil rights litigation. However, recent Supreme Court cases, as well as lower court decisions, all too clearly and similarly demonstrate that this tail has undoubtedly come to wag the dog.

In an effort to shore up the dog and bring the tail under control, this Essay will proceed in four parts. Parts I, II, and III will highlight, through some recent illustrative cases, areas where the qualified immunity defense has been especially ineffective and inefficient by: (Part I) hampering the development of constitutional law and impeding the redress of constitutional wrongs; (Part II) draining resources of litigants and courts through interlocutory appeals that are frequently without merit and often jurisdictionally suspect; and (Part III) breeding confusion into the roles of the judge and the jury in our judicial system, effectively enhancing the judge's role at the expense of the constitutional right to jury trial. Each criticism will be followed by a brief recommendation for change to the current doctrine that might ameliorate some of the problems identified in each Part.³⁰

But, my conclusion, in Part IV, consistent with that of Professor Chen's in this Issue, is that the doctrine of qualified immunity is beyond repair.³¹ Thus, I urge the Court to make the reformation of its qualified immunity doctrine unnecessary by revisiting and revamping another of its confusing creations, the doctrine of municipal liability under Section 1983.³²

263 U.S. 413 (1923). As Professor Rowe put it in his introduction to the Issue, the doctrine "rests innocuously enough on the proposition that Congress has conferred appellate jurisdiction over state court judgments upon only one federal court, the Supreme Court of the United States." Thomas D. Rowe, Jr., *Rooker-Feldman: Worth Only the Powder to Blow It Up?*, 74 NOTRE DAME L. REV. 1081, 1081 (1999).

27 544 U.S. 280, 284 (2005).

28 The defense of qualified immunity is available only to individual government officials sued in their individual capacity for damages. See, e.g., Baude, *supra* note 2, at 46.

29 It cannot be raised as a defense to claims for injunctive relief and it cannot be raised by local government entities or officials sued in their official capacity. See *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (clarifying that immunities available to individual actors are not available to local governments).

30 Given the Court's current fondness for the qualified immunity doctrine, one might try to appeal to Congress for clarification, but I share Professor Michelman's concern that it would be a long and futile battle to persuade Congress to clarify the remedy intended by Section 1983. See Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018).

31 See Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018).

32 42 U.S.C. § 1983 (2012) provides:

I. POST-PEARSON: ARRESTED DEVELOPMENT OF CONSTITUTIONAL PRINCIPLES AND WRONGS WITHOUT REMEDIES

Since the Supreme Court in *Pearson v. Callahan*³³ released lower federal courts from the “rigid order of battle” demanded by *Saucier v. Katz*,³⁴ and made addressing the “merits” question in prong one of the qualified immunity defense discretionary,³⁵ most courts have been happy to forgo diving into tough constitutional questions when prong two has presented an obvious escape route.³⁶ There are well-founded criticisms leveled at the

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

33 555 U.S. 223 (2009).

34 533 U.S. 194, 201 (2001).

35 See *supra* note 11 and accompanying text.

36 See *infra* notes 54–57 and accompanying text; see also *Knopf v. Williams*, 884 F.3d 939, 946 (10th Cir. 2018) (considering “only the second requirement to overcome qualified immunity” and concluding that Plaintiff “did not meet his burden of showing that any violation of the First Amendment he may have suffered was based on clearly established law”); *Sebesta v. Davis*, 878 F.3d 226, 235 (7th Cir. 2017) (because law was not clearly established, “we need not consider whether there was any violation of [Plaintiff’s] constitutional right to familial integrity”); *Isayeva v. Sacramento Sheriff’s Dep’t*, 872 F.3d 938, 946 (9th Cir. 2017) (“Here, Deputy Barry stresses the second prong, whether [Plaintiff’s] rights not to be subject to the tasing and to the shooting were ‘clearly established’ on February 18, 2013. We address that prong first and, given our conclusion, need not address the other.”); *Jones v. Fransen*, 857 F.3d 843, 851 (11th Cir. 2017) (“Because we conclude that Jones’s right was not clearly established in the specific context of the facts in this case, we do not reach the question of whether Defendants violated Jones’s constitutional rights.”); *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 584 (4th Cir. 2017) (“Because we find that the law was not clearly established here, we will not reach the other step in the analysis—whether a constitutional violation actually occurred.”); *Carroll v. Ellington*, 800 F.3d 154, 174 (5th Cir. 2015) (“We decline to reach the close constitutional question and instead decide the case on the second prong of qualified immunity.”); *De Boise v. Taser Int’l, Inc.*, 760 F.3d 892, 896 (8th Cir. 2014) (“Courts have discretion to decide which part of the inquiry to address first. Here, we begin with second inquiry.” (citation omitted)).

In both *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017), *petition for cert. filed*, No. 17-1284 (U.S. Mar. 9, 2018), and *Lowe v. Raemisch*, 864 F.3d 1205 (10th Cir. 2017), *petition for cert. filed*, No. 17-1289 (U.S. Mar. 9, 2018), the Tenth Circuit left undecided whether denying a prisoner outdoor exercise for eleven months, as in *Apodaca*, 864 F.3d at 1074, or for two years and one month, as in *Lowe*, 864 F.3d at 1207, constituted an Eighth Amendment violation. In both cases, the court of appeals granted qualified immunity because, although there was precedent holding that a denial of “outdoor” exercise could violate the Eighth Amendment under some circumstances, see *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d

mandatory two-step approach, and the Court carefully set out the most compelling concerns in *Pearson*: (1) deciding the constitutional question first often results in substantial expenditures of resources by litigants and courts on “questions that have no effect on the outcome of the case”;³⁷ (2) the development of constitutional doctrine is not furthered by decisions that are “so factbound that the decision provides little guidance for future cases”;³⁸ (3) it is senseless to force lower courts to decide a constitutional question that is pending in a higher court or before an en banc panel;³⁹ (4) it does little to further the development of constitutional precedent to mandate a decision that depends on “an uncertain interpretation of state law”;⁴⁰ (5) requiring a constitutional decision at the pleading stage based on bare-bones allegations of fact, or one at the summary judgment stage resting on “woefully inadequate” briefs, “create[s] a risk of bad decisionmaking”;⁴¹ (6) the mandated two-step analysis will often shield constitutional decisions from appellate review when the defendant loses on the “merits” question but prevails on the clearly established law prong of the analysis;⁴² and finally, (7) the approach requires unnecessary determinations of constitutional law and “departs from the general rule of constitutional avoidance.”⁴³

The concerns identified by the Court are legitimate ones, but too often play little or no role in the exercise of discretion by courts under *Pearson*, or, if they do, are left unidentified by a court choosing to exercise its discretion not to decide.⁴⁴ Indeed, in four cases, including *Pearson* itself, where the

803 (10th Cir. 1999), such precedent was announced in a case where there was a denial of out-of-cell exercise and, thus, did not clearly establish that a deprivation of outdoor-but-not-out-of-cell exercise would violate the Constitution. See *Apodaca*, 864 F.3d at 1078–79.

37 *Pearson*, 555 U.S. at 236–37.

38 *Id.* at 237.

39 *Id.* at 238.

40 *Id.*

41 *Id.* at 239.

42 *Id.* at 240. In *Camreta v. Greene*, the Court concluded that the Supreme Court “generally may review a lower court’s constitutional ruling at the behest of a government official granted immunity.” 563 U.S. 692, 698 (2011). But see *Wheeler v. City of Lansing*, 660 F.3d 931, 940 (6th Cir. 2011) (suggesting that such review at the behest of a prevailing party should be limited to the Supreme Court’s review of an appellate opinion that might be viewed as clearly establishing the constitutional principle, as opposed to a circuit’s review of a district court decision that does not serve as binding precedent in the circuit).

43 *Pearson*, 555 U.S. at 241.

44 For a comprehensive empirical study of *Pearson*’s impact on decisionmaking by federal courts of appeals, see Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015). Professors Nielson and Walker conclude that “[t]o date, appellate courts hardly ever give reasons for how they exercise their discretion” under *Pearson*. *Id.* at 65. For an earlier empirical study of the impact of mandatory sequencing under *Saucier*, see generally Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009). Professor Leong found that mandatory sequencing resulted in “the articulation of more constitutional law, but not the expansion of constitutional rights.” *Id.* at 670. She also recommended that courts exercise their then–newly conferred discretion under *Pearson* to decide the constitutional issue based on an “assessment of two relevant factors: whether the constitutional issue is likely to

Supreme Court jumped to the second prong and left the merits question undecided, the reasons for doing so were not articulated in terms of a *Pearson* justification and each case resulted in leaving both officials and citizens without guidance on important constitutional questions.⁴⁵ In *Pearson*, the question left unanswered was whether the “consent-once-removed” doctrine⁴⁶ applies when a warrantless entry is made by police upon a signal given by a confidential informant, rather than an undercover police officer, who has entered the home with consent and observes contraband in plain view.⁴⁷ In *Reichle v. Howards*,⁴⁸ the Court left for another day the question of “whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest.”⁴⁹ Likewise, in *Stanton v. Sims*,⁵⁰ even after noting that federal and state courts were “sharply divided” on the issue, the Court inexplicably left unanswered the question of “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.”⁵¹ Finally, in *Carroll v. Carman*,⁵² the Court reversed the Third Circuit, addressing only the second prong of the qualified immunity analysis and eschewing the question of “whether a police officer may conduct a ‘knock and talk’ at any entrance that

be repeated without ever becoming more susceptible to review and whether the issue is adequately presented in the particular case, taking account of the procedural posture of the case, the corresponding thoroughness of the parties’ briefing of the constitutional issue, and the level of factual development.” *Id.* at 709.

45 See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 927–32 (2015) (discussing more thoroughly the facts and issues presented in these cases). The point here is to emphasize the nature of the constitutional questions that the Court left unresolved.

46 The doctrine generally applies when a warrantless entry is made by officers who have been alerted by an undercover police officer who was given consent to enter the suspect’s home. *Pearson*, 555 U.S. at 229.

47 See *id.* at 245.

48 566 U.S. 658 (2012).

49 *Id.* at 663. After this Essay’s submission, the Court issued its opinion in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), a case raising this issue in a suit against a municipality, where qualified immunity was not a factor. Characterizing Lozman’s allegations that the City had adopted an official policy of intimidation against him in retaliation for his criticism of city officials as “far afield from the typical retaliatory arrest claim,” *id.* at 1954, the Court rendered a narrow ruling that “Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.” *Id.* at 1955. The Court made clear that it “need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.” *Id.*

To compound the confusion, the Court in *Reichle* reserved the question of what precedent(s) may serve as a source of clearly established law. *Reichle*, 566 U.S. at 665–66. In a more recent qualified immunity decision, the Court similarly made a point of noting that “[w]e have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018).

50 134 S. Ct. 3 (2013) (per curiam).

51 *Id.* at 5.

52 135 S. Ct. 348 (2014) (per curiam).

is open to visitors rather than only the front door.”⁵³ These four cases presented important issues of constitutional law, issues that were not particularly fact bound, and issues on which it would have been extremely helpful for law enforcement to have guidance from the Court.

The federal courts of appeals have followed the Supreme Court’s lead and often leave the first prong of the qualified immunity defense for future resolution, taking the easier route of finding no clearly established law on prong two. For example, in *Carroll v. Ellington*,⁵⁴ the Fifth Circuit was confronted with the same issue that the Supreme Court left unanswered in *Stanton*: whether an officer with probable cause to arrest a suspect for a misdemeanor may make a warrantless entry into the suspect’s home when in hot pursuit of that suspect. Expressing no view on whether the officer’s warrantless entry under these circumstances was constitutional, the Fifth Circuit panel disposed of the case on the second prong, noting that “[t]he Carrolls do not point to authority that the law on hot pursuit of misdemeanor suspects was any clearer in 2006, when [Officer] Viruette entered the residence, than in 2008, when the Supreme Court ruled the law was not then clearly established.”⁵⁵ Similarly, the Supreme Court’s unwillingness to address the merits question in *Reichle*, leaving unresolved whether probable cause for an arrest under the Fourth Amendment defeats any First Amendment retaliatory arrest claim, has spawned six years of litigation over the issue,⁵⁶ with numerous appellate courts taking the easier path offered by the Supreme Court.⁵⁷

53 *Id.* at 352.

54 800 F.3d 154, 172 (5th Cir. 2015).

55 *Id.* at 173.

56 Given the limited reach of *Lozman*, see *supra* note 49, it is not surprising that the Court has granted certiorari in *Bartlett v. Nieves*, 712 F. App’x 613 (9th Cir. 2018), *cert. granted*, No. 17-1174, 2018 WL 1023097 (U.S. June 28, 2018) (raising the question whether probable cause defeats a First Amendment retaliatory arrest claim).

57 See, e.g., *Scott v. Tempelmeyer*, 867 F.3d 1067, 1069 (8th Cir. 2017) (“[T]he First Amendment right asserted by Scott—a right to be free from retaliatory regulatory enforcement that is otherwise supported by probable cause—was not clearly established.”); *Marshall v. City of Farmington Hills*, 693 F. App’x 417, 426 (6th Cir. 2017) (“Although the district court did not dismiss Marshall’s First Amendment retaliatory use of force and retaliatory-arrest claims on qualified immunity grounds, *Reichle* is nevertheless dispositive.”); *Pegg v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017) (“The Supreme Court ‘has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.’ Since the *Reichle* decision, no such right has been recognized, so the *Reichle* principle is fully controlling here.” (citation omitted) (quoting *Reichle v. Howards*, 566 U.S. 658, 659 (2012))); *Mocek v. City of Albuquerque*, 813 F.3d 912, 932 (10th Cir. 2015) (“Because the law was not clearly established in June 2006, and because no Supreme Court or Tenth Circuit decision between then and November 2009 clarified the law, the law was not clearly established at the time of Mocek’s arrest.”); *Dukore v. District of Columbia*, 799 F.3d 1137, 1144–45 (D.C. Cir. 2015) (“The Supreme Court has ‘never held that there is such a right.’ Nor was there in February 2012 (nor is there now) any settled consensus view in this court or other federal courts of appeals such that ‘the statutory or constitutional question’ has been placed ‘beyond debate.’” (citation omitted) (first quoting

The exercise of *Pearson* discretion in favor of *not* deciding often leaves important, recurring, and non-fact-bound constitutional questions needlessly floundering in the lower courts. Yet, at some point, these questions do tend to get resolved because they *are* important, recurring, and not fact bound. For example, both the Third Circuit⁵⁸ and the Fifth Circuit,⁵⁹ after years of disposing of the issue on the second prong,⁶⁰ have recently joined the First, Seventh, Ninth, and Eleventh Circuits⁶¹ in recognizing a First Amendment right to film police when they are engaged in performing their duties in public. Of course, in both circuits, the defendant officers prevailed on the second prong of qualified immunity because the law was not clearly established in either circuit at the time of the challenged conduct,⁶² and plaintiffs who assert such claims based on incidents prior to the date of the respective decisions will be left similarly without redress absent a successful *Monell* claim.⁶³ Even when resolved, however, broad statements of the law announced in such cases may not suffice to clearly establish the right in subsequent cases

Reichle, 566 U.S. at 665; and then quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011)); *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012) (“As the Supreme Court held in *Reichle*, the ‘clearly established’ standard is not met in this case because neither our circuit nor the Supreme Court has ‘recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.’” (quoting *Reichle*, 566 U.S. at 659)). *Reichle*’s failure to establish the standard for First Amendment retaliatory arrest claims also left in place an intracircuit split in the Ninth Circuit. Compare *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2013) (per curiam) (“Assuming *Acosta*’s contention accurately reflects why he was arrested, *Acosta*’s claim still fails under prong two of *Saucier*. In *Reichle*, the Supreme Court held that it had never recognized, nor was there a clearly established First Amendment right to be free from a retaliatory arrest that is otherwise supported by probable cause.” (footnote omitted)), with *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013) (per curiam) (“In this Circuit, an individual has a right ‘to be free from police action motivated by retaliatory animus but for which there was probable cause.’ That right was violated when the officers booked and jailed *Ford* in retaliation for his protected speech, even though probable cause existed for his initial arrest.” (citation omitted) (quoting *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006))).

58 See *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (“In sum, under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”).

59 See *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (“We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.”).

60 See, e.g., *Fields*, 862 F.3d at 357 (“We have not ruled on the First Amendment right, instead merely holding that at the time of our rulings the claimed right was not clearly established.”).

61 See *Gericke v. Begin*, 753 F.3d 1, 9 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 602–03 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 88 (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, 438, 440 (9th Cir. 1995).

62 See *Fields*, 862 F.3d at 362; *Turner*, 848 F.3d at 687.

63 See *infra* notes 276–80 and accompanying text.

with factual differences,⁶⁴ given the Supreme Court's demand for precedent with factual specificity and similarity to "clearly establish" the law, especially in Fourth Amendment excessive force cases.⁶⁵

Cases raising Fourth Amendment claims based on the use of Tasers serve to illustrate this problem. In *Thomas v. City of Eastpointe*,⁶⁶ the "merits" question was whether an officer used excessive force when he tased "someone he reasonably perceive[d] to be ignoring his commands and walking away."⁶⁷ The Sixth Circuit, like a number of other circuits, has cases holding that use of a Taser on a suspect who is "actively resisting" is not a use of excessive force, while use of a Taser on a suspect who is "compliant" or who has stopped resisting is unreasonable.⁶⁸ The court in *Thomas* observed that the

64 See, e.g., *Sandberg v. Englewood*, No. 17-1147, 2018 WL 1180971, at *10 (10th Cir. Mar. 7, 2018) ("Sandberg does not point to a case in which the videographer was also the subject of the police action. As such, it was not clearly established that officers violate the First Amendment when they prevent a person who is the subject of the police action from filming the police."); *Davis-Bey v. City of Warren*, No. 16-cv-11707, 2018 WL 895394, at *6 (E.D. Mich. Jan. 16, 2018) (finding "no clearly established right to videotape police officers under the circumstances of this case"), *report and recommendation adopted*, No. 16-CV-11707, 2018 WL 878879 (E.D. Mich. Feb. 14, 2018); *Rivera v. Foley*, No. 3:14-CV-00196, 2015 WL 1296258, at *10 (D. Conn. Mar. 23, 2015) (where plaintiff was using a drone to record police activity at the scene of an accident, the court noted that "[e]ven if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits").

65 See, e.g., *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) ("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."); *Mullenix v. Luna*, 136 S. Ct. 305, 308–12 (2015) (per curiam) ("[N]one of our precedents 'squarely governs' the facts here."). See also *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 2997415, at *6 (E.D.N.Y. June 11, 2018) ("The Court's expansion of immunity, specifically in excessive force cases, is particularly troubling.").

Even in Fourth Amendment contexts that do not involve the use of force, there is likewise a demand for similar precedents to clearly establish the law. For example, in *Estate of Walker v. Wallace*, 881 F.3d 1056 (8th Cir. 2018), the validity of a warrantless search of a home turned on whether consent had been given by the occupant. In granting qualified immunity, the court of appeals noted that:

Since questions of consent necessarily turn on the particular facts of a case, it may be hard to show that prior decisions should have put [Defendant] on notice that his search under the circumstances was unconstitutional or that every reasonable official in his position would have understood that he was violating a constitutional right.

Id. at 1060. But see *Crocker v. Beatty*, 886 F.3d 1132, 1138 (11th Cir. 2018) (per curiam) (in case involving the warrantless seizure of a cell phone, the court of appeals found the right to be free from a warrantless seizure under the circumstances was clearly established and stated that "[t]he novelty of cutting-edge electronic devices cannot grant police officers *carte blanche* to seize them under the guise of qualified immunity").

66 715 F. App'x 458 (6th Cir. 2017).

67 *Id.* at 460.

68 See *id.* (collecting cases from the Sixth Circuit and other circuits drawing the "active resistance" line).

case before it “does not fit cleanly into either camp.”⁶⁹ Finding the facts fell within the “gray area” of the law, the court had no need to resolve the merits and granted qualified immunity because “[h]ow the law applied to this set of facts was not ‘beyond debate’ in May 2013.”⁷⁰ Likewise, in *Isayeva v. Sacramento Sheriff's Department*,⁷¹ the Ninth Circuit found none of the circuit precedent addressing the reasonableness of the use of a Taser⁷² controlling on the facts presented to the court, where a Taser was used on a 250-pound mentally ill individual engaged in a struggle with the officers.⁷³ General statements of the law regarding Taser use were not sufficient to give notice to officers in either *Thomas* or *Isayeva* that their conduct violated the Constitution.

Fourth Amendment excessive force cases are inevitably fact specific. Thus, insisting on precedent with the degree of particularity required by the Supreme Court in recent cases means that many claims against individual officers will be disposed of on the second prong and plaintiffs with serious and substantial injuries will be left without redress for actual constitutional violations or without explanation as to why their injuries did not rise to the level of constitutional harms. For example, in *Young v. Borders*,⁷⁴ a panel of the Eleventh Circuit, while “echo[ing] the district court’s expression of sympathy for the plaintiffs’ loss,” affirmed the grant of summary judgment for defendants in an unpublished, three-sentence decision without opinion.⁷⁵ Taking the facts in the light most favorable to the plaintiffs, Andrew Scott, a totally innocent individual, was fatally shot by Deputy Sylvester when Scott responded to loud knocking on his apartment door at 1:30 a.m. by police who did not announce themselves as law enforcement.⁷⁶ The police were in search of a suspect who had been riding a motorcycle that was parked in a space near Scott’s unit in an apartment complex.⁷⁷ Given the hour, the loud knocking, and the failure of the police to announce themselves, Scott

69 *Id.* Similarly, the Sixth Circuit, in *Cockrell v. City of Cincinnati*, concluded that non-violent flight “does not fit cleanly within either group.” 468 F. App’x 491, 496 (6th Cir. 2012).

70 *Thomas*, 715 F. App’x at 461 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

71 872 F.3d 938 (9th Cir. 2017).

72 See *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc); *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010).

73 *Isayeva*, 872 F.3d at 948–50.

74 620 F. App’x 889 (11th Cir. 2015) (per curiam).

75 *Id.*

76 A more detailed and complete version of the facts can be found in both the district court opinion, *Young v. Borders*, No. 5:13-cv-113, 2014 WL 11444072, at *3–4 (M.D. Fla. Sept. 18, 2014), and in the opinions regarding the denial of rehearing en banc, *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017). Plaintiffs did assert a claim of municipal liability based on the officers’ failure to announce themselves, but the district court characterized the relevant conduct as a “knock-and-talk” situation that was not subject to the “knock-and-announce” requirements of the Fourth Amendment. 2014 WL 1144072, at *13. Thus, finding no underlying constitutional violation, the court found the plaintiffs’ municipal liability claim based on this conduct foreclosed. *Id.*

77 *Young*, 2014 WL 1144072, at *2.

opened the door holding a gun down by his side.⁷⁸ Within seconds, Deputy Sylvester fired six times as Scott backed into the apartment.⁷⁹ Three shots hit and killed Scott.⁸⁰ The district court decided both prongs of the qualified immunity analysis against the plaintiffs,⁸¹ and the court of appeals, in a rather equivocal statement, found “no reversible error in the district court’s *ultimate* qualified immunity rulings.”⁸²

While Plaintiffs’ petition for rehearing en banc was denied,⁸³ it generated a lengthy and heated discussion in opinions respecting the denial of en banc review. Judge Hull, joined by Judge Tjoflat,⁸⁴ explained at length the panel’s reasons for affirming the district court. Recognizing that the district court did address the merits question, and expressing no disagreement with the finding that the use of force was objectively reasonable,⁸⁵ Judge Hull nevertheless pointed out that the panel “did not need to decide” the constitutional question because resolution on the clearly established prong was dispositive.⁸⁶ After a review of recent Supreme Court precedent⁸⁷ admonishing federal courts for conducting the clearly established analysis “at too high a level of generality and without regard to the particular facts of prior case law,”⁸⁸ Judge Hull concluded that there was “no prior case with facts remotely similar, much less particularized facts similar, to the facts in this case.”⁸⁹ Thus, qualified immunity was warranted.

In dissent from the denial of rehearing en banc, Judge Martin, joined by Judges Wilson, Rosenbaum, and Jill Pryor, criticized the panel decision for not confronting what she considered to be a clear violation of law, thus leaving officers under the impression that similar conduct could be repeated in the future without sanction.⁹⁰

When police clearly violate a person’s constitutional rights, as here, it is our role to confront that violation of the law and to ensure as best we can that it is not repeated. I don’t believe the panel’s summary affirmance performed that role. Instead, it gave a pass as reasonable to the actions of police in surrounding a randomly selected home in the dead of night, occupied by

78 *Id.* at *3–4.

79 *Id.*

80 *Id.*

81 *Id.* at *20.

82 *Young v. Borders*, 620 F. App’x 889, 889 (11th Cir. 2015) (per curiam) (emphasis added).

83 *Young v. Borders*, 850 F.3d 1274, 1274 (11th Cir. 2017) (denying rehearing en banc).

84 Judges Hull and Tjoflat were members of the original panel. The third member of the panel, Judge J. Randal Hall, is a district judge who was sitting by designation, and thus not participating in the decision respecting en banc review.

85 *Young*, 850 F.3d at 1280 (Hull, J., concurring in the denial of rehearing en banc).

86 *Id.*

87 *See id.* at 1280–82.

88 *Id.* at 1281.

89 *Id.* at 1282.

90 *Id.* at 1288–1300 (Martin, J., dissenting from the denial of rehearing en banc).

someone not a suspect; drawing loaded weapons; pounding on the door until the beleaguered occupant opened it; and then shooting him on sight, only because he was holding a gun. If these actions are constitutional, as the panel suggests, then the Second and Fourth Amendments are having a very bad day in this Circuit.⁹¹

Judge Hull is right that neither the unreported panel decision, nor any of the opinions respecting the denial of rehearing en banc, have precedential effect,⁹² but therein lies the problem. The suit filed on behalf of Scott's estate was initiated in 2013. The district judge, in a thorough opinion, addressed both prongs of the qualified immunity defense and decided on the merits question that Deputy Sylvester was justified in his use of deadly force at the moment the force was used because "it was not unreasonable for Sylvester to believe that his life was in danger in the instant the door opened and to immediately take action in self-defense."⁹³ The panel decision of the court of appeals says nothing about the soundness of the merits ruling, but merely confirms that there was no error in the finding of qualified immunity. The explanation given by Judge Hull in the denial of en banc review implies that the merits question is still unresolved with qualified immunity resting soundly on the conclusion that no case gave Sylvester fair warning that his conduct was unlawful.⁹⁴ After five years of litigation, there is no definitive ruling on whether the district court's focus on *the moment* force was used was a proper timeframe within which to assess the "totality of the circumstances" in judging the objective reasonableness of the use of force under *Tennessee v. Garner*⁹⁵ and *Graham v. Connor*,⁹⁶ or whether conduct leading up to the moment deadly force was used might be relevant.⁹⁷ Officers are left without a clear statement of what may be constitutional going forward, and plaintiffs are left

91 *Id.* at 1299–1300. Judge Jill Pryor, in her dissent, was equally concerned about the message being sent to police by the panel's tacit approval of the officers' conduct in *Young*, an approval that effectively "cloak[s] fast-acting officers with qualified immunity based on unreasonably escalated circumstances that they alone create." *Id.* at 1300 (Jill Pryor, J., dissenting from the denial of rehearing en banc).

92 *Id.* at 1274 (Hull, J., concurring in denial of rehearing en banc).

93 *Young v. Borders*, No. 5:13-cv-113, 2014 WL 11444072, at *16 (M.D. Fla. Sept. 18, 2014).

94 *Young*, 850 F.3d at 1281–82 (Hull, J., concurring in denial of rehearing en banc).

95 471 U.S. 1, 9 (1985).

96 490 U.S. 386, 396 (1989).

97 The Supreme Court, in *County of Los Angeles v. Mendez*, was clear that it did not grant certiorari on the question and was not deciding in *Mendez* whether the "totality of the circumstances" that must be considered under *Graham* "means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." 137 S. Ct. 1539, 1547 n.* (2017) (internal quotation marks omitted) (quoting *Graham*, 490 U.S. at 396); see also *Pauly v. White*, 874 F.3d 1197, 1219–20 & n.7 (10th Cir. 2017) ("[T]he concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits. The Supreme Court very recently had an opportunity to resolve this issue but declined to do so Thus, at least for now, *Sevier* and *Allen* remain good law in this circuit." (citations omitted)), *petition for cert. filed*, No. 17-1078 (U.S. Jan. 29, 2018). The issues avoided by the Supreme Court in

clueless as to whether the challenged conduct violated the Constitution—and remediless even if it did.

Some courts, perhaps frustrated by the uncertainty about constitutional standards so often perpetuated by a continuous cycle of exercising *Pearson* discretion to *not* decide, have addressed the merits question in Fourth Amendment cases that are seemingly quite fact bound, albeit while granting qualified immunity on the clearly established prong. In *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*,⁹⁸ while the Fourth Circuit announced a rule “that a police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force,”⁹⁹ it did so in a case where the officer deployed a Taser on a mentally ill man who was immobile and surrounded by three officers and two security guards who were attempting to return him to the hospital.¹⁰⁰ It is unlikely that *Estate of Armstrong* will be viewed as clearly establishing the law on the use of Tasers in cases where the facts differ in an arguably significant way from the facts of Armstrong’s case,¹⁰¹ but there is some satisfaction for

Mendez and by the Eleventh Circuit in *Young* are presented in the petition for certiorari in *Pauly III*. The questions presented are:

1. Under 42 U.S.C. § 1983, is a public official, whose reckless conduct proximately causes another official to violate a plaintiff’s federally protected right, liable for the plaintiff’s injuries, even though the latter official is entitled to qualified immunity?
2. When a public official violates clearly established law through his pre-seizure conduct, and the conduct causes the need to use deadly force, is the official protected by qualified immunity?

Petition for a Writ of Certiorari at i, *Pauly v. White* (No. 17-1078) (U.S. Jan. 29, 2018).

98 810 F.3d 892 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 61 (2016) (mem.).

99 *Id.* at 905.

100 *Id.* at 906.

101 As Judge Wilkinson noted in his concurrence, “Today’s prescription may not fit tomorrow’s facts and circumstances. Our rather abstract pronouncements in one case may be of little assistance with the realities and particulars of another.” *Id.* at 911 (Wilkinson, J., concurring in part). In another recent Fourth Circuit case, the panel majority took a similar approach, holding on prong one that a school resource officer violated the Fourth Amendment when she handcuffed “a calm, compliant” ten-year-old student who had been involved in a fight with another student several days earlier, but granting qualified immunity on prong two because the law was not clearly established such that a reasonable officer would have understood that the handcuffing under these circumstances was unlawful. *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 184–85 (4th Cir. 2018). Much like Judge Wilkinson criticized the majority in *Estate of Armstrong*, Judge Shedd criticized the majority for reaching the merits question in a fact-bound case. *Id.* at 189 (Shedd, J., concurring in the judgment only) (“The majority’s holding runs counter to the prevailing federal rule and provides little, if any, guidance for law enforcement officers going forward.”); *see also* *Wilson v. Prince George’s County*, Maryland, No. 17-1856, 2018 WL 3015045, at *7 (4th Cir. June 18, 2018) (finding an excessive force violation on prong one, but granting qualified immunity because it was not clearly established law that it was unconstitutional to use deadly force “against an armed, but otherwise non-threatening, self-harming individual suspected of committing misdemeanor offenses”).

plaintiffs when a court acknowledges the Constitution has been violated and some hope that a “holding” on these particular facts will serve to remove similar conduct from the realm of “bad guesses in gray areas”¹⁰² which typically results in a grant of qualified immunity.¹⁰³

The Sixth Circuit recently took a similar approach in *Latits v. Phillips*.¹⁰⁴ Viewing the facts and a video in the light most favorable to the plaintiff, the court held that Officer Phillips violated Latits’s Fourth Amendment right to be free from objectively unreasonable force when Phillips shot and killed Latits to terminate a car chase in which the plaintiff had evidenced no intent to harm officers and presented no significant risk to others.¹⁰⁵ On prong two of the analysis, however, the court granted qualified immunity, noting that “[p]laintiff has not identified any caselaw where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment, and neither have we.”¹⁰⁶ Judge Clay would have denied qualified immunity because, in his opinion, governing caselaw clearly established “that an officer may not shoot a fleeing suspect who poses no danger to others.”¹⁰⁷

Perhaps the majority of the panel in *Latits* intended to send the message that, although the Supreme Court “has . . . 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,”¹⁰⁸ defendants should not view the Supreme Court decisions in this area as declaring “open

102 *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

103 It would appear that the grant of qualified immunity on the second prong served to lessen the Supreme Court’s interest in granting review. Review was denied to the defendants who were contesting the Fourth Circuit’s disposition on prong one. See *Village of Pinehurst v. Estate of Armstrong*, 137 S. Ct. 61 (2016) (mem.). Another case involving the use of a Taser to keep a mentally disturbed individual from leaving the hospital is *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), *cert. granted, judgment vacated, and case remanded*, 136 S. Ct. 479 (2015) (mem.). In *Aldaba*, the Tenth Circuit had found the use of the Taser unreasonable under the Fourth Amendment, but, unlike the Fourth Circuit, also found the officers’ conduct to have violated clearly established law and, thus, denied qualified immunity. *Id.* at 1160–61. On remand from the Supreme Court and on reconsideration in light of *Mullenix*, the court of appeals left the merits question unanswered and granted qualified immunity on the clearly established law prong. *Aldaba v. Pickens*, 844 F.3d 870, 871 (10th Cir. 2016).

104 878 F.3d 541 (6th Cir. 2017).

105 *Id.* at 549–52.

106 *Id.* at 552.

107 *Id.* at 554 (Clay, J., concurring in part and dissenting in part). Judge Clay thought that *Tennessee v. Garner*, 471 U.S. 1 (1985), clearly established “that police officers may not fire at non-dangerous fleeing felons such as Latits.” *Id.* He also pointed to Sixth Circuit precedent that he found controlling on the present facts. See *id.* at 557–59; *accord Lytle v. Bexar County*, 560 F.3d 404, 417–18 (5th Cir. 2009) (“It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. This holds as both a general matter and in the more specific context of shooting a suspect fleeing in a motor vehicle.” (citations omitted)).

108 *Mullenix v. Luna*, 136 S. Ct. 305, 310 (2015) (per curiam).

season”¹⁰⁹ on suspects attempting to flee in a motor vehicle. The merits holding in *Latits*, like that in *Estate of Armstrong*, even if clearly establishing the law going forward only for cases with facts very similar, at least gives citizens the gratification of knowing and officers the benefit of a warning that certain conduct violates the Constitution and will no longer be protected by qualified immunity.¹¹⁰ If cases with factual similarity in particular contexts are needed to make out clearly established law to overcome the second prong of qualified immunity, then courts should not shy away from decisions holding specific fact-bound conduct unconstitutional.¹¹¹ At the very least, holdings rendered in fact-bound cases may serve to shrink the “gray areas.”

109 *Lytle*, 560 F.3d at 414.

110 For another example of such an approach, see *Thompson v. Rahr*, 885 F.3d 582, 587 (9th Cir. 2018) (holding that pointing a gun at the head of a compliant, nonthreatening suspect was a use of excessive force, even though the context was a felony traffic stop in which a gun was found, but granting qualified immunity because Plaintiff’s “right not to have a gun pointed at him under the circumstances here was not clearly established at the time the events took place”).

111 For example, in *Sause v. Bauer*, 859 F.3d 1270, 1274–75 (10th Cir. 2017), *rev’d*, No. 17-742, 2018 WL 3148262 (U.S. June 28, 2018) (per curiam), the court of appeals, in affirming the grant of a motion to dismiss based on qualified immunity, jumped to the second prong, assuming without deciding that the pro se plaintiff asserted the violation of a First Amendment right against officers who, while responding to a noise complaint in Plaintiff’s home, were alleged to have “repeatedly mocked her, ordered her to stop praying so they could harass her, threatened her with arrest and public humiliation, insisted that she show them the scars from her double mastectomy, and then ‘appeared . . . disgust[ed]’ when she complied.” *Id.* at 1274 (alterations in original). Finding the conduct “obviously unprofessional,” but not “obviously unlawful,” the court granted qualified immunity because, not surprisingly, the plaintiff could not “identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here.” *Id.* at 1275–76. Furthermore, because of the impossibility of overcoming the “legal hurdle” posed by the clearly established law requirement, the court approved of the dismissal of the complaint with prejudice. Such a disposition, a predictable one under current Supreme Court qualified immunity jurisprudence, does little to promote confidence in the enforcement of constitutional rights and even less to discourage such behavior by officers in the future.

Another source of confusion in the qualified immunity doctrine, and a question lurking in *Sause* as well, is whether a plaintiff must identify the particular constitutional right that the challenged conduct violates, or whether it is sufficient to demonstrate that every reasonable officer would have known that the conduct engaged in was unconstitutional, without regard to which provision of the Constitution may have been violated. In *Sause*, Chief Judge Tymkovich hinted that the plaintiff perhaps could have stated a claim under the Fourth Amendment, but agreed that “First Amendment law is not clearly established,” and thus concurred in the opinion. *Id.* at 1280 (Tymkovich, C.J., concurring). On this question of whether the qualified immunity analysis should be “right-centric” or “conduct-centric,” a question that undoubtedly provides fodder for future scholarly articles, compare, for example, *Estate of Booker v. Gomez*, 745 F.3d 405, 428 (10th Cir. 2014) (holding right to be free from excessive force was clearly established despite uncertainty about whether claim arose under Fourth, Fifth, Eighth, or Fourteenth Amendment), and *Davis v. Murphy*, No. 13-CV-11900, 2018 WL 1524532, at *9 (D. Mass. Mar. 28, 2018) (focusing on the conduct alleged to be unlawful rather than the precise formulation of the constitu-

Recommendation: I would adopt the proposal made by Professors Nielson and Walker that courts be encouraged, if not required, to give reasons for their exercise of discretion under *Pearson* to decide or not decide the constitutional question.¹¹² But I would suggest that the “fact-bound-case” justification for *not* deciding be eliminated. Encouraging courts to forgo announcing a constitutional right in fact-bound cases not only deprives plaintiffs with substantial claims a remedy under Section 1983, but also essentially insures that constitutional principles will be limited to broad, general statements of the law that will fail to sufficiently establish rights in future cases. In short, the message of not resolving merits questions that are fact bound along with the insistence on factually similar precedent to clearly establish the law, produces an impossible “Catch 22” for civil rights plaintiffs suing individual officials for damages under Section 1983.

II. INTERLOCUTORY APPEALS ARE INEFFICIENT, EXPENSIVE, AND OFTEN WITHOUT MERIT

In *Mitchell v. Forsyth*,¹¹³ the Supreme Court, emphasizing that qualified immunity is “an *immunity from suit* rather than a mere defense to liability,”¹¹⁴ announced that orders of district courts denying qualified immunity to government officials fell within the “collateral order doctrine,”¹¹⁵ a judicially created exception to the final judgment rule.¹¹⁶ The Court held that “a district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ within the meaning of 28

tional claim), with *Hernandez v. Mesa*, 885 F.3d 811, 823–24 (5th Cir. 2018) (en banc) (Dennis, J., concurring in the judgment) (explaining that even though “according to the complaint, [Border Patrol Agent] Mesa essentially committed a cold-blooded murder,” qualified immunity should be granted because “the right giving rise to the claim—here, Hernández’s Fourth Amendment rights—must be clearly established”), and *Thomas v. City of Philadelphia*, No. 17-4196, 2018 WL 684836, at *8–10 (E.D. Pa. Feb. 2, 2018) (adhering to “right-centric” view and granting qualified immunity on Fourteenth Amendment claim where, although plaintiff stated a violation of the Fourth Amendment, there was no clearly established right to be free from malicious prosecution under the procedural due process clause of the Fourteenth Amendment).

112 See Nielson & Walker, *supra* note 44, at 60–65; see also, e.g., *Peffer v. Stephens*, 880 F.3d 256, 264 (6th Cir. 2018) (jumping to the second prong in a case that turns on interpretation of an unsettled Michigan statute, explaining that “[a]lthough we generally determine whether a constitutional violation occurred before we determine whether qualified immunity applies, we need not follow this order of inquiry when determining whether a constitutional violation occurred would require interpreting unsettled state law”).

113 472 U.S. 511 (1985).

114 *Id.* at 526.

115 See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The collateral order doctrine applies to orders “which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Id.* at 546.

116 28 U.S.C. § 1291 (2012) sets out the general rule that courts of appeals shall have jurisdiction of appeals from *final* judgments of district courts.

U.S.C. § 1291 notwithstanding the absence of a final judgment.”¹¹⁷ In *Behrens v. Pelletier*,¹¹⁸ the Court clarified that defendants may be entitled to more than one interlocutory appeal because the facts relevant to the legal question presented by the defense “will be different on summary judgment than on an earlier motion to dismiss.”¹¹⁹ But in *Johnson v. Jones*,¹²⁰ the Court carved out an exception to the *Forsyth* appeal, holding “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.”¹²¹

As Professor Schwartz has impressively documented,¹²² and as Judge Gwin has recently observed, “years of experience and the exhaustive empirical study [done by Professor Schwartz] undermine [] the Supreme Court’s

117 *Forsyth*, 472 U.S. at 530.

118 516 U.S. 299 (1996).

119 *Id.* at 309.

120 515 U.S. 304 (1995). In *Johnson*, Plaintiff alleged that five officers had beaten him in the course of an arrest, using excessive force in violation of the Fourth Amendment. *Id.* at 307–08. Three of the officers denied involvement in the beating and moved for summary judgment, which was denied. *Id.* On appeal from the denial of summary judgment, the Seventh Circuit dismissed for want of jurisdiction. *Id.* at 308. In affirming the appellate court’s dismissal, the Supreme Court held that courts of appeals have no jurisdiction to entertain interlocutory appeals that raise only a question of “evidence sufficiency.” *Id.* at 313 (internal quotation marks omitted).

121 *Id.* at 319–20 (emphasis added). Before his appointment to the Supreme Court, then-Judge Gorsuch characterized *Johnson* as a decision that was supposed to have created a “labor-saving exception” to *Forsyth* appeals, but which “has now invited new kinds of labor all its own.” *Walton v. Powell*, 821 F.3d 1204, 1208 (10th Cir. 2016). For example, when a party argues that the district court failed to identify what facts a jury might reasonably find or what facts it assumed for purposes of denying qualified immunity, the appellate court would be required to determine whether the district court did so and, if not, may be required to review the record to make its own determination of the facts or remand the case for the district court to do so in the first instance. *Id.*; see also *Forbes v. Township of Lower Merion*, 313 F.3d 144, 149 (3d Cir. 2002) (the court exercising its supervisory power “to require that future dispositions of a motion [for summary judgment] in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues”); *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001) (observing that when a district court fails to identify which facts plaintiff may be able to establish at trial, “[w]e can either scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order”). A party might also argue that the district court’s presumed facts are “blatantly contradicted” by the record, again requiring the appellate court to assess the weight of that argument before deciding whether the *Johnson* exception applies. *Walton*, 821 F.3d at 1208 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

122 In Professor Schwartz’s study, she found that just seven of 1183 tracked cases resulted in dismissal at the motion to dismiss stage on qualified immunity grounds. See Schwartz, *supra* note 23, at 48. Furthermore, grants of qualified immunity at summary judgment, while more frequent, still disposed of plaintiffs’ cases in just 2.6% of the 1183 cases tracked by Professor Schwartz. *Id.* at 49.

reasoning for allowing [the *Forsyth*] exception to the final judgment rule.”¹²³ *Forsyth* appeals have resulted in expensive, burdensome, and often needless delays in the litigation of civil rights claims. Compounding the factors of delay and disruption, there is a great deal of confusion. The lower courts are conflicted on the scope of *Forsyth* appellate jurisdiction and the extent of the carve-out created by *Johnson*. District courts have limited authority to control the abuse of *Forsyth* appeals, but some judges have become more vocal about criticizing defendants’ perversion of such appeals, and, where appropriate, have taken to certifying them as frivolous.

Generally, the filing of an interlocutory appeal under *Forsyth* deprives the district court of jurisdiction to proceed, unless the court certifies the appeal as frivolous.¹²⁴ The practice of certification in the context of *Forsyth* appeals appears to have originated in the Seventh Circuit in *Apostol v. Gallion*,¹²⁵ where Judge Easterbrook, concerned that defendants might invoke *Forsyth* appeals for improper tactical reasons or purely for purpose of delay,¹²⁶ suggested that trial courts certify such improper appeals as frivolous and proceed with the trial.¹²⁷ Faced with a finding of frivolousness by the district court, the defendant would have to seek a stay from the court of appeals in order to bring the trial to a halt while the appeal was pending.¹²⁸ The district court must provide a reasoned finding to accompany its certification of the appeal as frivolous.¹²⁹ Other circuits have recognized the merit of

123 *Wheatt v. City of East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017). Relying on Professor Schwartz’s study, Judge Gwin noted that “*Forsyth* . . . was likely wrongly decided.” *Id.* at *1. He also observes that *Forsyth* is a “wildly atypical” case, involving as it did, a suit against the Attorney General of the United States, as opposed to line officers or lower-level government officials. *Id.* at *4.

124 *Id.* at *2. As Judge Gwin noted, the Sixth Circuit has neither explicitly approved nor disapproved of this practice, but has implied its approval. *Id.* at *2 n.10 (citing *Yates v. City of Cleveland*, 941 F.2d 444, 448 (6th Cir. 1991)).

125 870 F.2d 1335 (7th Cir. 1989); *see also* *Mays v. Sheahan*, 226 F.3d 876, 881 (7th Cir. 2000) (concluding “that a *Forsyth* appeal deprives a district court of jurisdiction to accept an amended complaint filed while the appeal is pending”).

126 *Apostol*, 870 F.2d at 1338.

127 As Judge Easterbrook noted, *Forsyth* appeals bear a close resemblance to interlocutory appeals authorized in double jeopardy cases, where “a district court may certify to the court of appeals that the appeal is frivolous and get on with the trial.” *Id.* at 1339; *see also* Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 47–51 (1998) (discussing orders of frivolity and dual jurisdiction, and comparing double jeopardy appeals with *Forsyth* appeals).

128 In a subsequent case, the Seventh Circuit clarified that the claim of immunity is not mooted by a denial of the request for a stay, “for while the immunity is from trial as well as from judgment, by the same token it is from judgment as well as from trial.” *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). Neither does the certification of the appeal as frivolous deprive the appellate court of jurisdiction to proceed. Thus the district court and the appellate court would be exercising concurrent jurisdiction. *Martinez v. Mares*, 613 F. App’x 731, 735 n.9 (10th Cir. 2015); *see also* *Langley v. Adams County*, 987 F.2d 1473, 1477 (10th Cir. 1993).

129 *See Apostol*, 870 F.2d at 1339.

Apostol's certification procedure¹³⁰ and the Supreme Court cited to those cases with seeming approval in *Behrens*.¹³¹

My own tracking¹³² of appellate cases entertaining appeals from denials of qualified immunity at the summary judgment stage reveals that many of these appeals are dismissed for lack of jurisdiction because defendants are arguing the appeal based on their own version of the facts,¹³³ rather than arguing that the plaintiff's version of the facts, even if supported, does not "create a triable question" on the issue of liability or give rise to the violation

130 See, e.g., *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Yates v. City of Cleveland*, 941 F.2d 444, 448–49 (6th Cir. 1991); *Stewart v. Donges*, 915 F.2d 572, 576–77 (10th Cir. 1990); see also *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 96 (1st Cir. 2003) ("We have never adopted the *Apostol* certification procedure in this circuit. Although appellants urge us to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation. Whatever the merits of the certification procedure may be, its primary innovation—permitting the district court to reclaim jurisdiction from the court of appeals in the wake of a *Forsyth* appeal—has no relevance to this case."); *Betances v. Fischer*, 140 F. Supp. 3d 294, 302 (S.D.N.Y. 2015) ("Although the Second Circuit has not specifically addressed dual jurisdiction over frivolous qualified immunity claims, district courts across this Circuit . . . have endorsed this approach."); *Owens v. Ala. Dep't of Mental Health and Mental Retardation*, No. 2:07cv650, 2008 WL 4722038, at *2–3 (M.D. Ala. Oct. 24, 2008) (relying on *Apostol* to certify appeal as frivolous and noting Eleventh Circuit's citation to *Apostol* with approval on a pair of occasions); *Thompson v. Farmer*, 945 F. Supp. 109, 112 (W.D.N.C. 1996) ("This Court has reviewed the Seventh Circuit's decision in *Apostol* and agrees with Thompson that this Court has power to certify an appeal as frivolous in an appropriate case. The Court believes that the reasoning of *Apostol* is well-rooted in the general principles governing appellate jurisdiction such that the Fourth Circuit would adopt its eminently sensible holding.").

131 *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996).

132 For almost thirty years, I have been doing a daily search on Westlaw of all federal cases that include any reference to the term "qualified immunity."

133 For some recent examples, see *Burnikel v. Fong*, 886 F.3d 706, 711 (8th Cir. 2018) (no jurisdiction where officers "defined the constitutional right in terms of disputed facts viewed in their favor"); *Ralston v. Cannon*, 884 F.3d 1060, 1068 (10th Cir. 2018) (finding no jurisdiction in challenge to evidence sufficiency, noting "that appeals like the instant one that flaunt the jurisdictional limitations set out in *Johnson* serve only to delay the administration of justice"); *Winfrey v. Pikett*, 872 F.3d 640, 644 (5th Cir. 2017) (finding no jurisdiction over officer's appeal that challenged "the genuineness, not the materiality, of factual disputes"); *Davenport v. Borough of Homestead*, 870 F.3d 273, 280–82 (3d Cir. 2017) (finding no jurisdiction over one officer's appeal that challenged district court's determination that there was genuine issue of fact for jury); *Morse v. Cloutier*, 869 F.3d 16, 26 (1st Cir. 2017) (finding no jurisdiction where "defendants plainly rest their appeals on an alternative version of the facts"); *Harmon v. Hamilton County*, 675 F. App'x 532, 542 (6th Cir. 2017) (finding no appellate jurisdiction over fact-based challenges); *Mallak v. City of Baxter*, 823 F.3d 441, 446–47 (8th Cir. 2016) (finding no jurisdiction over appeal that called for reevaluation of district court's determination of genuineness of issue of fact for trial); *Nettles-Bey v. Williams*, 819 F.3d 959, 961 (7th Cir. 2016) (no jurisdiction where "[a]ppellants' brief makes it clear that they think that the district judge got the facts wrong"). In *Davenport*, the Third Circuit did entertain the appeals of three of the officers and reversed the denial of qualified immunity as to claims against them, so the entire appeal was not without merit. *Davenport*, 870 F.3d at 282.

of a clearly established constitutional right.¹³⁴ Yet, plaintiffs rarely ask the district court to certify such appeals as frivolous and district court judges appear reluctant to grant such certifications.¹³⁵ In *Apostol*, the Seventh Circuit warned that the district court's power of certification "must be used with restraint,"¹³⁶ but the court also acknowledged that the certification process "may be valuable in cutting short the deleterious effects of unfounded appeals."¹³⁷

In *Estate of Heenan ex rel. Heenan v. City of Madison*,¹³⁸ Judge William Conley noted the paucity of district courts in the Seventh Circuit that have invoked the certification procedure authorized by *Apostol*, even when confronted with meritless appeals.¹³⁹ Yet, as the district court acknowledged, "despite the rarity of such certifications, the Seventh Circuit routinely dismisses appeals from a denial of qualified immunity because it turns on factual disputes, like those at issue here, or finds the factual issues preclude

134 See, e.g., *Wheatt v. City of East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816 (N.D. Ohio Dec. 6, 2017). In *Wheatt*, Judge Gwin, noting that neither the city nor the county defendants accepted the plaintiff's version of the facts for purposes of the appeals from denials of qualified immunity, certified the appeals as frivolous and refused to stay the proceedings. *Id.* at *1, *3-4. I learned through email correspondence with the plaintiff's attorney, Mark Loevy-Reyes, that the Sixth Circuit did issue a stay of the trial on Dec. 8, 2017, and expedited the appeal. Email from Mark Loevy-Reyes, Attorney, to Author (Jan. 4, 2018) (on file with author). Judge Gwin is not alone in expressing his frustration with the disruption, delay, and expense that flow from meritless appeals. In *Krycinski v. Packowski*, the district court observed that *Forsyth* appeals "rarely serve to clarify a decisive legal issue in the case, and they always build new and significant delay into the trial process." 556 F. Supp. 2d 740, 745 (W.D. Mich. 2008). In an attempt to address the problem of "disruptive use of qualified immunity defenses that come late in the case—after discovery, on the eve of trial, and usually inextricably intertwined with factual disputes," Judge Jonker established an early deadline in his case management orders applicable in cases where qualified immunity was likely to be raised. *Id.* If defendants fail to file a motion regarding qualified immunity before the deadline passes, "the case management order will deem defendants to have waived interlocutory appeal of any denial of summary judgment on a subsequently asserted qualified immunity defense." *Id.*

135 See, e.g., *Jones v. Wilhelm*, No. 03-C-0025, 2004 WL 420147, at *2 (W.D. Wis. Feb. 24, 2004) (expressing belief that interlocutory appeal was a "waste of time," but exercising restraint and refusing to certify as frivolous under *Apostol*). But see *Estate of Robinson v. City of Madison* 15-cv-502, 2017 WL 685527, at *3 (W.D. Wis. Feb. 16, 2017) (certifying defendant's appeal as frivolous where it rested on a genuinely disputed fact).

136 *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

137 *Id.*

138 No. 13-CV-606, 2015 WL 3539613 (W.D. Wis. June 5, 2015).

139 *Id.* at *2. The court noted that it "found but a handful of examples of district courts certifying an interlocutory appeal from the denial of qualified immunity to the Seventh Circuit as frivolous or a sham, all of which have come from the Northern District of Illinois." *Id.* The court likewise observed that "despite the *Apostol* decision being now more than 25 years old, district courts and summarily the Seventh Circuit have seldom, seriously considered its application to require trials to proceed without a full appeal on a claim of qualified immunity." *Id.* at *3.

qualified immunity altogether.”¹⁴⁰ As the court explained, the appeal taken in *Estate of Heenan* was no doubt without merit. Defendant’s counsel, though purporting to accept the facts that the district court found supported in the light most favorable to the plaintiff, “repeatedly failed to do so in written submissions and arguments to this court on summary judgment.”¹⁴¹ Furthermore, after detailing all the facts the appellate court would have to accept as true for purposes of the interlocutory appeal, the district court concluded that it was “hard-pressed to see any merit in defendant’s appeal.”¹⁴² The problem for the court in certifying the appeal as frivolous was in the very low bar established by that standard. As the court put it, “whatever ‘frivolous’ may mean in this context, it is an even lower bar than an appeal ‘without merit.’”¹⁴³ Noting the “perplexing dynamic” illustrated by this case, the court nonetheless felt constrained to deny certification under *Apostol* in the absence of a directive from the Seventh Circuit indicating that the standard for “frivolousness” is different from its ordinary meaning when considered in the context of appeals from denials of qualified immunity.¹⁴⁴ Agreeing with Plaintiff’s counsel that “a lengthy stay while waiting for the resolution of a marginal appeal will inevitably prejudice the parties and the court by requiring a completely new ramp up for a trial that is now less than three weeks away,” the court nevertheless agreed to stay the proceedings pending the appeal, but urged that the appeal be expedited.¹⁴⁵

In *Olson v. Stewart*,¹⁴⁶ federal and state-law claims asserting unlawful entry, arrest, and use of force were asserted by Ms. Olson against Deputy Whitfield, in his individual capacity, and the Sheriff of Madison County, in his official capacity.¹⁴⁷ After the close of discovery and entry of partial summary judgment,¹⁴⁸ the only claims remaining were Plaintiff’s state unlawful arrest and use of force claims against the Sheriff and Plaintiff’s federal and state-law claims for unlawful arrest and use of force against Deputy Whitfield.¹⁴⁹ Summary judgment was denied on those claims and Deputy Whitfield filed an interlocutory appeal from the denial of qualified immunity on

140 *Id.* at *2 (collecting Seventh Circuit cases dismissing appeals resting on factual disputes).

141 *Id.* at *3.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 240 F. Supp. 3d 1251 (N.D. Fla. 2017).

147 *Id.* at 1252–53.

148 Summary judgment was granted for both defendants on the federal and state unlawful entry claims because the entry was deemed lawful, and summary judgment was granted for the sheriff on the federal claims for unlawful arrest and use of force because Plaintiff’s evidence failed to support *Monell*’s custom or policy requirement with respect to those claims. *Id.* For a discussion of *Monell*, see *infra* notes 277–80 and accompanying text.

149 *Olson*, 240 F. Supp. 3d at 1252–53.

the federal claims.¹⁵⁰ Both defendants moved to stay the district court proceedings pending the appeal and plaintiff consented to the stay.¹⁵¹

Despite ultimately granting the stay, Judge Hinkle did not shy away from listing a litany of problems caused by the availability of such interlocutory appeals, especially in a case like *Olson*. He noted three factors that weighed against granting a stay. First, the case was ready for trial and, if not stayed, would result in a jury determination within six weeks, based on “actual” rather than presumed facts, with a verdict that would most likely resolve the case and leave no need for appellate review at all.¹⁵² Second, staying the case pending appeal would not obviate the need for trial because the state-law claims against the Sheriff were not subject to any qualified immunity defense.¹⁵³ The court recognized that the Eleventh Circuit might dispose of the federal claims against Deputy Whitfield on the merits, with a finding of no constitutional violation that would most likely dispose of the state claims as well,¹⁵⁴ but Judge Hinkle criticized the use of interlocutory appeals to resolve the underlying constitutional issue in a case and stated that such a practice “runs afoul” of the important principle that federal courts should address constitutional issues only when necessary for resolution of a dispute.¹⁵⁵ This, of course, is one of the many criticisms that the Supreme Court directed at the pre-*Pearson* mandate that federal courts resolve the merits question before addressing the clearly established prong of qualified immunity.¹⁵⁶ Judge Hinkle stated that there is little justification for the appellate court to decide a constitutional dispute based on hypothetical facts when a jury trial could be had within six weeks, establishing the actual facts, and appellate review could then be pursued if needed.¹⁵⁷ Finally, consistent with Professor Schwartz’s findings in both of her studies,¹⁵⁸ Judge Hinkle pointed out how the “purported justification” of allowing an interlocutory appeal from a denial of qualified immunity of protecting officers from unnecessary exposure to the burdens of discovery and litigation, and the risk of liability, is ill-served by allowing an interlocutory appeal in a case like *Olson*.¹⁵⁹ The appeal, even if successful, would not keep Deputy Whitfield

150 *Id.* at 1253.

151 *Id.*

152 *Id.* at 1254.

153 If the case were stayed, and the plaintiff prevailed in the appeal, nothing will have changed except the timing of the trial, which would now be roughly a year later, and the expenses incurred by both sides in pursuing the appeal. *Id.* at 1254–55. If Deputy Whitfield prevailed on qualified immunity on appeal, elimination of the federal claim would make attorneys’ fees unavailable to the plaintiff, but the state claims against the sheriff would still have to be tried, necessitating testimony by all the same witnesses and resolution by the jury of the same factual disputes. *Id.*

154 *Id.* at 1255.

155 *Id.*

156 *See supra* notes 37–43 and accompanying text.

157 *Olson*, 240 F. Supp. 3d at 1255.

158 *See supra* notes 22–23.

159 *Olson*, 240 F. Supp. 3d at 1255.

out of the case. He would still be implicated either as a party to the remaining state-law claims against him, or, even if those were eliminated, as a witness to the state-law claims against the Sheriff.¹⁶⁰ Furthermore, Deputy Whitfield, as a practical matter, had “no skin in the game” since he was defended, and would be indemnified if found liable, by the same fund that covered the Sheriff.¹⁶¹ Having made a persuasive case against granting a stay pending the appeal, Judge Hinkle nevertheless felt constrained to grant the stay given the fact that the Eleventh Circuit accepts jurisdiction in most qualified immunity appeals and the fact that Plaintiff’s counsel had consented to Defendant’s motion to stay the proceedings.¹⁶² The court’s frustration with *Forsyth* appeals is evident in Judge Hinkle’s concluding observations:

This is a case study on how not to run a railroad.

In the federal judiciary, we generally do an excellent job of resolving disputes correctly in accordance with the law—when we finally get around to resolving them. But the process takes too long and costs too much. We bemoan the disappearing trial, but we adopt procedures that cause delays and increase costs, making it harder and harder to actually resolve factual disputes through trials.

This case is an illustration. The case is ready for trial and could be resolved correctly, based on the actual facts, within six weeks. Instead, the case will now be delayed, probably for a year or more, awaiting an appellate ruling on hypothetical facts. The appellate ruling, if it ultimately makes any difference at all, probably will affect only the issue of attorney’s fees, not resolution of the underlying dispute on the merits. This will happen based on the demonstrably false assertion that it will more quickly exonerate a party who has no skin in the game. As I said, a case study on how not to run a railroad.¹⁶³

Where a defendant is clearly contesting the district court’s findings as to the sufficiency of evidence to support a plaintiff’s factual allegations or is pursuing an appeal based on his or her own version of the facts, the lack of jurisdiction under *Forsyth*, and thus, the eligibility for certification as frivolous under *Apostol*, would seem obvious. On many interlocutory appeals, however, the question of jurisdiction will depend on a finer tuning of the scope of review authorized by *Forsyth* and the breadth of the exception created by *Johnson*, and on this issue, the appellate courts are conflicted, both within and among the circuits. In *Walton v. Powell*,¹⁶⁴ then-Judge Gorsuch explained that while *Johnson* required the appellate court to accept the facts as found by the district judge, *Johnson* did “not *also* require this court to accept the district court’s assessment that those facts suffice to create a triable question on any legal element essential to liability.”¹⁶⁵

160 *Id.*

161 *Id.*

162 *Id.* at 1256.

163 *Id.*

164 821 F.3d 1204 (10th Cir. 2016).

165 *Id.* at 1208. Confessing that the Tenth Circuit itself had “struggled . . . to fix the exact parameters of the *Johnson* innovation,” then-Judge Gorsuch relied on the Supreme

Whether then-Judge Gorsuch's narrow view of the *Johnson* limitation on *Forsyth* appellate jurisdiction will prevail will remain unresolved for the time being, given the Court's denial of certiorari in *Stinson v. Gauger*.¹⁶⁶ After spending twenty-three years in prison for a murder he did not commit, Robert Stinson was exonerated by DNA evidence and sued a detective and two dentists "alleging that they violated due process by fabricating the expert opinions and failing to disclose their agreement to fabricate."¹⁶⁷ The district court, finding sufficient evidence to support Plaintiff's claims and finding that the law was clearly established, denied qualified immunity to the defendants.¹⁶⁸ A panel of the Seventh Circuit had found jurisdiction to entertain the defendants' appeal and granted qualified immunity.¹⁶⁹ On rehearing en banc, the majority of the en banc court, finding that neither *Scott v. Harris*¹⁷⁰

Court's clarification of *Johnson*'s limitations in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), to conclude that while *Johnson* generally precluded appellate review of the sufficiency of the evidence to establish facts found by the district court, it did not preclude an appellate court from reviewing the sufficiency of those facts to establish the legal elements of the plaintiff's claim. *Walton*, 821 F.3d at 1209. As he summed it up:

Under *Johnson*, it is for the district court to tell us what facts a reasonable jury might accept as true. But under *Plumhoff*, it is for this court to say whether those facts, together with all reasonable inferences they permit, fall in or out of legal bounds—whether they are or are not enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff.

Id. at 1209–10.

166 868 F.3d 516 (7th Cir. 2015) (en banc), *cert denied*, 138 S. Ct. 1325 (2018) (mem.). The petition for certiorari presented the following two questions for review:

1. Whether *Johnson v. Jones*, 515 U.S. 304 (1995) precludes a Federal appellate court from exercising jurisdiction over a challenge to a denial of qualified immunity that turns not upon disputed facts, but upon the disputed application of the inferences drawn by the District Court from the facts, in concluding that a reasonable jury could find a violation of a Constitutional right which was clearly established.

2. Whether the Seventh Circuit, sitting en banc, applied an impermissibly broad reading of *Johnson v. Jones*, 515 U.S. 304 (1995) in vacating the opinion of the Seventh Circuit's three judge panel and denying jurisdiction over Dr. Lowell T. Johnson's appeal, where the appeal sought review of the District Court's determination that a reasonable jury could find that Dr. Johnson violated respondent's right to due process.

Petition for Writ of Certiorari at i, *Johnson v. Stinson*, No. 17-749 (U.S. Nov. 25, 2017). Another case that raised the question of the scope of *Forsyth* appellate jurisdiction was *Thibault v. Wierszewski*, 695 F. App'x 891 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1280 (2018) (mem.).

167 *Stinson*, 868 F.3d at 518. Basically, Stinson claimed that the defendants manipulated and fabricated bite-mark evidence to falsely implicate him as the murderer. *Id.* at 521–22.

168 *Id.* at 522.

169 *Id.*

170 550 U.S. 372 (2007). In *Scott*, the Supreme Court reversed a denial of qualified immunity that had been based on the lower court's determination that there was a genuine dispute of fact as to whether plaintiff's operation of a vehicle during a high-speed pursuit was so dangerous as to warrant an officer's ramming of the vehicle in order to terminate the threat presented. Both the district court and the court of appeals had concluded that a

nor *Plumhoff v. Rickard*¹⁷¹ was inconsistent with *Johnson*, and that “*Johnson* very much remains the law,”¹⁷² proceeded to address the basic question of “whether our case is one of evidentiary sufficiency or one of a question of law.”¹⁷³

Critical to both Stinson’s fabrication claim and his *Brady*¹⁷⁴ claim was the question of whether a meeting had taken place between Detective Gauger and Dr. Johnson before the detectives met with Stinson.¹⁷⁵ Noting the district court’s determination that there was sufficient evidence to support Stinson’s claim of intentional fabrication of evidence, the majority of the en banc court correctly observed that the question of whether the odontologists’ opinions “were intentionally fabricated or honestly mistaken is a question of fact, not a question of law.”¹⁷⁶ Thus, the majority concluded:

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.

reasonable jury might find that Mr. Harris’s driving did not present a threat that justified the use of such force. *Id.* at 376. Justice Scalia, writing for the majority, concluded that the Court was not constrained by the usual principle of viewing the facts in the light most favorable to the nonmoving party where the plaintiff’s version of the facts relied on by the lower courts was “blatantly contradicted” by a videotape taken from the dash-mounted video camera of the police vehicle and made part of the record. *Id.* at 380–81. Thus, in *Scott*, the Court concluded that there was no genuine dispute about a material fact and the only issue presented on appeal was a question of law. *Id.* For an excellent critique of *Scott* and how it might be viewed to effect “a shift in the core summary judgment standard, undertaken to justify a massive expansion of interlocutory appellate jurisdiction in qualified immunity cases,” see Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1352 (2015).

171 134 S. Ct. 2012 (2014). In *Plumhoff*, the Court again reversed a denial of qualified immunity in a case where officers shot and killed a driver to terminate a high-speed pursuit. *Id.* at 2016–17. As in *Scott*, the Court distinguished *Johnson* and found jurisdiction was properly exercised because the facts were not in dispute and the issue on appeal presented just the legal question of whether, based on the undisputed facts, the use of force was objectively reasonable. *Id.* at 2019–20.

172 *Stinson*, 868 F.3d at 523–24.

173 *Id.* at 524.

174 See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the Due Process Clause requires prosecutors to turn over all exculpatory evidence that is material to the defense).

175 *Stinson*, 868 F.3d at 525. Stinson claimed that Dr. Johnson had originally shown the detectives a sketch with the “assailant’s dentition reflecting a missing tooth to the right of the central incisor,” but that after the detectives interviewed Stinson and saw that it was his right front tooth that was missing, Dr. Johnson changed his sketch to reflect “that the assailant was missing the right central incisor, i.e., the right *front* tooth, which is the same tooth the detectives had observed missing on Stinson.” *Id.* at 525–26. The district court had found sufficient evidence to support a finding that the preinterview meeting took place and that the existence of this meeting was crucial to Stinson’s claims. *Id.* Another material fact in dispute as to which the district court found sufficient evidence was whether Dr. Johnson had reached out to Dr. Rawson before the detectives did, to encourage Dr. Rawson to support Dr. Johnson’s revised analysis of the dentition evidence. *Id.* at 526. According to the majority, the defendants did not accept these facts for purposes of the appeal. *Id.*

176 *Id.*

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.¹⁷⁷

Judge Sykes, writing in dissent, found that the district court's decision embodied a legal ruling on qualified immunity that was separable from the court's determination of evidence sufficiency and appealable under *Johnson*.¹⁷⁸ Reading *Johnson* as creating a narrow limitation on *Forsyth* appeals, carving out only those appeals that rest "solely on a dispute about the historical facts,"¹⁷⁹ the dissent relied on language in *Johnson* that would allow an appellate court to review a district court's determination that facts which the court found supported by the record demonstrate the violation of clearly established law.¹⁸⁰ The dissent viewed *Johnson* as precluding an appeal that contests *only* the district court's conclusion that the evidence was sufficient to allow a jury to find certain facts, but, consistent with then-Judge Gorsuch's opinion in *Walton*, maintained that *Johnson* does not preclude review of the district court's determination as to what inferences a reasonable jury might draw from those facts and whether those inferences would support the conclusion that defendants violated clearly established law.¹⁸¹ I find it difficult to escape the conclusion that the dissent's view in *Stinson* amounts to anything other than an appellate court contesting the district court's finding that the evidence was sufficient for a jury to find intent to fabricate and withhold such information from the plaintiff. The dissent suggests that a jury might infer gross negligence from the facts the district court found to be supported by the record, but that there was no support for a finding of intent.¹⁸² Without a videotape or other such evidence to "blatantly contradict[]"¹⁸³ the record as found by the district court, the dissenters would appear to be engaging in pure factfinding, usurping the role of both the district judge and the jury with respect to the factual issue of intent.

The Supreme Court's lack of guidance as to what is within or without the scope of *Forsyth* appeals has resulted in confusion and inconsistency in the

177 *Id.* at 528; *see also* *Hurt v. Wise*, 880 F.3d 831, 839 (7th Cir. 2018) ("Rather than fully accepting the facts in the light most favorable to the plaintiffs . . . [d]efendants . . . have asked us to revisit the inferences that the district court found could reasonably be drawn from [Plaintiffs'] recorded interrogation. That we cannot do without going beyond our jurisdiction on this interlocutory appeal." (citation omitted)).

178 *Stinson*, 868 F.3d at 529 (Sykes, J., dissenting).

179 *Id.* at 530.

180 *Id.* In *Johnson*, the Court acknowledged that "if the District Court in this case had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination." *Johnson v. Jones*, 515 U.S. 304, 318 (1995).

181 *Stinson*, 868 F.3d at 532–33 (Sykes, J., dissenting).

182 *Id.* at 533–34.

183 *See* *Scott v. Harris*, 550 U.S. 372, 380 (2007).

circuits.¹⁸⁴ The source of many of the troubles in the qualified immunity analysis, and certainly in the muddle surrounding the scope of *Forsyth* interlocutory appeals, is the Court's having made the determination of the legal question of qualified immunity—i.e., whether an asserted right was clearly established at the time of the challenged conduct—heavily dependent upon the facts of a particular case, such that the qualified immunity issue has become inextricably intertwined with the merits question. I am not at all certain that this aspect of qualified immunity can be fixed, but if the interlocutory appeal is to be retained, some modification and clarification is sorely needed.

Recommendation: Given the infrequency with which defendants raise the defense at the motion to dismiss stage,¹⁸⁵ and perhaps the greater infrequency with which the motion is granted,¹⁸⁶ I would eliminate the availability of the interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage. It appears to accomplish little, while unnecessarily adding to the expense and delay of litigation. At the summary judgment stage, district courts should have discretion to certify interlocutory appeals as “without merit,” as well as “frivolous.” Such a certification would allow the district

184 Compare, e.g., *Walton v. Powell*, 821 F.3d 1204, 1210 (10th Cir. 2016) (holding appellate court had jurisdiction under *Forsyth* “to say whether [the] facts, together with all reasonable inferences they permit, fall in or out of legal bounds—whether they are or are not enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff under the terms of the governing legal test for causation or any other legal element”), with *Ralston v. Cannon*, 884 F.3d 1060, 1067 (10th Cir. 2018) (holding court lacked jurisdiction over interlocutory appeal where defendant “simply assert[ed] the district court erred in determining a reasonable juror could conclude he acted intentionally or consciously”), and *DiLuzio v. Village of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015) (holding defendant may not challenge inferences drawn by the district court from facts, as that too constitutes a prohibited fact-based appeal); compare also *Franklin v. Peterson*, 878 F.3d 631, 637 (8th Cir. 2017) (“These officers do not argue that even if inferences are made in the estate’s favor the use of deadly force was reasonable in this circumstance, but rather they argue the inferences raised by the estate from the evidence presented are not plausible—a factual dispute.”), *petition for cert. filed*, No. 17-1572 (U.S. May 17, 2018), with *id.* at 638–40 (Loken, J., dissenting) (explaining that he would exercise jurisdiction and reverse denial of qualified immunity based on facts he viewed as undisputed). See also *Estate of Walker v. Wallace*, 881 F.3d 1056, 1059–60 (8th Cir. 2018) (“The district court did indeed mention that ‘disputes of fact remain regarding whether Victor voluntarily consented to the inspection,’ and we have said that when the appeal from the denial of qualified immunity turns on whether the plaintiff consented to a search, which is a factually intensive inquiry, we lack jurisdiction. We conclude nonetheless that we have jurisdiction. . . . The way in which the district court resolved the motion does not necessarily govern whether we have jurisdiction. Where the appellant does not challenge that factual disputes exist but rather whether, even if the facts are construed in a light most favorable to the appellees, he violated a clearly established right, we have jurisdiction over the interlocutory appeal.” (citations omitted) (quoting the district court’s opinion)).

185 See *supra* note 23 and accompanying text.

186 See *supra* note 122 and accompanying text; see also *Jackson v. Curry*, 888 F.3d 259 (7th Cir. 2018) (dismissing interlocutory appeal from denial of motion to dismiss based on qualified immunity for lack of jurisdiction).

court to proceed with the case absent the granting of a stay by the appellate court and, in any event, should compel expedited review by the appellate court. Too many interlocutory appeals from denials of qualified immunity at the summary judgment stage are dismissed for lack of jurisdiction,¹⁸⁷ again causing needless and useless litigation delays and expense. In agreement with Judge Hinkle, I would echo, “not [the way] to run a railroad.”¹⁸⁸ Finally, if appellate courts are permitted to exercise review of the district court’s findings as to what inferences may be drawn from the facts as supported by the record, this will result in more frequent transgressions by appellate judges into the roles assigned to district judges and jurors. *Johnson* should be construed to preclude interlocutory review of a district court’s sufficiency of the evidence determinations, where not blatantly contradicted by the record, as well as a district court’s conclusions as to what inferences a jury might draw from the facts as supported. Interlocutory appeals should be confined to the legal question of whether the facts and inferences found supported by the district court set forth the violation of a clearly established right.

III. QUALIFIED IMMUNITY IS RARELY A PURE QUESTION OF LAW: MULTIPLE LAYERS OF REASONABLENESS, MIXED MESSAGES, MUDDY WATERS

I will not belabor the point, elsewhere made and supported by Professor Chen, that the Supreme Court has injected into its qualified immunity jurisprudence the unavoidable relevance of facts, but has ignored the problem the lower courts inevitably face in attempting to resolve qualified immunity as a pure question of law in pretrial disposition of the case.¹⁸⁹ The Court has consistently pushed for resolution of the legal question of qualified immunity early on in litigation, purportedly to protect officers from burdens of discovery and trial.¹⁹⁰ In appeals from denials of qualified immunity at the sum-

187 See *supra* note 133 and accompanying text.

188 *Olson v. Stewart*, 240 F. Supp. 3d 1251, 1256 (N.D. Fla. 2017).

189 See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) (“As any experienced civil rights practitioner or federal trial judge knows, the primary impediment to expedited termination of constitutional tort suits through qualified immunity-based summary judgment claims is the existence of material fact disputes.”); see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1 (1997).

190 See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (“Immunity ordinarily should be decided by the court long before trial.”); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (“[W]e have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation.”). But the Court has sent mixed messages as to whether qualified immunity *must* be resolved prior to any discovery. *Compare* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“Until [the] threshold immunity question is resolved, discovery should not be allowed.”), *with* *Anderson*, 483 U.S. at 646 n.6 (“[I]f the actions [Defendant] claims he took are different from those the [Plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [Defendant’s] motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to

mary judgment stage, there is not only confusion about the scope of *Forsyth* appellate review, as discussed in Part II,¹⁹¹ but also considerable disagreement about whether and when both trial and appellate judges are usurping the role of jurors by assuming facts or drawing inferences that are not favorable to the nonmoving party and by granting summary judgments based on their own findings and assessments of facts. In *Tolan v. Cotton*,¹⁹² the Supreme Court made clear that normal summary judgment rules apply even when a court is addressing only the clearly established law prong of qualified immunity, so that the facts the district court finds supported by the record and the inferences that may be drawn therefrom must be viewed in the light most favorable to the nonmoving party.¹⁹³ After the Supreme Court's decision in *Tolan*, I wrote: "Whether *Tolan* represents a unique response to a particularly egregious misapplication of summary judgment rules to an especially horrendous set of facts or whether it will be invoked to ward off summary judgment on qualified immunity in a much broader spectrum of cases remains to be seen."¹⁹⁴ Following *Tolan*, I find little cause for optimism. Both trial and appellate courts, as well as the Supreme Court itself, continue

the question of [Defendant's] qualified immunity."). See also *McMillen v. Windham*, No. 3:16-CV-558, 2018 WL 652830, at *2-3 (W.D. Ky. Jan. 31, 2018) (discussing both views and refusing to stay discovery pending resolution of defendants' motion to dismiss based on qualified immunity).

191 See *supra* notes 163-83 and accompanying text.

192 134 S. Ct. 1861 (2014) (per curiam). In *Tolan*, the facts surrounding the shooting of a young, unarmed, black male on his own front porch were disputed, but the Fifth Circuit gave the officer the benefit of the doubt based on his version of the facts and granted summary judgment based on qualified immunity. *Tolan v. Cotton*, 713 F.3d 299, 306-08 (5th Cir. 2013), *aff'd in part, rev'd in part*, 134 S. Ct. 1861.

193 *Tolan*, 134 S. Ct. at 1866; see also *Thomas v. Williams*, 719 F. App'x 346, 357 (5th Cir. 2018) (Dennis, J., dissenting) ("In *Tolan v. Cotton* the Supreme Court took the unusual step of granting certiorari simply to correct this court's misapplication of the summary judgment standard. . . . Statistically speaking, it is highly unlikely that the Supreme Court would repeat this strong remedy in the instant case, but the majority appears bent on providing a very good candidate for this course of action. Because the majority opinion fails to view the evidence in the light most favorable to the nonmovant, fails to credit evidence that contradicts its key factual conclusions, and makes additional serious legal errors, I must respectfully dissent." (citations omitted)); *Dawson v. Anderson County*, 566 F. App'x 369, 371-74, 376-79 (5th Cir. 2014) (Dennis, J., dissenting) ("The majority concludes that Dawson has failed to present a genuine issue of material fact regarding whether the Defendants violated clearly established Fourth Amendment law by repeatedly shooting at her with a pepperball gun during a strip search in which she was undressed, unarmed, and surrounded by multiple officers. The majority fails to view the evidence in the light most favorable to Dawson and disregards reasonable inferences that jurors could draw from the record to conclude that under clearly established law, the officers used excessive force and conducted a strip search in an unreasonable manner in violation of Dawson's Fourth Amendment rights. Accordingly, I respectfully dissent and would reverse and remand for trial." (footnote omitted)); *Thomas v. Nugent*, 539 F. App'x 456 (5th Cir. 2013) (per curiam), *cert. granted, judgment vacated*, 134 S. Ct. 2289 (2014) (mem.).

194 Blum, *supra* note 45, at 944.

to ignore the ordinary rules of summary judgment when deciding or reviewing motions based on qualified immunity.¹⁹⁵

In the wake of *Tolan*, the Fifth Circuit has continued to render seemingly improper summary judgment rulings on qualified immunity. In *Guerra v. Bellino*,¹⁹⁶ Sergeant Bellino responded to a report of a young man, Mr. Guerra, appearing to be intoxicated and walking in the midst of traffic after midnight.¹⁹⁷ After exiting his car, Bellino approached Guerra and ordered him to stop walking, but claimed that Guerra became menacing and, after initial compliance with a command to put his hands on the hood of Bellino's car, suddenly charged towards him, resulting in Bellino's shooting and killing the nineteen-year-old man.¹⁹⁸ An eyewitness filmed the events on his cellphone from a distance of fifteen to twenty yards away.¹⁹⁹ In response to the excessive force claim filed by his parents on behalf of Guerra's estate, Sergeant Bellino asserted the defense of qualified immunity and moved for summary judgment. The witness who did the filming, as well as other eyewitnesses, contested Bellino's version of the events.²⁰⁰ The district judge denied summary judgment, concluding that there were three genuine issues of material fact in dispute: "(1) whether Guerra attempted to rush Bellino or attempted to flee; (2) whether Guerra was cooperative or posed a threat of serious physical harm to Bellino prior to the shooting; and (3) whether Bellino's statement following the incident was credible."²⁰¹ On appeal, how-

195 In *Scott v. Harris*, a case involving the ramming of the suspect's vehicle at the end of a high-speed pursuit, Justice Stevens chastised his colleagues as the eight "jurors" on the Court who thought no reasonable person could disagree that the suspect's driving was reckless and presented a serious threat, even when three federal circuit judges and one federal district judge had disagreed with the eight Supreme Court "jurors" assessments of the evidence. 550 U.S. 372, 389–90 (2007) (Stevens, J., dissenting). Likewise, in her strongly worded dissent in *Kisela v. Hughes*, Justice Sotomayor criticized the majority for "stretch[ing] the facts," not drawing inferences in favor of the Plaintiff, and summarily reversing a denial of qualified immunity in a case where "the relevant facts are hotly disputed, and the qualified-immunity question . . . is, at the very best, a close call"—a case that should have gone to a jury. 138 S. Ct. 1148, 1159, 1162 (2018) (Sotomayor, J., dissenting); see also *Poole v. City of Shreveport*, 691 F.3d 624, 635 (5th Cir. 2012) (Elrod, J., concurring in part and dissenting in part) ("The majority opinion's disagreement about the videotape evidence only underscores why this case should go to a jury. Nowhere does the majority opinion indicate that Creighton would be entitled to qualified immunity under my understanding of the facts."); *Lopera v. Town of Coventry*, 640 F.3d 388, 396–98, 402–03 (1st Cir. 2011) (granting officers qualified immunity after deciding that reasonable officers could have believed a coach "consented" to the search of his team). Judge Thompson dissented in *Lopera*, saying the case should have gone to a jury on facts that raised a question about whether consent was voluntarily given. *Id.* at 404–06 (Thompson, J., dissenting in part). See generally Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

196 703 F. App'x 312 (5th Cir. 2017) (per curiam).

197 *Id.* at 314.

198 *Id.* at 314–15.

199 *Id.*

200 *Id.*

201 *Id.* at 315.

ever, the majority of the Fifth Circuit panel took its cue from the Supreme Court in *Scott*, viewed the video through its own eyes,²⁰² and concluded that the “video offers irrefutable proof that [Bellino] was justified in believing Guerra presented a threat at the time of the shooting.”²⁰³ Thus, the majority concluded on prong one of the immunity analysis that there was no constitutional violation, and, even if there were a constitutional violation, Plaintiffs did not carry their burden of showing the violation of a clearly established right.²⁰⁴

In dissent, Judge Graves agreed with the district court’s assessment that there was a dispute about the material fact of whether Guerra was attempting to *run at* Bellino, thus presenting a threat, or *run past* Bellino, attempting to flee. Even the witness who took the video said he could not tell if Guerra was charging at Bellino or running at an angle to get around him.²⁰⁵ As the dissent noted, Plaintiffs put forth evidence that, when viewed in the light most favorable to the nonmoving party, supported the conclusion that “Guerra was unarmed, nonthreatening, and was shot dead while attempting to flee the scene” on foot.²⁰⁶ If such facts were found by a jury, *Garner* would “clearly establish[] that Bellino’s use of lethal force against an unarmed, nonthreatening and fleeing suspect was unreasonable.”²⁰⁷ As in *Tolan*, and other cases,²⁰⁸ the majority of the panel in *Guerra* engaged in factfinding to resolve the purely legal question of qualified immunity.²⁰⁹

Three years after the Supreme Court summarily reversed the Fifth Circuit in *Tolan*, the Court denied certiorari in *Salazar-Limon v. City of Houston*²¹⁰ and let stand summary judgment for the defendant-officer in another case from the Fifth Circuit where the lower courts made the “same fundamental error”²¹¹ that was corrected in *Tolan*. While the Supreme Court purports to not be in the business of granting certiorari for purposes of mere

202 *Id.* at 317 (“Though grainy, the video shows that Bellino’s detainee suddenly turned and charged toward him in the dark from less than a car’s length away.”).

203 *Id.* at 318.

204 *Id.*

205 *Id.* at 319 (Graves, J., dissenting). The dissent provided a link to the eyewitness video. *Id.* at 319 n.1 (“http://www.ca5.uscourts.gov/opinions/pub/15/15-51252_enhanced.mp4”). I watched the video several times and could not tell what was happening. It was dark, grainy, and the figures could barely be made out, let alone what anyone was doing. But I am only one juror. View it for yourself.

206 *Id.* at 319.

207 *Id.* at 320.

208 *See supra* note 193.

209 For a better approach, see, for example, *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1075 (8th Cir. 2018) (“Having reviewed the evidence in the record, we conclude that there is a key factual question in this case about whether Raines advanced on Officer Hanson just before being shot, which is both material and disputed, that precludes us from resolving the legal issue of whether the officers’ conduct constitutes a violation of clearly established law.”).

210 826 F.3d 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1277 (2017).

211 *Salazar-Limon*, 137 S. Ct. at 1279 (Sotomayor, J., dissenting from the denial of certiorari).

error correction,²¹² the summary reversal in *Tolan* and the denial of certiorari in *Salazar-Limon* stand in stark contrast to one another, especially given the common error and their origins in the same circuit. Salazar-Limon was shot in the back and left partially paralyzed following an altercation with Officer Thompson, who had stopped Salazar-Limon after midnight for speeding and swerving between lanes.²¹³ Thompson claimed that Salazar-Limon, after a brief struggle with Thompson, walked away but turned toward him and reached for his waist band, prompting Thompson to use deadly force because he thought Salazar-Limon might be reaching for a weapon.²¹⁴ Both the district court and the court of appeals adopted Thompson's version of the facts and, based on such, granted summary judgment for the officer because the use of deadly force was objectively reasonable under the assumed circumstances.²¹⁵ Although neither the district court nor the court of appeals found evidence in the record sufficient to contest Thompson's version of the story, Justice Sotomayor, in dissenting from the denial of certiorari, concluded that Salazar's own testimony that he was shot *before he turned* toward Thompson was sufficient to create a material issue of fact that called into question the objective reasonableness of the shooting.²¹⁶ Thus, the case should have been submitted to a jury.

As *Tolan*, *Guerra*, and *Salazar-Limon* demonstrate, most Fourth Amendment excessive force cases turn on material facts that are disputed by the parties. But, requiring a jury to resolve those factual disputes would obviously defeat pretrial disposition of such cases and expose officials to the burdens of litigation against which the Supreme Court has stressed qualified immunity is designed to serve as a shield. The Supreme Court has stuck to its message (#welovequalifiedimmunity) and its insistence on early resolution of the qualified immunity issue has resulted in lower courts moving factfinding from the province of the jury to the chambers of the judge so that the legal issue can be disposed of without the need for trial. And, even if a plaintiff is somehow able to overcome the qualified immunity defense at the motion to

212 *Id.* at 1278 (Alito, J., concurring in the denial of certiorari) (“[W]e 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.”).

213 *Salazar-Limon*, 826 F.3d at 275.

214 *Id.*

215 *Id.* at 278–79.

216 *Salazar-Limon*, 137 S. Ct. at 1281 (Sotomayor, J., dissenting from the denial of certiorari) (“Salazar–Limon’s own testimony ‘controverted’ Thompson’s claim that Salazar–Limon had turned and reached for his waistband.”). In cases presenting similar issues, both the Ninth Circuit and the D.C. Circuit took approaches aligned with the views of Justice Sotomayor. See *Flythe v. District of Columbia*, 791 F.3d 13, 19 (D.C. Cir. 2015) (reversing a grant of qualified immunity to officer where officer’s account that suspect attacked him with a knife might be disbelieved by a jury); *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir. 2014) (reversing summary judgment in favor of officers where jury needed to resolve material issue of fact as to whether suspect reached for his waistband before being shot).

dismiss and summary judgment stages, qualified immunity, like the cat with nine lives, may be resuscitated at trial or resurrected after trial.

The final two cases I will discuss in this Part, *Simmons v. Bradshaw*²¹⁷ and *Montero v. Nandlal*,²¹⁸ involve two more young men of color who were shot, one left paraplegic and one killed, by officers who claimed the threat of serious harm as justification for the shooting. Like Robbie Tolan, Jose Guerra, and Ricardo Salizar-Limon, Dontrell Stephens was unarmed and not suspected of a serious offense when stopped after Deputy Lin observed him riding his bicycle on the wrong side of the road in Palm Beach County, Florida.²¹⁹ Stephens claimed that before stopping him, Lin saw a cellphone that Stephens was holding to his ear while riding.²²⁰ Lin claimed he did not see the cellphone and that he believed Stephens had nothing in his hands when stopped.²²¹ According to Lin, Stephens dismounted his bike and began walking toward Lin but then turned away as he approached Lin. At that moment, Lin shot Stephens four times.²²²

The unfolding of the lawsuit that was filed by Stephens is a classic example of the multiple hurdles qualified immunity constructs to block plaintiffs at every step of a civil rights action, prompting the frustration and anxiety expressed by plaintiffs, judges, and scholars and portraying the very real Kafkaesque world that civil rights litigators routinely confront. The suit was filed in state court and removed to federal district court in the spring of 2014.²²³ Lin's motion for summary judgment based on qualified immunity was denied with respect to the Fourth Amendment excessive force claim and Lin took an interlocutory appeal.²²⁴ A panel of the Eleventh Circuit affirmed the denial of qualified immunity because, based on Stephens's version of the facts as supported by the record and as relied on by the district court, Stephens made out a violation of clearly established law.²²⁵ The panel set out the following facts found and supported by the district court and relied on by the panel in reviewing the denial of qualified immunity:

217 879 F.3d 1157 (11th Cir. 2018). Stephens asserted claims against both the shooting officer, Deputy Lin, in his individual capacity, and Sheriff Bradshaw, in his official capacity. *Id.* at 1160. Only the individual capacity claim against Lin is discussed here.

218 682 F. App'x 711 (11th Cir. 2017) (per curiam).

219 *Simmons*, 879 F.3d at 1160.

220 *Id.* at 1160–61.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 See *Stephens v. Lin*, 612 F. App'x 581, 581 n.1 (11th Cir. 2015) (per curiam). Stephens had argued that the appellate court lacked jurisdiction to hear the appeal since the district court had found there were material facts in dispute, but the panel correctly noted that the district court had based its order on facts and inferences found in Stephens's favor and the question of whether such facts and inferences demonstrated the violation of clearly established law presented the "core qualified immunity" legal issue that could be addressed in a *Forsyth* appeal. *Id.* (quoting *Cottrell v. Caldwell*, 85 F.3d 1480, 1484 (11th Cir. 1996)) (internal quotation marks omitted).

Lin stopped Stephens for riding his bicycle on the wrong (left) side of the road. When Stephens saw the lights of Lin's patrol car, he crossed the road (to the right side) in front of Lin's patrol car. Stephens dismounted his bicycle in a yard when he heard the patrol car's siren blast. Stephens had been talking to someone on his cell phone, and it was in his right hand as he approached Lin. Stephens asked Lin why he was being stopped. Lin did not respond. Lin told Stephens to raise his hands above his head; Stephens did. His cell phone was still in his right hand, and his left hand was empty. With his hands still up and the cell phone still in his right hand, Stephens began to pivot to his right. Lin then shot Stephens four times, rendering Stephens a paraplegic.²²⁶

Based on those facts, the panel affirmed the denial of qualified immunity and sent the case back to the district court for trial.²²⁷ The case went to trial on January 25, 2016, and on February 3, 2016, a jury rendered a verdict in favor of Stephens on the excessive force claim against Lin, awarding Stephens the amount of \$23,148,100.²²⁸ Deputy Lin moved for a new trial based on the trial judge's failure to give a requested interrogatory with respect to his qualified immunity defense.²²⁹ The district court denied the post-trial motion and another appeal to the Eleventh Circuit followed. Judge Robreno, sitting by designation and writing for the majority of the panel, set out the role of the judge and the jury as it has developed in the context of qualified immunity.

When qualified immunity is denied at summary judgment and a case goes to trial, the jury is tasked with finding "the relevant facts bearing on qualified immunity."²³⁰ This raises the question of what are the "relevant facts" and whether the question of whether any mistake made by Deputy Lin was an objectively reasonable mistake is a question of fact or a question of law.

Judge Robreno sets out this language from *Saucier*:

Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the [Constitution] . . . , [Supreme Court precedent] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.²³¹

226 *Id.* at 581–82. As the panel notes, Lin did not claim that the alleged conduct did not violate clearly established law. His claim was that under *his* version of the facts, he did not violate clearly established law. *Id.* at 582. This is the sort of appeal that I would suggest should be certified as "without merit," if not frivolous. *See supra* Part II.

227 *Stephens*, 612 F. App'x at 582.

228 *Simmons*, 879 F.3d at 1161. The jury returned a verdict against Lin on the Fourth Amendment excessive force claim and against Bradshaw on a state law vicarious liability claim for battery. The district judge entered a judgment against Lin and Bradshaw, jointly and severally, in the amount of \$22,431,892.05. *Id.*

229 *Id.*; *see* FED. R. CIV. P. 59(a) (governing motions for new trial).

230 *Simmons*, 879 F.3d at 1164.

231 *Id.* (alterations in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

He then proceeded to explain that “the 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.”²³² But, in my view, that explanation does not really flow from the language referenced in *Saucier*, which says that an officer who makes a reasonable mistake of fact will not have violated the Constitution, but even if he makes an unreasonable mistake and violates the Constitution, he may still be entitled to qualified immunity based on a reasonable mistake as to the *legality* of the challenged conduct. The legal question for the court goes to the second prong of immunity, the clearly established law prong.

The district court in *Simmons* had rightly noted that although Lin was not entitled to summary judgment on qualified immunity, he was not precluded from asserting the defense at trial, where the jury might discredit Stephens’s version of the events or the facts found by the jury might differ from those alleged and supported at the summary judgment stage.²³³ The majority of the panel faulted the district court on three counts: (1) for not submitting the contested factual issues to the jury by way of special interrogatories; (2) for giving erroneous jury instructions which conflated the merits question and qualified immunity; and (3) for removing the legal question of qualified immunity from the judge and essentially assigning it to the jury.²³⁴ The majority found the following jury instructions problematic:

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.²³⁵

Judge Wilson, in dissent, observed the flaws in the majority’s analysis. First, in his appeal, Lin did not argue that the district court’s instructions were erroneous. Lin argued that the district court erred by not submitting this requested special interrogatory to the jury:

Do you find by a preponderance of the evidence that Deputy Adams Lin made an objectively reasonable mistake when he perceived that Dontrell Ste-

232 *Id.*

233 *Id.* at 1165 (citing *Simmons v. Bradshaw*, No. 14-80425-CIV, 2014 WL 11456548, at *8–9 (S.D. Fla. Dec. 31, 2014)).

234 *Id.* at 1166–67.

235 *Id.* at 1165–66.

phens 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?²³⁶

But, as Judge Wilson pointed out, the question of whether Deputy Lin made an objectively reasonable mistake of fact in perceiving that Stephens threatened him with a firearm was already embedded in the jury instructions and, under the instructions given, was a crucial *finding of fact* that the jury had to have made against Lin in order to conclude that the use of force was excessive under the Fourth Amendment.²³⁷ Furthermore, the instruction given did not mention or imply that the jury was to decide the qualified immunity issue. The jury was instructed to assess the *Graham* factors and to determine whether Lin's conduct was objectively reasonable, including whether any mistake of fact he may have made was an objectively reasonable mistake. As Judge Wilson notes, and consistent with the language in *Saucier*, if the mistake were found to be reasonable, then there would be no Fourth Amendment excessive force violation.²³⁸ The jury's determination that Lin used excessive force meant they necessarily decided that a reasonable officer would not have mistaken Stephens's cellphone for a firearm or perceived a threat that justified the use of deadly force. The qualified immunity question, which the district court *did not* submit to the jury, is the *legal* question of whether a reasonable officer would have understood that his conduct under the circumstances as found by the jury, including the unreasonable mistake of fact as to the threat presented, violated clearly established law.²³⁹ So, yes, in this case, as in many excessive force cases, the key question of fact to be decided by the jury was determinative of both the merits question and the qualified immunity question. Once a finding had been made that Lin was objectively unreasonable in perceiving a threat because a reasonable officer would not have mistaken Stephens's cellphone for a firearm, no officer could argue that it was not clearly established that using deadly force on a person who presented no serious threat of harm to the officer or others was unlawful.

I do think it would have been helpful if the district court had submitted special interrogatories to the jury instead of requesting a general verdict.²⁴⁰ While I agree with Judge Wilson that the jury instructions necessitated that

236 *Id.* at 1171–72 (Wilson, J., dissenting).

237 *Id.* at 1172.

238 *Id.*

239 *Id.* at 1171.

240 The majority sets out in a footnote the type of factual findings that the district court might request the jury to make in order to assist the court in resolving the qualified immunity issue:

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 deter-

the jury resolve the key disputed fact, the reasonableness of Lin's perception of a threat, more specificity in determining the circumstances surrounding the shooting would clarify for the court and the parties the underpinnings of the jury's verdict and avoid the kind of confusion that gave rise to the divergent views expressed by the second panel in *Simmons*.

In *Montero*, Richard Montero was shot four times and killed by another Palm Beach County Deputy Sheriff, Ramesh Nandlal, during the course of a struggle that ensued when Montero was being placed under arrest for intoxication.²⁴¹ He was removed from his vehicle, in which he had been sleeping, and became angry and combative when he learned his vehicle would be towed.²⁴² Montero was unarmed and there was no reason to believe that he was armed.²⁴³ Deputies Blackman and Nandlal physically engaged with Montero for several minutes, and after Nandlal was knocked to the ground a second time, he announced that he was going to shoot if Montero didn't stop struggling. Deputy Nandlal shot Montero four times, resulting in his death.²⁴⁴ He subsequently testified that he shot Montero because he believed Montero was going to get his or Blackman's gun and presented a serious threat of harm to the officers.²⁴⁵

As in *Simmons*, qualified immunity was denied at summary judgment, an interlocutory appeal was taken and the denial of qualified immunity was affirmed by a panel of the Eleventh Circuit, which construed the record in the light most favorable to Montero and assumed that Montero was "on his back, subdued and immobilized, with Deputy Blackman standing over him" when he was shot by Nandlal.²⁴⁶ At trial on remand, the jury was given both a general verdict form and the same special interrogatory that the same defense counsel had requested and the district court in *Simmons* had refused to give to the jury. 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

mined, as a matter of law, "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions."

Id. at 1167 n.7 (majority opinion) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). In my opinion, only the questions of whether Stephens possessed a weapon or threatened Deputy Lin would be material to the issue of excessive force or relevant to the qualified immunity inquiry. Some questions I would submit to the jury would be: whether Deputy Lin observed Stephens holding a cellphone while riding on his bicycle; whether Lin raised both hands above his head when stopped; whether Lin had his cellphone in his right hand and nothing in his left hand; whether he turned to the right while facing Deputy Lin; and whether Lin could have reasonably believed he was threatened if and when Stephens turned.

241 *Montero v. Nandlal*, 682 F. App'x 711, 712–13 (11th Cir. 2017) (per curiam).

242 *Id.*

243 *Id.* at 713–14.

244 *Id.* at 713.

245 *Id.* at 714.

246 *Montero v. Nandlal*, 597 F. App'x 1021, 1025 (11th Cir. 2014) (per curiam).

upon Richard Montero during his arrest?”²⁴⁷ The jury answered “yes” to this question and awarded the plaintiff \$540,000 in compensatory damages.²⁴⁸ Question two, the special interrogatory, 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?”²⁴⁹

The jury answered the special interrogatory in the affirmative as well.²⁵⁰ This resulted, of course, in precisely the inconsistency the trial court in *Simmons* wanted to avoid. The general verdict finding that Nandlal’s use of force was excessive necessarily meant that any mistake of fact he made was not objectively reasonable.²⁵¹ Based on the answer to the special interrogatory and its review of trial testimony, the district court granted defendant’s motion for a judgment as a matter of law based on qualified immunity.²⁵² Rule 49(b)(3)(A) permits the district court to resolve an inconsistency between a general verdict and a special interrogatory by entering a judgment that is consistent with the answer to the special interrogatory, notwithstanding the general verdict.²⁵³ The majority of the panel did not view the special interrogatory as giving the legal question of qualified immunity to the jury. It considered the question of whether Nandlal made an objectively reasonable mistake as to the threat presented by Montero as a question of fact appropriate for submission to the jury.²⁵⁴ Based on the jury’s answer to the special interrogatory, supported by evidence at trial, the trial court did not abuse its discretion in entering a judgment for Nandlal based on qualified immunity.²⁵⁵ While the majority of the panel does not specify, it must be that the judgment based on “qualified immunity” in *Montero* is grounded in the first prong, the merits question. The factual determination that Nandlal’s mistake was a reasonable one means there was no excessive force, and thus no violation of the Fourth Amendment.

Judge Walker, sitting by designation,²⁵⁶ agreed that Nandlal was entitled to qualified immunity, but disagreed with the majority’s analysis. First, he believed the district court erred by essentially giving the legal question of qualified immunity to the jury in the form of a special interrogatory, and second, even if the special interrogatory were viewed as presenting a question of fact, he saw no inconsistency between the general verdict and the answer to the special interrogatory.²⁵⁷ Judge Walker espoused the view that while

247 *Montero*, 682 F. App’x at 714.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.* at 717.

252 *Id.* at 714.

253 See FED. R. CIV. P. 49(b)(3)(A).

254 *Montero*, 682 F. App’x at 717.

255 *Id.*

256 *Id.* at 712 n*.

257 *Id.* at 718 (Walker, J., concurring).

specific factual questions should be given to the jury, the ultimate question of whether, based on those findings, the officer made an objectively reasonable mistake of fact in perceiving a threat warranting the use of deadly force, is a question “the court should have determined for itself and without jury input.”²⁵⁸ He concluded that “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.”²⁵⁹ Judge Walker viewed the special interrogatory as improperly submitting the qualified immunity question to the jury and therefore believed that the district court erred in relying on the jury’s response to the interrogatory as the basis for awarding qualified immunity to the defendant.²⁶⁰ But, in any event, Judge Walker would have entered a judgment as a matter of law for Nandlal on the qualified immunity issue based on what he viewed as uncontroverted testimony in the trial record that “taken in the light most favorable to the plaintiff compels the conclusion that Nandlal acted with arguable probable cause when he shot Montero.”²⁶¹

Furthermore, even if the special interrogatory were viewed as properly presenting the jury with the objective reasonableness question as a matter of fact, Judge Walker found the answer could be construed to be consistent with the general verdict. Relying on cases granting qualified immunity where probable cause was lacking but “arguable probable cause” was found to exist,²⁶² Judge Walker finds no inconsistency in the jury’s determination that

258 *Id.*

259 *Id.* at 719.

260 *Id.*

261 *Id.* at 721. Judge Walker found the following evidence determinative:

The record developed at trial contains ample evidence from which the only reasonable conclusion is that qualified immunity was warranted. . . . Specifically, uncontradicted testimony at trial established that Montero had “red, bloodshot, watery eyes” and “smelled strongly of alcohol” during the time of the arrest. Montero’s girlfriend testified that once Montero was told that his car would be towed, a “huge struggle ensued” in which there was “cussing and yelling” and “lots of struggling and fighting.” Eventually, Montero, Nandlal, and Nandlal’s partner, Blackman, “all ended up down on the ground in a pile again, fighting and [with the officers] trying to cuff him.” At one point, Montero yelled “I’m going to rip your balls off,” and the officers unsuccessfully tried to stop him with a taser.

Id. As with the videotape from *Scott v. Harris*, some might disagree that only one reasonable conclusion could be reached based on such testimony.

262 *Id.* at 720 (citing *Turner v. Jones*, 415 F. App’x 196, 201 (11th Cir. 2011) (per curiam)) (distinguishing probable cause from “arguable probable cause” sufficient to sustain qualified immunity). As Justice Sotomayor once observed when she was on the Court of Appeals for the Second Circuit, the term “‘arguable probable cause’ finds no mention in any Supreme Court opinion.” *Walczyk v. Rio*, 496 F.3d 139, 168 (2d Cir. 2007) (Sotomayor, J., concurring). My own word search for “arguable probable cause” in the Supreme Court data base on Westlaw still uncovers no cases using the term. There was potential for the term to appear in the recent decision of *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). The Court in *Wesby* held that officers responding to a complaint about a

excessive force was used and a court's granting qualified immunity based on the jury's additional determination that a reasonable mistake of fact was made.²⁶³

Much of the confusion reflected in both *Simmons* and *Montero* stems from inconsistent and muddled messages delivered by the Supreme Court on the nature of the "objective reasonableness" question in excessive force cases, where disputed issues of material fact render summary judgment inappropriate and where the Supreme Court has made the facts contested relevant to both the constitutional inquiry and the qualified immunity analysis. In *Saucier*, the Court took us down the rabbit hole to the land where objectively unreasonable conduct under the Fourth Amendment could be objectively reasonable for purposes of qualified immunity. Under the *Saucier* mandatory two-step qualified immunity analysis, it may have been easier to sort out that disputed issues of material fact relating to reasonableness on the merits prong were questions that had to be submitted to a jury while questions about whether a reasonable officer would have understood objectively unreasonable conduct established under prong one to violate clearly established legal principles would be a pure question of law for the judge. The Court explained that the excessive force inquiry was distinct from the qualified immunity inquiry.²⁶⁴ But the two are not always distinguished by courts, and it is not always clear whether the objective reasonableness question being addressed is one central to the merits prong of immunity and dependent upon the resolution of facts by a jury or one going to the clearly established law prong, dependent upon the state of the law as determined by a judge.

loud party in an apparently vacant apartment had probable cause to arrest the twenty-one partygoers for unlawful entry, and, in any event, the Court unanimously held that the officers were entitled to qualified immunity on prong two. *Id.* at 590–91. While there was no debut of the precise term "arguable probable cause" in the language of the Court's opinion, the Court did support the notion that a "reasonabl[e] but mistaken[]" conclusion that probable cause existed would entitle the officers to qualified immunity. *Id.* at 591 (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

263 I would take issue with this assessment for ignoring what must have been the same Eleventh Circuit pattern jury instructions on excessive force given to the jury. Just as in *Simmons*, if the jury found that Nandlal made an objectively reasonable mistake of fact as to the threat presented by *Montero*, then the use of force would not have been excessive and there would have been no violation of the Fourth Amendment. Thus, as the majority suggests, the general verdict would be inconsistent with the special interrogatory.

264 See *Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed. The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct."); see also *Stephenson v. Doe*, 332 F.3d 68, 78 (2d Cir. 2003) ("[A]s the Supreme Court clarified in *Saucier*, claims that an officer made a reasonable mistake of fact that justified the use of force go to the question of whether the plaintiff's constitutional rights were violated, not the question of whether the officer was entitled to qualified immunity.").

While virtually all circuits now agree that the clearly established law question should not be given to a jury,²⁶⁵ cases like *Simmons* and *Montero* reflect inconsistency and disagreement as to whether the question of an objectively reasonable mistake of fact, a question that affects both the merits and the qualified immunity analysis, is something to be decided by a judge or a jury. In *Scott*, Justice Scalia stated that at the summary judgment stage, once the relevant historical facts have been established, the question of whether the officer's conduct was objectively reasonable is a "pure question of law" for the court to resolve.²⁶⁶ Does this hold true when the case goes to trial and is submitted to a jury on the disputed facts? If so, then, as the Eleventh Circuit has suggested, the jury should resolve only the questions of historical fact, the "who-what-when-where-why" questions.²⁶⁷ The role of the judge and jury is still debated in such cases.²⁶⁸ Another panel of the Eleventh Circuit found

265 See *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) (citing *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000)) (joining the majority of circuits in holding that the clearly established prong of qualified immunity is a question of law for the judge and noting that "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 also *Reese v. County of Sacramento*, 888 F.3d 1030, 1038 (9th Cir. 2018) ("In arguing that his right to be free of excessive force under these circumstances was clearly established, Reese relies on the jury's answer to Question 14, their finding that it did not appear that Reese posed an immediate threat of death or serious physical injury to Rose at the time Rose fired his shot. Reese contends that by making this finding, the jury determined Rose violated Reese's clearly established right not to be subjected to deadly force when he posed no immediate threat to Rose or others. As *Morales* confirmed, however, the question of whether the right was clearly established is solely for the judge to decide, not the jury. Thus, although the jury's finding that Reese posed no immediate threat of death or serious physical injury to Rose addresses the first prong of the qualified immunity analysis, it does not answer the purely legal question of whether the right was clearly established in this context." (citation omitted)).

266 *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). As noted earlier, Justice Stevens was critical of this view and accused the majority of usurping the role of the jury. See *supra* note 195.

267 *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996).

268 See, e.g., *Lowry v. City of San Diego*, 858 F.3d 1248, 1261 n.1 (9th Cir. 2017) (en banc) (Thomas, C.J., dissenting) ("The majority emphasizes that the reasonableness of a particular use of force is a 'pure question of law' once the facts are established. However, '[w]here the objective reasonableness of an officer's conduct turns on disputed issues of material fact, it is 'a question of fact best resolved by a jury.'" Because Lowry has succeeded in raising material disputes of fact, as detailed below, it is the task of the jury to resolve those fact disputes and draw any relevant inferences from them." (alteration in original) (citations omitted) (quoting *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011))). Compare *Gonzalez v. City of Anaheim*, 747 F.3d 789, 793–97 (9th Cir. 2014) (en banc) (ruling that jury could decide defendant's use of deadly force was reasonable or unreasonable depending on how it resolved factual disputes), with *id.* at 800–01 (Trott, J., dissenting in part and concurring in part) ("The threshold question at the summary judgment stage of whether or not an officer's actions were objectively reasonable under the Fourth Amendment is 'a pure question of law,' not a question of fact reserved for a jury. Included in this 'pure question of law' is whether a suspect's actions have risen to a level warranting deadly force. In handing down this ruling, the *Scott* Court explicitly rejected

that the question of whether it was feasible for an officer to give a warning before shooting a suspect was not a question of fact, but a question of law—“a legal conclusion drawn from facts.”²⁶⁹ The court recognized that there is a difference of opinion about who should decide the question of the reasonableness of the officer’s actions, but concluded that “the opinion that matters is the Supreme Court’s opinion.”²⁷⁰

Recommendation: As it turns out, layering is a good thing if you want to keep warm, or even better if you want to make a chocolate cake, but multiple layers of reasonableness lead to the web of confusion and inconsistency evident in the cases discussed.²⁷¹ I am not sure any amount of tweaking can fix the mess that results from these layers melting into one another. If Justice Scalia’s view in *Scott* is the rule, and if the Eleventh Circuit’s description of the jury function is correct, then, at least with respect to excessive force cases that survive summary judgment and go to trial, the use of special interrogatories should be required. There should be no general verdict asking whether the plaintiff has proved by a preponderance of the evidence that an officer has used excessive or unreasonable force. That would also mean that the jury would receive no instructions on the law. What would be the point? They would just be asked particular factual questions needed for the judge to decide the ultimate question of reasonableness. If the judge determined the conduct was objectively unreasonable, the judge would proceed to address the qualified immunity question based on whether a reasonable officer would have understood that the conduct he engaged in, as found by the jury, violated law that was clearly established at the time.

I think Justice Scalia’s view presents serious Seventh Amendment²⁷² concerns. *Saucier* did not remove from the jury the factual question of objective reasonableness as to the use of force. It reserved the merits question for the

Justice Stevens’s dissenting view that the objective reasonableness of an officer’s actions should always be a question for the jury.” (citations omitted) (quoting *Scott*, 550 U.S. at 381 n.8)).

269 *Williams v. Deal*, 659 F. App’x 580, 601 (11th Cir. 2016) (per curiam).

270 *Id.* at 601 n.16. *Williams*, although unreported, was a lengthy opinion in which the panel noted its efforts to confront any implicit biases or “unconscious priors” that might influence its decisionmaking in the case. *Id.* (first citing Kahan, *supra* note 195, at 843; and then citing RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 17 (2016)) (internal quotation marks omitted).

271 In *Saucier*, Justice Ginsburg warned of such confusion:

The Court today tacks on to a *Graham* inquiry a second, overlapping objective reasonableness inquiry purportedly demanded by qualified immunity doctrine. The two-part test today’s decision imposes holds large potential to confuse. Endeavors to bring the Court’s abstract instructions down to earth, I suspect, will bear out what lower courts have already observed—paradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?

Saucier v. Katz, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring in the judgment).

272 The Seventh Amendment provides:

jury while adding the layer of *legal* reasonableness to the qualified immunity determination. The confusion that results from the reasonableness layering should be sorted out, preferably by clarifying that jurors are entitled to determine historical facts and draw inferences from those facts. Questions such as whether an officer made a reasonable mistake of fact when he perceived a firearm instead of a cell phone or whether a warning was feasible before using deadly force are, in my opinion, classic questions for a jury to decide, not a judge. The judge's role should be confined to the second prong of the immunity analysis involving the state of the law that existed at the time of the challenged conduct and whether the law was sufficiently clear to give a reasonable officer notice that his conduct, as found by the jury, was unlawful. On the merits prong, the judge should instruct the jury on the *Graham* factors and let the jury decide whether the officer's conduct was objectively reasonable under the Fourth Amendment.

IV. TIME TO CHANGE THE MESSAGE

The qualified immunity doctrine hardly monopolizes the field of confusion in Section 1983 litigation. As I have written elsewhere,²⁷³ the “maze” that judges and litigants confront with respect to claims against local governments has been equally frustrating for all concerned. In *Monell v. Department of Social Services*,²⁷⁴ the Court reexamined the legislative history of Section 1983 that it had interpreted as totally precluding municipal liability in *Monroe v. Pape*,²⁷⁵ and concluded that local government entities *could* be held liable under the statute for constitutional violations caused by the entity's own policies or customs, including acts or edicts of final policymakers.²⁷⁶ But the

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

273 Blum, *supra* note 45.

274 436 U.S. 658 (1978).

275 365 U.S. 167 (1961), *overruled by Monell*, 436 U.S. 658.

276 See *Monell*, 436 U.S. at 690–91. One rather perverse intersection of qualified immunity with municipal liability doctrine is exemplified by cases holding that, although municipalities are not entitled to qualified immunity, if an individual officer prevails on the clearly established law prong of the immunity analysis, a government entity cannot be held liable on a “failure to train” claim because it could not have been deliberately indifferent under *City of Canton v. Harris*, 489 U.S. 378 (1989), in not training as to the violation of a right that was not clearly established. For examples of such cases, see *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017) (“The absence of a clearly established right spells the end of this *Monell* claim.”); *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 992 (8th Cir. 2015) (“As it was not clearly established in July 2009 that force resulting in only *de minimis* injury could violate the Fourth Amendment, the City did not act with deliberate indifference by failing to train its officers that use of a Taser in these circumstances was impermissible.”); *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) (per curiam) (“[O]ur rationale here for granting qualified immunity to the

Court also held that Congress had rejected the suggestion that municipal corporations might be held liable on a respondeat superior basis for constitutional torts of their employees.²⁷⁷ The *Monell* Court's misreading of the legislative history and common law surrounding the rejection of the Sherman Amendment and its implications for respondeat superior liability under Sec-

officers—that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional—also precludes municipal liability.”).

277 *Monell*, 436 U.S. at 691. *Monell*'s rejection of respondeat superior liability for public entities has been extended to private for-profit corporations whose employees commit constitutional torts while engaged in the performance of public functions. See, e.g., *Palakovic v. Wetzel*, 854 F.3d 209, 232 (3d Cir. 2017) (“To state a claim against a private corporation providing medical services under contract with a state prison system, a plaintiff must allege a policy or custom that resulted in the alleged constitutional violations at issue.”); *Pyles v. Fahim*, 771 F.3d 403, 410 n.23 (7th Cir. 2014) (“Although Wexford is a private corporation, we analyze claims against the company as we would a claim of municipal liability.”); *Rouster v. County of Saginaw*, 749 F.3d 437, 453 (6th Cir. 2014) (“Private corporations that ‘perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting under color of state law.’ However, private corporations cannot be held liable on the basis of respondeat superior or vicarious liability.” (quoting *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996)) (internal quotation marks omitted)); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (“Every one of our sister circuits to have considered the issue has concluded that the requirements of *Monell* do apply to suits against private entities under §1983. Like those circuits, we see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law.” (citations omitted)). But see *Shields v. Ill. Dep’t of Corr.*, 746 F.3d 782, 789–92 (7th Cir. 2014) (critically examining history, precedent, and policy surrounding application of *Monell* to private corporations, questioning whether private health care provider for prisoners should be able to take advantage of *Monell*, and urging en banc “fresh consideration” of precedent rejecting respondeat superior liability for private corporations providing essential governmental services); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449 (2009) (arguing that rationale for exempting government entities from respondeat superior liability does not justify exempting private corporations from such liability).

In a thoughtful, unpublished response to Frankel's article, Professor Reinert has raised a serious concern as to the power of Congress under Section 5 of the Fourteenth Amendment to impose respondeat superior liability upon either government or private entities. After *City of Boerne v. Flores*, 521 U.S. 507 (1997), such a remedy would arguably have to be construed as necessary to enforcement of a constitutional right as defined by the Court. The question is then posed as to “whether an action against an employer . . . for the violation of the Constitution by an employee [is] an action to enforce the Constitution.” Alex Reinert, *Accounting for the Limitations of Congress’ Enforcement Power: A Response to “Regulating Privatized Government Through § 1983”* (on file with the *Notre Dame Law Review*). While employing a constitutional tortfeasor may not itself be a violation of the Constitution, given the obstacles to relief created by the Court's policy-driven, and arguably “unlawful,” qualified immunity jurisprudence, an argument could be made that respondeat superior liability would satisfy the “congruence and proportionality” requirements of *City of Boerne*, 521 U.S. at 520, and would fall within the “wide latitude” that must be afforded to Congress in devising remedies for constitutional wrongs. Of course, to the extent that the Court might significantly restrict or abandon the qualified immunity defense, the corresponding need for respondeat superior liability as a remedy for constitutional violations may be reduced.

tion 1983 have long been criticized by myself and others.²⁷⁸ I will not repeat those criticisms here. Suffice it to say that rejection of the Sherman Amendment, which would have imposed strict liability on municipalities for acts of private violence committed within their borders by members of the Ku Klux Klan, was *not* a rejection of respondeat superior liability for constitutional torts committed by employees of the local government entity. The Court was just flat out wrong about this.

In *Board of County Commissioners v. Brown*,²⁷⁹ Justice Breyer called for a reexamination of what has become the “highly complex body of interpretive law” that stems from *Monell’s* rejection of respondeat superior for local governments under Section 1983. The Court would be wise to take up that suggestion. As Professor Schwartz has demonstrated, government indemnification of officials found liable under Section 1983 is the norm, not the exception,²⁸⁰ so making respondeat superior the rule would not impose a change in standard operating procedure for those cases in which officers are found to have violated the Constitution and do not prevail on qualified immunity; nor, obviously, would it affect those cases where defendants pre-

278 See, e.g., David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2203 (2005) (“The Sherman Amendment itself said nothing about a city’s § 1983 liability for its employees’ constitutional torts. Instead it would have added a separate section to the Ku Klux Act making cities liable for damages resulting, not from the conduct of their employees, but rather from racially motivated mob violence occurring within the cities’ boundaries.”); Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 *DEPAUL L. REV.* 627, 667 (1999) (“[A]s Justice Stevens has argued, the Court, and not Congress, is responsible for the doctrinal mess that is the *Monell* rule.”); Karen M. Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 *TEMP. L.Q.* 409, 413 n.15 (1978) (arguing that the Court’s rejection of vicarious liability in *Monell* “should not be acknowledged as a legitimate interpretation of congressional intent in 1871”); see also *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 & n.4 (1986) (Stevens, J., concurring in part and concurring in the judgment) (“[B]oth the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.” (citing Blum, *supra*, as well as other Notes and Comments criticizing *Monell’s* rejection of respondeat superior)); *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011) (“For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian) the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are.” (citations omitted)); *Pinter v. City of New York*, 976 F. Supp. 2d 539, 550 n.23 (S.D.N.Y. 2013) (“Pinter correctly notes that questions have been raised about the accuracy of *Monell’s* analysis of Section 1983. . . . If it were within the province of a federal district court to question Supreme Court precedent based on indications of dissension, I might be inclined to do so in this case. But this Court’s task is to apply Supreme Court and Second Circuit law as it stands. As a result, I am constrained to apply *Monell* and its progeny, although I add my voice to the chorus of those who would encourage the Supreme Court to revisit *Monell’s* analysis.” (citations omitted)).

279 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting).

280 See generally Schwartz, *supra* note 22.

vail because there has been no constitutional violation. And officers who would prevail under qualified immunity under the current doctrine would still be protected from exposure to individual liability. What respondeat superior would accomplish is what Congress originally intended: the provision of a remedy for those whose constitutional rights have been violated by those acting pursuant to authority vested in them by the state. Establishing the underlying constitutional violation by a government employee would still be no walk in the park. As I have explained in previous writing:

[T]he need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success in these suits. But, adopting respondeat superior would eliminate the enormous amount of time and resources spent litigating and adjudicating the qualified immunity defense, as well as the hours that presently go into establishing or defeating *Monell* claims.²⁸¹

By adopting the doctrine of respondeat superior in Section 1983 litigation, the Court would not only rectify the mistake it made in *Monell* forty years ago, but it would “fix” the doctrine of qualified immunity by making it largely irrelevant. The Supreme Court has reexamined its own precedents in the context of qualified immunity and Section 1983 a number of times and has made corrections or adjustments to its prior interpretations.²⁸² It is time to take another look at the message Congress intended in the Civil Rights Act of 1871.²⁸³ Correcting the Court’s error in *Monell* and recognizing that respondeat superior was part of the original scheme would be a good first step towards cleaning up the mess of qualified immunity and clarifying the message that Section 1983 was intended to restore, rather than restrict, civil rights.

Professor Rowe’s words in the Issue dedicated to *Rooker-Feldman* are equally applicable here:

[T]he proliferation of lower court case law with many different emphases and some highly questionable decisions suggests that the time may be nigh for the Supreme Court to take an opportunity to clarify the doctrine. Not knowing what the Supreme Court might do if it [reexamines the qualified immunity doctrine], I drop that hint with some trepidation; but the papers in this issue should give the Court much help if it chooses to do so. The academy has done its job, and it is now the Court’s turn.²⁸⁴

281 See Blum, *supra* note 45, at 964. For a more modest but very well-constructed proposal for allowing individuals to sue local governments for police brutality, see generally Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375 (2018).

282 See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 234 (2009) (abandoning *Saucier*’s mandatory two-step analysis for qualified immunity); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) (jettisoning the “subjective” prong of the qualified immunity analysis that was recognized under *Wood v. Strickland*, 420 U.S. 308 (1975)); *Monell*, 436 U.S. at 701 (overruling in part *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent it completely immunized local governments from suit under § 1983). See generally Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018).

283 Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13.

284 Rowe, *supra* note 26, at 1084 (footnote omitted).

