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QUALIFIED IMMUNITY DEVELOPMENTS: NOT MUCH *HOPE* LEFT FOR PLAINTIFFS

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I. INTRODUCTION: RECENT TRENDS IN THE QUALIFIED IMMUNITY DEFENSE

This Article highlights important developments in the qualified immunity defense to Section 1983 claims. The focus is on recent Supreme Court decisions and the fallout from such decisions in the lower courts. First, however, we tackle the Supreme Court's recent expansion of absolute immunity to grand jury witnesses, and its impact on the application of qualified immunity. Second, consideration is given to the Court's newfound willingness to provide qualified immunity to private actors engaged in conduct under color of state law. Third, this Article discusses the continued effects of the Supreme Court's reformulation of the qualified immunity analysis that allows lower courts to skip deciding the merits of the constitutional issue and jump to the question of whether the law was clearly established. Finally, this Article discusses recent decisions making it more difficult for Section 1983 plaintiffs to establish that the federal law was clearly established.

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A. The Line Between Absolute and Qualified Immunity Since *Rehberg*

PROFESSOR BLUM: A discussion about significant developments in the landscape of qualified immunity would not be complete without a few words about the Supreme Court's most recent case on absolute immunity and the impact that case might have on the line drawn between absolute and qualified immunity in certain circumstances. This past Term, in *Rehberg v. Paulk*,¹ the Supreme Court clarified that the absolute immunity traditionally afforded to trial witnesses² extends to grand jury witnesses as well.³ Paulk was a chief investigator in a local district attorney's office.⁴ His testimony before a grand jury on three different occasions was instrumental in bringing about three different indictments against Mr. Rehberg, each of which was ultimately dismissed.⁵ The Court rejected the argument that Paulk should be treated as a "complaining witness," and thus entitled to only qualified immunity.⁶ Noting that "testifying, whether before a grand jury or at trial, was not the distinctive function performed by a complaining witness,"⁷ the Court concluded that a law enforcement officer who testifies before a grand jury is performing a function quite different from the function of applying for an arrest warrant or the decision to initiate a prosecution.⁸ In holding that absolute immunity would protect grand jury witnesses from Section 1983 claims based on their grand jury testimony, the Court also warned that "this rule may not be circumvented by claiming that a Grand Jury witness conspired to present false testimony, or by using evidence of the witness's testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution."⁹

¹ 132 S. Ct. 1497 (2012).

² See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (holding that police officers are entitled to absolute immunity for claims brought pursuant to Section 1983 arising out of allegedly perjured testimony at criminal trials).

³ *Rehberg*, 132 S. Ct. at 1505. ("The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses.")

⁴ *Id.* at 1500.

⁵ *Id.* at 1501.

⁶ *Id.* at 1507 n.1 (distinguishing *Kalina v. Fletcher*, 522 U.S. 118, 129-131 (1997), and *Malley v. Briggs*, 475 U.S. 335, 340-345 (1986), where only qualified immunity was provided to law enforcement officers for the filing of false affidavits).

⁷ *Id.* at 1507.

⁸ *Rehberg*, 132 S. Ct. at 1507-08.

⁹ *Id.* at 1506.

Although this language provides for a very expansive protection for all claims based on grand jury witness testimony,¹⁰ two post-*Rehberg* cases suggest windows that may be carved out for plaintiffs to pursue Section 1983 claims, even in cases where grand jury testimony or grand jury witnesses might be implicated.¹¹

In *Sankar v. City of New York*,¹² a district court in New York noted that “*Rehberg* did not alter controlling Second Circuit (and New York) law that an officer’s filing of a sworn complaint is sufficient to satisfy the initiation prong of a malicious prosecution claim.”¹³ Thus, according to the court, the fact that the officer in this case eventually provided grand jury testimony was not an “all-purpose shield from malicious prosecution.”¹⁴ The court stated that in the event false testimony is provided during the filing of the affidavit, the swearing of the complaint, or the filing of the sworn complaint, an officer is entitled only to the protection of qualified immunity—even if the officer ultimately testifies at a grand jury proceeding.¹⁵ Therefore, despite *Rehberg*’s language, which establishes absolute immunity from claims based on a conspiracy to provide false testimony,¹⁶ law enforcement officials should still be entitled to only qualified immunity for conduct performed as a complaining witness prior to the giving of grand jury testimony.¹⁷

A second case, *Frederick v. New York City*,¹⁸ from the Southern District of New York, involved a motion to unseal selected por-

¹⁰ See, e.g., *Jones v. Dalton*, 867 F. Supp. 2d 572, 584 (D.N.J. 2012) (stating absolute immunity prohibited plaintiff from rebutting presumption of probable cause with evidence that investigator made misrepresentations to grand jury).

¹¹ See, e.g., *Sankar v. City of New York*, No. 07 CV 4726(RJD)(SMG), 2012 WL 2923236, at *3 (E.D.N.Y. July 18, 2012) (granting only qualified immunity on malicious prosecution claim for police officer who filed the initial sworn complaint and who also subsequently testified at grand jury); see also *Frederick v. New York City*, No. 11 Civ. 469(JPO), 2012 WL 4947806, at *4, *6 (S.D.N.Y. Oct. 11, 2012) (suggesting grand jury testimony could be used to support a malicious prosecution claim against someone other than the person who provided the grand jury testimony).

¹² No. 07 CV 4726(RJD)(SMG), 2012 WL 2923236 (E.D.N.Y. July 18, 2012).

¹³ *Id.* at *3.

¹⁴ *Id.*

¹⁵ *Id.* The grand jury testimony was inadmissible in that case; additionally, if the officer did, in fact, do something prior to the grand jury to warrant a malicious prosecution claim, the filing of the sworn complaint remains a basis for a malicious prosecution claim. *Id.*

¹⁶ *Rehberg*, 132 S. Ct. at 1506 (“This rule may not be circumvented by claiming that a Grand Jury witness conspired to present false testimony . . .”).

¹⁷ *Sankar*, 2012 WL 2923236, at *3.

¹⁸ No. 11 Civ. 469(JPO), 2012 WL 4947806 (S.D.N.Y. Oct. 11, 2012).

tions of an eyewitness' grand jury testimony to support a malicious prosecution claim against the arresting officers, not the witness.¹⁹ In *Frederick*, after the witness of a drive by shooting told the police he could not identify the shooter or driver and failed to identify anyone in a photo array, the police brought the witness to a lineup where he identified a man as the shooter.²⁰ The man was arrested under the theory that he was a driver, not a shooter; however, all charges were dropped three days later.²¹

Here, the court drew an important distinction between the protection for a defendant's grand jury testimony and the grand jury testimony of a different witness.²² The court stated that it would examine the testimony in camera to decide whether to unseal it, but if the testimony was unsealed, it could only be used against the defendant police officers in the malicious prosecution claim, not against the grand jury witness.²³ Thus, under *Frederick*, *Rehberg* does not preclude the use of grand jury testimony to support all Section 1983 claims, such as those against a police officer for malicious prosecution; *Rehberg*'s language that suggests grand jury testimony cannot be used to support a Section 1983 claim merely prohibits the use of such testimony against the witness who gave the testimony.²⁴

The discussion of absolute immunity would not be complete without mentioning a third case involving prosecutorial immunity. The Second Circuit's decision in *Giraldo v. Kessler*²⁵ reflects a trend towards expanding the scope of absolute immunity to protect conduct associated not only with the prosecutorial function, but conduct typically viewed as investigative. In *Giraldo*, a New York state senator, Hiram Monserrate, went to an emergency room with a female companion, Karla Giraldo, because of a cut on Giarldo's eye.²⁶ Despite Monserrate's claim that such injuries resulted from a glass accidentally breaking, domestic violence was suspected, and he was arrested.²⁷ Giraldo supported Monserrate's story and stated that she did

¹⁹ *Id.* at *1, *2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *4.

²³ *Frederick*, 2012 WL 4947806, at *14.

²⁴ *Id.* at *3, *4.

²⁵ 694 F.3d 161 (2d Cir. 2012).

²⁶ *Id.* at 164.

²⁷ *Id.*

not want to talk to the police.²⁸ However, despite her unwillingness, the police continued to question her at the hospital, brought her to a police precinct to have her sign a statement, and brought her, against her will, to the District Attorney's office for two more hours of interrogation.²⁹

In response, Giraldo filed a claim against the assistant district attorneys who interrogated her, alleging that she was “ ‘unlawfully detained, held against her will and maliciously interrogated’ . . . in violation of her right to be free from unreasonable seizures”³⁰ Although the prosecutors’ challenged conduct could be viewed as investigative, the court concluded that once Monserrate had been arrested, the questioning of Giraldo was clearly in preparation for and in furtherance of the court proceeding, and thus the prosecutors were entitled to absolute immunity for that conduct.³¹ “While questioning an important witness may accurately be described as investigative, appellants’ interview was an integral part of appellants’ advocacy function as prosecutors protected by absolute immunity.”³² This case serves as an extreme application of absolute immunity because the statements were made during an investigative stage, in which the police were still gathering evidence to support probable cause for an arrest they had made.³³

DEAN CHEMERINSKY: The result of *Giraldo* illustrates the recent trend by the Supreme Court to provide absolute immunity for prosecutors. The Supreme Court has consistently drawn a distinction between investigative and prosecutorial acts in terms of when there is absolute immunity for prosecutors. For example, in the cases of *Burns v. Reed*³⁴ and *Buckley v. Fitzsimmons*,³⁵ the Court held that prosecutors are entitled to absolute immunity for prosecutorial, but not for investigative or administrative acts.³⁶ On the other hand, in

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Giraldo*, 694 F.3d at 164.

³¹ *Id.* at 167. The police said the arrest occurred before the intensive questioning of the woman, and it was the reason they arrested Monserrate. *Id.* But, the police were still essentially in the investigative stage. *Id.*

³² *Id.*

³³ *Giraldo*, 694 F.3d at 166-67.

³⁴ 500 U.S. 478 (1991).

³⁵ 509 U.S. 259 (1993).

³⁶ *Burns*, 500 U.S. at 496; *Buckley*, 509 U.S. at 278.

Van De Kamp v. Goldstein,³⁷ a prosecutorial immunity case, the Supreme Court stated that even administrative decisions that affect subsequent events in the courtroom should be protected by absolute prosecutorial immunity.³⁸ Therefore, if certain acts relate to what is going to occur at trial, then absolute prosecutorial immunity is available for prosecutorial conduct that relates to courtroom events.³⁹

PROFESSOR BLUM: In sum, recent decisions from both the Supreme Court and the Second Circuit suggest that absolute immunity will be applied quite broadly to protect grand jury witnesses from civil rights claims based on their grand jury testimony, and to protect prosecutors who engage in administrative or investigative conduct that can be linked to their ultimate prosecutorial function in the courtroom.⁴⁰

II. QUALIFIED IMMUNITY AND PRIVATE ACTORS SINCE *FILARSKY*

Another recent development in the qualified immunity defense to Section 1983 claims is the Court's recent grant of qualified immunity to private actors working with the government. In *Wyatt v. Cole*,⁴¹ the Supreme Court held that a private person, who had acted in conjunction with a sheriff in invoking a state replevin statute to allegedly deprive the plaintiff of property without due process, was not

³⁷ 555 U.S. 335 (2009).

³⁸ *Id.* at 349.

³⁹ Ephraim Unell, *A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 963 (2010) ("This decision [*Van De Kamp*] has implications for cases addressing the investigatory function because, in classifying administrative actions that relate to trial as protected prosecutorial functions, it implies that investigatory acts, which by definition relate to trial, are protected as well."). To resolve this, the Court must consider earlier cases that drew a bright line distinction between investigative and prosecutorial. *See, e.g., Burns*, 500 U.S. at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct."); *Buckley*, 509 U.S. at 276 ("A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as preparation for a possible trial When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

⁴⁰ *See generally* Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1024, 1049 (2012) (discussing the Court's trend in granting absolute and qualified immunity).

⁴¹ 504 U.S. 158 (1992).

entitled to the qualified immunity defense available to the government official.⁴² Subsequently, the Supreme Court, in *Richardson v. McKnight*,⁴³ held that prison guards who were employed by a private prison management firm and assumed to be acting under color of state law, were not entitled to qualified immunity from prisoners' Section 1983 claims.⁴⁴ The Court found no " 'firmly rooted' tradition"⁴⁵ of qualified immunity for privately employed prison guards and no public policy concerns driving a qualified immunity defense where private employees performed with no government supervision, and private for-profit employers had market incentives to monitor and avoid improper conduct by employees.⁴⁶ In the Court's last Term, however, both *Wyatt* and *Richardson* were distinguished in *Filarsky v. Delia*,⁴⁷ which raised the issue of whether a private attorney retained by a city to conduct an internal affairs investigation was entitled to qualified immunity.⁴⁸

In *Filarsky*, a firefighter, Nicholas Delia, was suspected of feigning illness to receive disability benefits and to get time off from work to make improvements to his home.⁴⁹ The city hired a private attorney, who specialized in employment and labor law, to assist in the investigation.⁵⁰ The investigators and attorney went to Delia's house and, without a warrant, requested to go inside to search for evidence to prove he was not making improvements, but Delia refused.⁵¹ Claiming a violation of his Fourth Amendment rights, Delia sued the city, the fire department, and the private attorney.⁵² In response, the private attorney claimed qualified immunity.⁵³ The Court held that the private attorney who had worked with the government in such a capacity was entitled to the same immunity as a full-time em-

⁴² *Id.* at 168.

⁴³ 521 U.S. 399 (1997). The opinion was 5-4, with Justice Breyer writing for the majority, joined by Justices Stevens, O'Connor, Souter, and Ginsburg. See also Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 483 (2011).

⁴⁴ *Richardson*, 521 U.S. at 402.

⁴⁵ *Id.* at 404.

⁴⁶ *Id.* at 409.

⁴⁷ 132 S. Ct. 1657 (2012).

⁴⁸ *Id.* at 1660.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Filarsky*, 132 S. Ct. at 1661.

⁵³ *Id.*

ployee of the government.⁵⁴ Therefore, in some cases, a private actor may be entitled to qualified immunity.⁵⁵

Although some circuits had granted qualified immunity for private citizens acting in the capacity of a public official prior to *Richardson*,⁵⁶ very few have since *Richardson*.⁵⁷ Thus, since *Filarsky*, it is unclear whether private actors acting under color of state law and vulnerable to suit under Section 1983 are entitled to qualified immunity.⁵⁸

PROFESSOR SCHWARTZ: In my opinion, *Richardson* and *Filarsky* are inconsistent because in *Richardson* the Court emphasized that there was no direct government supervision over the prison guards,⁵⁹ but that was true of the attorney in *Filarsky* as well.⁶⁰ Additionally, there was profit-making incentive for the attorney in *Filarsky*, assuming he was hired for profit, just as there was profit incentive for the prison company in *Richardson*, which was critical to

⁵⁴ *Id.* at 1667-68.

⁵⁵ *Id.* at 1667.

⁵⁶ *See, e.g.*, *Eagon Through Eagon v. City of Elk City*, 72 F.3d 1480, 1490 (10th Cir. 1996) (holding private citizen employed as event chairman was entitled to qualified immunity); *Warner v. Grand Cnty.*, 57 F.3d 962, 967 (10th Cir. 1995) (holding private actor who performed strip search of female detainee at request of sheriff was entitled to qualified immunity); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir. 1995) (holding a private physician whose employer provided medical services to a prison was entitled to qualified immunity); *Frazier v. Bailey*, 957 F.2d 920, 929 (1st Cir. 1992) ("We hold, therefore, that individuals . . . under contract with the government, are entitled to raise a qualified immunity defense because they are the functional equivalent of public officials."). *But see* *Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 796 (11th Cir. 1992) (qualified immunity not available for private actor who was "alleged to have acted in concert with public officials for the sole purpose of depriving another of her constitutional rights").

⁵⁷ *See, e.g.*, *Toussie v. Powell*, 323 F.3d 178, 183 (2d Cir. 2003) (denying qualified immunity for a private doctor who was working in a prison); *see also* *Harrison v. Ash*, 539 F.3d 510, 524 (6th Cir. 2008) (holding nurses working for private company that contracted to work in prison were not entitled to qualified immunity based on *Richardson*); *Jensen v. Lane Cnty.*, 222 F.3d 570, 576-80 (9th Cir. 2000) (holding no qualified immunity for privately organized group of psychiatrists under contract to provide psychiatry services to mental health detainees).

⁵⁸ *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES § 9A.03 (4th ed. Supp. 2012) ("Richardson v. McKnight seems like a harder case to distinguish from *Filarsky* because, like *Filarsky*, the private prison guards in *Richardson* were carrying out governmental responsibilities and presumably functioning akin to government employed prison guards. Nevertheless, the *Filarsky* Court brushed *Richardson* aside as a 'narrow' decision.").

⁵⁹ *Richardson*, 521 U.S. at 408-09 ("[I]t never has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction.").

⁶⁰ *Filarsky*, 132 S. Ct. at 1667.

the Court's rejection for the need of qualified immunity for the prison guards.⁶¹ Thus, it appears, *Filarsky* may signal to a new trend: private actors working closely with the government may obtain qualified immunity based on the nature of their relationship with state officials, even if the private actor had independent profit incentive.⁶²

PROFESSOR BLUM: A new trend is likely; but, on the other hand, *Filarsky* may only be an exception to the general rule. Even after *Richardson* and before *Filarsky*, a number of circuits granted qualified immunity to private actors who were working closely with the government in unique, extreme circumstances, such as a one-on-one or closely monitored situation.⁶³ However, it remains unclear how the attorney in *Filarsky* is different from the private prison guards in *Richardson*, and *Filarsky* lacks any of the unique circumstances found in previous exception cases. As a result, it will be important for practitioners in this area to track cases dealing with private actors sued under Section 1983 to see where the circuits stand with regard to qualified immunity in this context post-*Filarsky*. For example, in *Currie v. Cundiff*,⁶⁴ one of the first post-*Filarsky* decisions to address the question of *Filarsky*'s impact on qualified immunity for private actors in other contexts, the district court found that "the Supreme Court's recent decision in [*Filarsky*] . . . makes clear that qualified immunity is a defense available in this case,"⁶⁵ involving private health care workers employed by a private corporation under contract with the county to provide health care to inmates at a county jail.⁶⁶ It is truly difficult to distinguish private health care workers from private prison guards, but the court obviously thought that *Filarsky* was sending a message that qualified immunity was the

⁶¹ *Id.*

⁶² *Id.*

⁶³ See, e.g., *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000) ("[B]ecause of the closely monitored, non-profit interrelationship between FIA [Family Independence Agency] and LSS [Lutheran Social Services], we hold that the LSS defendants may assert qualified immunity."); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998) ("[T]he psychiatrists, . . . are for purposes of this case state actors performing in concert with the department. As such, they are . . . eligible for the balm of qualified immunity."); see also *Murphy v. N.Y. Racing Ass'n, Inc.*, 76 F. Supp. 2d 489, 507 (S.D.N.Y. 1999) ("NYRA is not really a market participant subject to competitive market pressures. As such, unlike the prison firm's employees [in *Richardson*], NYRA's trustees need the encouragement and protection of qualified immunity.").

⁶⁴ No. 09-CV-866-MJR, 2012 WL 2711469 (S.D. Ill. July 8, 2012).

⁶⁵ *Id.* at *4.

⁶⁶ *Id.*

default for private actors in such settings and *Richardson* was now the exception. In contrast, in *McCullum v. Tepe*,⁶⁷ the Sixth Circuit held there was no qualified immunity for a physician who was employed by an independent, nonprofit organization to work in a county prison as a psychiatrist.⁶⁸ Therefore, even though *Richardson* involved a for-profit corporation, and the court clearly stated that qualified immunity for employees of for-profit corporations is unnecessary because such corporations are likely to be self-monitoring, the physician's employer's non-profit status was not important to the Sixth Circuit.⁶⁹ *McCullum* is clearly inconsistent with *Currie* and other post-*Filarsky* cases dealing with doctors working in prisons.⁷⁰ There will inevitably be a circuit split on this issue in the near future, and the Supreme Court will undoubtedly revisit the question. Until then, practicing attorneys should keep a close watch on their own circuits to understand that circuit's position on qualified immunity for private actors after *Filarsky*.⁷¹

III. THE NATURE OF QUALIFIED IMMUNITY ANALYSIS POST-PEARSON

PROFESSOR BLUM: Another development worth following in the world of qualified immunity is the approach taken by courts in performing the qualified immunity analysis post-*Pearson*. In *Saucier v. Katz*,⁷² the Supreme Court instructed lower courts to perform a

⁶⁷ 693 F.3d 696 (6th Cir. 2012).

⁶⁸ *Id.* at 704.

⁶⁹ *Id.*; *Richardson*, 521 U.S. at 407.

⁷⁰ See, e.g., *Ford v. Wexford Health Sources, Inc.*, No. 12 C 4558, 2013 WL 474494, at *8 (N.D. Ill. Feb. 7, 2013) (noting that “[w]hether a privately employed medical official working at a prison may invoke qualified immunity is an open question in the Seventh Circuit,” but assuming the individual defendants could seek qualified immunity); *Braswell v. Shoreline Fire Dep’t*, No. C08-924-RSM, 2012 WL 1857858, at *7 (W.D. Wash. May 22, 2012) (“Here, as in *Filarsky*, Dr. Somers is an individual hired by the government to assist in carrying out its work Accordingly, Dr. Somers is entitled to assert qualified immunity.”).

⁷¹ PROFESSOR SCHWARTZ: Yet another interesting point raised by *Filarsky* is that the Supreme Court rendered a qualified immunity decision without first determining whether there was state action. *Filarsky*, 132 S. Ct. at 1668. The Court did the same thing in *Richardson*. 521 U.S. 399. Determining state action should be the first inquiry because it is an essential element of a Section 1983 claim that the defendant acted under the color of state law; if there is no state action, there is no immunity issue. 42 U.S.C. § 1983 (2012). However, despite this, the Court jumped straight to the immunity inquiry with no explanation. See, e.g., *Filarsky*, 132 S. Ct. at 1661-62; *McCullum*, 693 F.3d at 700.

⁷² 533 U.S. 194 (2001).

mandatory two-step analysis when deciding the issue of qualified immunity.⁷³ The analysis required, first, a determination of whether the plaintiff had alleged a violation of a constitutional right under current law: in essence, the “merits” or constitutional question.⁷⁴ Only if the first inquiry were answered in the affirmative were courts to turn to the second inquiry, the qualified immunity prong, which requires the plaintiff to show that the pertinent law was *clearly established* at the time of the defendant’s conduct so that a reasonable official would have understood that his or her conduct violated that clearly-established right.⁷⁵

After much resistance to and criticism of *Saucier*’s mandatory approach, the Supreme Court, in *Pearson v. Callahan*,⁷⁶ provided lower courts with the freedom to avoid the merits question, allowing them instead to go directly to the second prong of the immunity inquiry.⁷⁷ *Pearson*, decided in 2009, involved a confidential informant, not a police officer, who went to a drug dealer’s house and signaled the police to enter during a drug deal.⁷⁸ The police did not have a warrant, but they contended that the consent given to the confidential informant to enter the house operated as consent for the police.⁷⁹

⁷³ *Id.* at 200.

⁷⁴ *See id.* (“[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level . . .”).

⁷⁵ *Id.* at 201-02 (emphasis added).

⁷⁶ 555 U.S. 223 (2009).

⁷⁷ *See, e.g.,* *Hilton v. Wright*, 673 F.3d 120, 126 (2d Cir. 2012) (“*Pearson* freed courts from the mandatory nature of *Saucier*’s two-step process and allowed them to do the second, and often dispositive, step first.”); *see also* *Costello v. City of Burlington*, 632 F.3d 41, 51 (2d Cir. 2011) (“*Saucier*’s two-step framework, while often helpful, is not mandatory . . .”); *Ammons v. Wash. Dept. of Soc. & Health Serv.*, 648 F.3d 1020, 1026 (9th Cir. 2011) (“[W]e first examine the clearly established law with respect to the alleged Fourteenth Amendment violation, and then determine whether the facts before us support such a violation.”); *Haley v. City of Boston*, 657 F.3d 39, 47 (1st Cir. 2011) (“Because the answer to the second of the two qualified immunity inquiries required by *Pearson* is plain, we . . . proceed directly to the question of whether the specific right upon which the claim hinges was clearly established . . .”); *Moldowan v. City of Warren*, 570 F.3d 698, 720 (6th Cir. 2009) (“In light of *Pearson*, . . . we are free to consider those questions in whatever order is appropriate in light of the issues before us.”).

⁷⁸ *Pearson*, 555 U.S. at 227.

⁷⁹ *Id.* at 229. The doctrine of consent-once-removed is accepted in virtually all circuits for an undercover police officer who is allowed into a house and then signals other officers, but there was some question among the circuits about whether the consent-once-removed doctrine applied when it was not a police officer but a confidential informant who was given the consent. John F. Decker & Kathryn A. Idzik, *Disguising a New Exception to the Warrant Requirement: An Examination of the Consent-Once-Removed Doctrine and Its Hollow Justi-*

The Tenth Circuit held the police did not have consent to enter, the entry was a violation of clearly established Fourth Amendment law, and that the police were not entitled to qualified immunity.⁸⁰ After asking the parties to brief the issue of whether *Saucier*'s two-step analysis should continue to be mandatory, the Supreme Court decided the first step was no longer mandatory, vacated the Tenth Circuit's decision, and granted the police officers qualified immunity based exclusively on the second prong of the analysis.⁸¹ After *Pearson*, lower courts are free to use their discretion.⁸² Hence, in appropriate cases, courts may go directly to the second prong.⁸³

A. The Supreme Court's Avoidance of the Merits Inquiry

Two recent post-*Pearson* cases reflect the tendency of the Supreme Court to favor bypassing the merits prong of the qualified immunity test, thus leaving unsettled constitutional issues raised in the context of qualified immunity. First, in *Messerschmidt v. Millender*,⁸⁴ a warrant was issued to search a home for any weapons and indicia of gang membership.⁸⁵ Questions regarding the constitutionality of the search and warrant were raised.⁸⁶ Although the incident that

fications, 61 DRAKE L. REV. 127, 156, 203 (2012) (noting that most jurisdictions have expressly adopted the doctrine of consent-once-removed and most other jurisdictions have developed a similar doctrine).

⁸⁰ Callahan v. Millard Cnty., 494 F.3d 891, 899 (10th Cir. 2007), *rev'd*, *Pearson*, 555 U.S. 223.

⁸¹ *Pearson*, 555 U.S. at 245. While this author agrees with much of the criticism that had been directed towards *Saucier*'s mandatory "merits-first" approach to qualified immunity analysis, *Pearson* was a case where it would have made sense to address the merits question. The issue was not particularly fact driven, and it would have been helpful and instructive to law enforcement agencies and citizens to have a definitive answer to the question of whether consent given to a confidential informant operates as consent to officers entering the house without a warrant. Nevertheless, the Supreme Court declined to answer that first question, instead going directly to the second question, and holding that there was qualified immunity. *Id.*

⁸² *Id.* at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

⁸³ *Id.*

⁸⁴ 132 S. Ct. 1235 (2012).

⁸⁵ *Id.* at 1241.

⁸⁶ *Id.* PROFESSOR SCHWARTZ: *Messerschmidt* looked at the whole picture in evaluating whether the officer acted in a reasonable manner for the purpose of qualified immunity. *Id.*

provided the grounds for the search warrant resembled a domestic dispute—a young man shooting at his girlfriend after an argument escalated—the police viewed it as gang related.⁸⁷ Additionally, even though a particular gun was used, the warrant authorized the police to search for any weapons and gang-related paraphernalia in the house.⁸⁸

The Supreme Court found the validity of the warrant under the Fourth Amendment was not an issue.⁸⁹ Rather, the question was whether the police were entitled to immunity even if the warrant should not have been issued.⁹⁰ Here, the Court focused on the fact that the officers acted appropriately in many respects;⁹¹ they sought and got approval for the warrant application from a superior and a deputy district attorney, and they went before a judge to get the warrant.⁹² Although the fact that a warrant was issued does not in itself

⁸⁷ *Id.*

⁸⁸ *Messerschmidt*, 132 S. Ct. at 1243. DEAN CHERMERINSKY: The majority opinion is that it would be permissible to do the search for the purpose of gathering evidence for impeachment only. Generally, the focus of searches by the police is gathering information to use in a prosecution, and this is the only instance in which the Supreme Court has stated that a search is permissible, but only to gather information for impeachment at trial. *See id.* at 1248 (stating that “evidence demonstrating Bowen’s membership in a gang might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial”); *see also id.* at 1256 (Sotomayor, J., dissenting) (stating the Court has never treated searches differently for impeachment purposes and to do so would allow the police to search almost anyone simply by saying it is for impeachment); *Id.* at 1252 (Kagan, J., concurring) (stating support for validity of search for weapons, but “for all gang-related items . . . I would not award qualified immunity to Messerschmidt and his colleagues for this aspect of their search”).

⁸⁹ *Id.* at 1249 (“Whether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide.”).

⁹⁰ *Messerschmidt*, 132 S. Ct. at 1250.

⁹¹ *Id.* at 1249-50 (noting officers sought approval from a superior and a warrant).

⁹² *Id.* at 1249. PROFESSOR SCHWARTZ: Additionally, officers are typically given the benefit of the doubt, because an officer may have acted unreasonably under the Fourth Amendment but nevertheless, may be found to have acted reasonably for the purpose of qualified immunity. *See, e.g., Moore v. Andreno*, 505 F.3d 203, 215-16 (2d Cir. 2007) (holding defendant’s actions were unreasonable in terms of the Fourth Amendment, but were reasonable as to qualified immunity); *see also Bendlin, supra* note 40, at 1045 (“Currently, the objective government official merely has to act in a way that is not ‘entirely unreasonable.’”). PROFESSOR BLUM: The fact that an officer got approval from a superior or a warrant will count heavily towards granting qualified immunity but no one factor is determinative. *See Malley*, 475 U.S. at 345 (“We also reject petitioner’s argument that . . . the act of applying for a warrant is per se objectively reasonable.”); *see also Messerschmidt*, 132 S. Ct. at 1249 (focusing on police officer defendant’s actions in obtaining a warrant). *But see Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (“[A] warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid” for the purposes of qualified immunity (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984) (internal quotation marks omitted))). DEAN CHERMERINSKY: Thus, whether the officer is afforded qualified

provide qualified immunity, this case certainly suggests that a warrant is given great weight in supporting a claim of qualified immunity, regardless of whether the Court determined the plaintiff had a constitutional right violated.⁹³ While avoiding the merits question of whether, on the particular facts of the case, there was probable cause to support the scope of the warrant issued, the Court made it clear that reasonable conduct by the police will go a long way towards supporting a finding of qualified immunity.⁹⁴

In *Reichle v. Howards*,⁹⁵ once again, the Court went directly to the second prong. Mr. Howards was arrested after he approached then-Vice President Cheney at a shopping mall in Colorado where Cheney was making a public appearance.⁹⁶ Howards criticized Cheney's policies, touched the Vice President on the shoulder, walked away and was then questioned by secret service agents.⁹⁷ When he falsely denied having touched the Vice President, Howards was arrested.⁹⁸ He sued the responsible secret service officers for violating his Fourth and First Amendment rights, claiming that his arrest was in retaliation for his critical comments about the Vice President.⁹⁹ Ultimately, Howards did not challenge the determination that there was no Fourth Amendment violation because probable cause existed to arrest him "for making a materially false statement to a federal official."¹⁰⁰ The federal agents, however, sought review of the denial of qualified immunity with respect to Howards' First Amendment claim.¹⁰¹ The Tenth Circuit held that Howards had es-

immunity turns on reasonableness: if the conduct is clearly unreasonable, even if a superior approved it, qualified immunity will not be given. *Malley*, 475 U.S. at 345.

⁹³ Justices Kagan, Sotomayor and Ginsburg all dissented.

⁹⁴ See also *Ryburn v. Huff*, 132 S. Ct. 987, 990, 992 (2012) (per curiam) (Without deciding the merits question, concluding that "reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent.").

⁹⁵ 132 S. Ct. 2088 (2012).

⁹⁶ *Id.* at 2091.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2092.

⁹⁹ *Id.*

¹⁰⁰ *Reichle*, 132 S. Ct. at 2092.

¹⁰¹ *Id.* Because federal agents were sued, the case was brought as a *Bivens* action, not a Section 1983 action. While the Court "has recognized an implied cause of action for damages against federal officials for Fourth Amendment violations," the Court in *Reichle* assumed without deciding that a First Amendment violation could give rise to a claim under *Bivens*. *Id.* at 2093 n.4.

established a material factual dispute as to whether his arrest was motivated by an impermissible purpose and, if so, the law was clearly established in the Tenth Circuit that a retaliatory arrest was unlawful even if supported by probable cause.¹⁰² The Supreme Court granted certiorari “on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards’ arrest so held.”¹⁰³ Leaving the merits question undecided,¹⁰⁴ the Court held the officials were entitled to qualified immunity because the law was not clearly established regarding First Amendment retaliatory arrest claims in cases where there was probable cause for the arrest.¹⁰⁵ Given the current circuit split on the merits question,¹⁰⁶ the Supreme Court will no doubt be urged to revisit the question of retaliatory arrests to clarify whether the existence of probable cause defeats a First Amendment retaliatory arrest claim.¹⁰⁷

B. The Lower Courts’ Avoidance of the Merits Inquiry

The extent of *Pearson*’s negative effect on the development and clarification of constitutional rights is also apparent in lower court decisions, which demonstrate the courts’ willingness to ignore the merits question, leaving the constitutional issue for another day.

¹⁰² *Id.* at 2092.

¹⁰³ *Id.* at 2093.

¹⁰⁴ *Reichle*, 132 S. Ct. at 2093 (electing to address only the second question).

¹⁰⁵ *Id.*

¹⁰⁶ See Randolph A. Robinson II, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENV. U. L. REV. 499, 500 (2012) (stating in *Reichle* “the Court punted on the more important legal issue, thereby insuring a continued circuit split . . . as to the role that probable cause should play in civil suits for retaliatory arrests”).

¹⁰⁷ For post-*Reichle* decisions, see, e.g., *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013) (recognizing a First Amendment retaliatory “booking and jailing” claim even where probable cause existed); *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012) (holding officer had qualified immunity “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’ ”); *Storey v. Taylor*, 696 F.3d 987, 997 (10th Cir. 2012) (“The court below found Storey’s arrest was lawful. It also found that when an arrest is lawful, ‘then there is no but-for causation for a related tort requiring a retaliatory motive.’ Thus, the court applied qualified immunity and granted summary judgment. This result was consistent with [*Reichle*].”); *Veth Mam v. City of Fullerton*, No. 8:11-cv-1242-JST (MLGx), 2013 WL 951401, at *6 (C.D. Cal. Mar. 12, 2013) (noting that “the *Ford* decision makes it apparent that *Reichle* has not cast doubt on the Ninth Circuit’s prior precedents holding that retaliatory arrests supported by probable cause are actionable under § 1983”).

For example, in *Doninger v. Niehoff*,¹⁰⁸ the Second Circuit refused to express an opinion as to whether there was a violation of a student's First Amendment free speech right when she was prohibited from running for senior class secretary in response to a post on the Internet regarding the possible cancellation of a student event and the superintendent's involvement in the upset of plans.¹⁰⁹ The court saw "no need to decide"¹¹⁰ the question of whether the school officials violated plaintiff's constitutional rights, because the First Amendment right was not clearly established at the time.¹¹¹

Similarly, the Sixth Circuit in *Embodry v. Ward*¹¹² left undecided the question of whether the Second Amendment provides a right to bear arms within state parks.¹¹³ Where such a right was not clearly established at the time of the arrest, the officer was entitled to qualified immunity.¹¹⁴ And, in *Hagans v. Franklin County Sheriff*,¹¹⁵ involving a repeated tasing of an individual after he resisted arrest,¹¹⁶ the court avoided the merits question: whether there was a Fourth Amendment violation.¹¹⁷ The court held that the law governing taser use on a suspect who was resisting arrest was not clearly established, and as a result, the officer was entitled to qualified immunity.¹¹⁸ Qualified immunity often arises in cases involving the use of a taser, which is a relatively new technology with very little governing law, and consequently, some courts have jumped to the second prong without resolving whether the use of the taser in the particular situation was unlawful.¹¹⁹ Like the Supreme Court, lower courts too

¹⁰⁸ 642 F.3d 334 (2d Cir. 2011).

¹⁰⁹ *Id.* at 346.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 695 F.3d 577 (6th Cir. 2012).

¹¹³ *See id.* at 581-82 ("No court has held that the Second Amendment encompasses a right to bear arms within state parks Such a right may or may not exist, but the critical point for our purposes is that it has not been established—clearly or otherwise at this point. That suffices to resolve this claim under the Court's qualified-immunity precedents.").

¹¹⁴ *Id.*

¹¹⁵ 695 F.3d 505 (6th Cir. 2012). The court only determined that the police did not violate a well settled law, declining to determine whether an individual has a Fourth Amendment right against the police's use of a taser. *See id.* at 508 ("We opt to answer the easier of the two questions, saving the harder one for another day.").

¹¹⁶ *Id.* at 507.

¹¹⁷ *Id.* at 508.

¹¹⁸ *Id.* at 511.

¹¹⁹ *See, e.g., German v. Sosa*, 399 F. App'x 554, 557 (11th Cir. 2010) ("No case, statute, or principle within the Constitution provides the necessary precedent to clearly establish the

have left constitutional issues unanswered as a result of *Pearson*.

C. Answering the Merits Question Since *Pearson*

Not all courts have avoided the merits inquiry. In *Mattos v. Agarano*,¹²⁰ for example, the Ninth Circuit, sitting en banc, confronted the question of whether the use of a taser violated the Fourth Amendment in the contexts presented in the two cases consolidated for en banc review. One case involved a seven-month pregnant woman who was tased three times in drive stun mode for refusing to sign the back of a speeding ticket.¹²¹ The plaintiff in the companion case, a victim of domestic violence,¹²² was tased, apparently in dart mode,¹²³ when she tried to defuse the situation by stepping between her husband and the police.¹²⁴ The court held that both tasings con-

rights [plaintiff] claims were violated by the [defendant's] use of a taser. Thus, qualified immunity applies"); *Russell v. Wright*, No. 3:11-cv-00075, 2013 WL 74439, at *11 (W.D. Va. Jan. 4, 2013) ("Given the dearth of caselaw on the use of tasers in excessive force cases, particularly within the Fourth Circuit, the court simply cannot say that Wright's use of his taser under these circumstances violated clearly established law. Tasers are still relatively novel devices, and courts across the country continue to grapple with determining their proper role in assisting law enforcement officers."). *But see* *Meyers v. Baltimore Cnty.*, No. 11-2192, 2013 WL 388125, at *8 (4th Cir. Feb. 1, 2013) ("[T]he absence of a judicial decision holding that it is unlawful to use a taser repeatedly and unnecessarily under similar circumstances does not prevent a court from denying a qualified immunity defense."); *Abbott v. Sangamon Cnty.*, 705 F.3d 706, 732 ("[W]e conclude that it was clearly established on June 25, 2007, that it is unlawful to deploy a taser in dart mode against a non-violent misdemeanor who had just been tased in dart mode and made no movement when, after the first tasing, the officer instructed her to turn over."); *Austin v. Redford Twp. Police Dept.*, 690 F.3d 490, 499 (6th Cir. 2012) (" 'Even without precise knowledge that the use of the [t]aser would be a violation of a constitutional right,' on these facts, Morgan 'should have known based on analogous cases that [his] actions were unreasonable.' ") (citation omitted); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) ("[G]eneral constitutional principles against excessive force that were clearly established at the time of the incident between Deputy Eichenberger and Shekleton were such as to put a reasonable officer on notice that tasing Shekleton under the circumstances as presented by Shekleton was excessive force in violation of the clearly established law."); *see generally* Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1344 (2012).

¹²⁰ 661 F.3d 433 (9th Cir. 2011) (en banc).

¹²¹ *Id.* at 436-37.

¹²² *Id.* at 438.

¹²³ For a description of the difference between dart mode and drive stun mode, see, e.g., *Abbott*, 705 F.3d at 725. A major difference is that the use of the taser in dart mode will subject the victim to temporary paralysis of the muscles, overriding the victim's central nervous system. The use of the taser in drive stun mode inflicts temporary pain in order to achieve compliance with the officer's commands, but does not result in paralysis of the muscles. *Id.*

¹²⁴ *Mattos*, 661 F.3d at 439.

stituted a violation of the plaintiffs' constitutional rights, but the officers were entitled to qualified immunity because the law at the time of both incidents was unclear as to what level of force was involved with taser use, on what constituted a significant level of force, or under what circumstances a taser could be used.¹²⁵

When a court of appeals addresses the merits question and declares a constitutional right has been violated, but the defendant prevails on the qualified immunity prong of the analysis, an interesting problem is presented. May the defendant, the prevailing party in the court below, seek review in the Supreme Court of the merits question that was decided in the plaintiff's favor? While the defendant officials whose conduct has been deemed unconstitutional are shielded from liability in the case decided, future conduct under similar circumstances will be governed by the newly declared constitutional standard and qualified immunity will not be afforded. For example, in *Mattos*, police officials may not have agreed with the Ninth Circuit's decision that the taser use was unconstitutional, even though the officers were relieved of liability by a finding of qualified immunity.¹²⁶

The Supreme Court provided instruction on this issue in *Camreta v. Greene*.¹²⁷ In *Camreta*, a police officer and a social worker removed a child from her classroom to investigate suspected abuse at home.¹²⁸ The issue was whether this "seizure" and questioning required a warrant under the Fourth Amendment or whether an exception applied due to the school setting.¹²⁹ The Ninth Circuit held that regular Fourth Amendment doctrine applied, thereby requiring a warrant to remove a child from the classroom and interrogate her.¹³⁰ Nevertheless, the social worker and police officer were given qualified immunity because the law was not clearly established.¹³¹ Subsequently, the defendants, despite prevailing, sought review in the Su-

¹²⁵ *Id.* at 452.

¹²⁶ *See generally id.* (deciding first prong in favor of plaintiff, but granting qualified immunity based on second prong).

¹²⁷ 131 S. Ct. 2020 (2011). The Court addressed the question of whether "government officials who prevail on grounds of qualified immunity [may] obtain our review of a court of appeals' decision that their conduct violated the Constitution . . ." *Id.* at 2026; *see also id.* at 2030 ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party . . .").

¹²⁸ *Id.* at 2027.

¹²⁹ *Id.* at 2026.

¹³⁰ *Camreta*, 131 S. Ct. at 2027.

¹³¹ *Id.*

preme Court as to the holding that a warrant is required under such circumstances.¹³²

The Supreme Court held that on rare occasions it will grant certiorari to review the merits question, even though the appealing parties prevailed below.¹³³ However, the Court emphasized that the holding only applied to its own authority to hear such appeals, not the circuit courts.¹³⁴ Circuit courts need not review district court opinions at the behest of defendants who have prevailed on qualified immunity, even if such opinions err on the merits question, because district court opinions do not carry the same precedential authority as opinions from the courts of appeals, and thus cannot serve to clearly establish the law.¹³⁵ Therefore, although courts may be avoiding the merits inquiry with ever-greater frequency, attorneys should be aware of the precedent that may be created by a circuit court's adverse ruling on the merits question, even if qualified immunity is ultimately granted. In *Camreta*, the Court signaled a willingness to review such constitutional determinations.

IV. THE STANDARD FOR ASCERTAINING "CLEARLY ESTABLISHED LAW"

Because qualified immunity is entwined with the question of whether there was "clearly established law" at the time of the challenged action to put a reasonable official on notice that his or her conduct violated the plaintiff's constitutional rights, it is obviously important to figure out what makes the law "clearly established." First, there is the question of what law controls. In *Wilson v. Layne*,¹³⁶ news reporters on a police ride-along were invited to enter a citizen's home during a police search, which was authorized by a warrant.¹³⁷ In this pre-*Pearson* case, the Supreme Court first addressed the merits inquiry: whether it was unconstitutional for the po-

¹³² *Id.*

¹³³ *Id.* at 2032. In this particular case, the issue turned out to be moot because by the time it reached the Supreme Court the child was no longer a child, but had already grown and moved out of the state and clearly would not be subjected to such conduct again. In light of its finding of mootness, the Court vacated the Ninth Circuit's holding on the merits. *Id.* at 2035-36.

¹³⁴ *Camreta*, 131 S. Ct. at 2033 ("We emphasize, however, two limits of today's holding. First, it addresses only our own authority to review cases in this procedural posture.").

¹³⁵ *Wheeler v. City of Lansing*, 660 F.3d 931, 940 (6th Cir. 2011).

¹³⁶ 526 U.S. 603 (1999).

¹³⁷ *Id.* at 607.

lice to bring the news reporters into the home of a private citizen.¹³⁸ The Court unanimously held that bringing reporters into a private home, even when the police entry was authorized by a warrant, violated the Fourth Amendment “when the presence of the third parties in the home was not in aid of the execution of the warrant.”¹³⁹ With only Justice Stevens dissenting,¹⁴⁰ the Court went on to conclude that, despite the finding of a constitutional violation by a unanimous Court, the law was not clearly established at the time of the incident such that a reasonable officer would have known that the conduct violated the Fourth Amendment.¹⁴¹ The Court framed the issue as the objective question of “whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.”¹⁴² The Court concluded that general Fourth Amendment principles did not apply with obvious clarity to the officers’ conduct in this case.¹⁴³ Furthermore, “[p]etitioners [had] not brought to [the Court’s] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”¹⁴⁴ Thus, absent any pertinent Supreme Court or controlling circuit court decision or a consensus of persuasive authority from other circuits, the Court concluded that the law was not clearly established such that reasonable officers would have understood that, under these circumstances, entering the house with the reporters violated the Fourth Amendment.¹⁴⁵ While most circuits will consider a consensus of persuasive authority from other circuits in the absence of controlling precedent,¹⁴⁶ both the Second and Eleventh Circuits

¹³⁸ *Id.* at 609, 611.

¹³⁹ *Id.* at 614.

¹⁴⁰ *Id.* at 618 (Stevens, J., concurring in part and dissenting in part).

¹⁴¹ *Wilson*, 525 U.S. at 615.

¹⁴² *Id.*

¹⁴³ *Id.* at 615-16.

¹⁴⁴ *Id.* at 617.

¹⁴⁵ *Id.* at 617-18.

¹⁴⁶ *See, e.g.,* *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (en banc) (stating it is appropriate for courts to look to other circuits when neither the Fifth Circuit nor the Supreme Court has spoken); *Hatch v. Dep’t for Children, Youth & Their Families*, 274 F.3d 12, 23 (1st Cir. 2001) (instructing courts to “look not only to Supreme Court precedent but to all available case law” in determining the contours of a right); *Medina v. City of Den-*

have expressed disapproval of such an approach.¹⁴⁷

Once the relevant source of “clearly established law” has been determined, the more difficult task is figuring out what is required to make the law “clearly established.” It is on this issue that most of the debate takes place, and what has become clear is that the framing of the question may be determinative of the answer.

One problem with negotiating the clearly-established-law terrain is that the Supreme Court, in earlier cases, sent mixed signals as to what is sufficient to give officials notice that certain conduct is unconstitutional. In *Saucier v. Katz*, *Hope v. Pelzer*,¹⁴⁸ and *Brosseau v. Haugen*,¹⁴⁹ the Supreme Court addressed the problem of defining the contours of the right in the Fourth Amendment and Eighth Amendment contexts. In *Saucier*, the Court instructed the Ninth Circuit to construe the clearly established law standard more narrowly and to frame the contours of the right that must be found clearly with more attention to the particular facts of the case before the court.¹⁵⁰ Asking whether it was clearly established that unreasonable use of force violates the Fourth Amendment is framing the question too broadly.¹⁵¹ In *Hope*, the plaintiff alleged that he was handcuffed to a hitching post for seven hours in the hot sun, without bathroom breaks and with no or very little water.¹⁵² The Eleventh Circuit held that the alleged conduct violated the Eighth Amendment, but affirmed the district

ver, 960 F.2d 1493, 1498 (10th Cir. 1992) (“[T]here must be a Supreme Court or Tenth Circuit decision on point, or [there must be] clearly established weight of authority from other courts . . .”). See also *Buckley v. Rogerson*, 133 F.3d 1125, 1129 (8th Cir. 1998) (“In the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits, and district courts.” (quoting *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993))).

¹⁴⁷ See *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) (denying law was clearly established, without looking to other circuits, “because neither this court nor the Supreme Court had recognized such a right at that time”); see also *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (“[O]nly Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can ‘clearly establish’ law in this circuit.”); *Marsh v. Butler Cnty.*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (“When case law is needed to ‘clearly establish’ the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state.”).

¹⁴⁸ 536 U.S. 730 (2002).

¹⁴⁹ 543 U.S. 194 (2004).

¹⁵⁰ See *Saucier*, 533 U.S. at 200 (“[T]he question whether the right was clearly established must be considered on a more specific level than recognized by the [Ninth Circuit] Court of Appeals.”).

¹⁵¹ *Id.* at 201-02.

¹⁵² *Hope*, 526 U.S. at 734-35.

court's grant of qualified immunity on the clearly-established-law prong of the analysis.¹⁵³ The Supreme Court granted certiorari and agreed with the Eleventh Circuit's conclusion that the plaintiff had asserted a violation of the Eighth Amendment.¹⁵⁴ The Court reversed, however, as to the grant of qualified immunity, admonishing the court of appeals for its overly rigid approach to the qualified immunity analysis.¹⁵⁵ The Court instructed the Eleventh Circuit to construe the clearly-established-law standard more liberally, rejecting the requirement of a case on point,¹⁵⁶ instead stating that all that was required was "fair warning" that the challenged conduct was unconstitutional.¹⁵⁷

The Court's language in *Hope* is clearly more "plaintiff-friendly," but since that decision, the "fair warning" formula has been virtually ignored by the Supreme Court.¹⁵⁸ For example, in *Brosseau*, the Court addressed just the second prong of the analysis and summarily reversed the denial of qualified immunity to the defendant officer because the plaintiff could point to no case that "squarely governed" the situation confronting Officer Brosseau in that case, "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are a risk from that flight."¹⁵⁹ More significantly, in *Ashcroft v. al-Kidd*,¹⁶⁰ the Supreme Court recently raised the bar for plaintiffs to overcome the clearly-established-law hurdle. The majority opinion, written by Justice Scalia, added the "every reasonable" phrase to the clearly established law test, surreptitiously changing the game when nobody was looking.¹⁶¹

Thus, defendants seeking qualified immunity will now proffer the *Al-Kidd* formulation of the test and argue that "a government official's conduct violates clearly established law when at the time of

¹⁵³ *Id.* at 735-36.

¹⁵⁴ *Id.* at 737.

¹⁵⁵ *Id.* at 739.

¹⁵⁶ *Id.* at 739, 741.

¹⁵⁷ *Hope*, 526 U.S. at 741.

¹⁵⁸ See generally Daniel K. Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in Bellotte v. Edwards*, 90 N.C. L. REV. 1241, 1252 (2012) (discussing the modern trend among the circuits to require a case on point for law to be clearly established).

¹⁵⁹ *Brosseau*, 543 U.S. at 200-01.

¹⁶⁰ 131 S. Ct. 2074 (2011).

¹⁶¹ *Id.* at 2083.

the challenged conduct the contours of the right are sufficiently clear' that *every* 'reasonable official would have understood that was he is doing violates that right.'"¹⁶² The language "*a* reasonable official" was replaced and is now "every reasonable official,"¹⁶³ a major change in the stringency of the clearly-established-law test.¹⁶⁴ The Court further explained that the "existing precedent must have placed the statute or constitutional question beyond debate."¹⁶⁵ Lower courts have taken note of the Supreme Court's conflicting messages and the current Court's raising of the qualified immunity bar. In a post-*Al-Kidd* en banc decision, *Morgan v. Swanson*,¹⁶⁶ the Court of Appeals for the Fifth Circuit granted qualified immunity to elementary school principals who restricted the distribution of written religious materials in public elementary schools.¹⁶⁷ Writing for the majority of the en banc panel, Judge Benevides made the following observations:

The *Al-Kidd* Court, in admonishing lower courts "not to define clearly established law at a high level of generality," did not discuss or even cite *Hope*, nor other earlier opinions reflecting a similar concern that a damages remedy be available for "obvious" or flagrant constitutional violations. This silence is puzzling given that *Al-Kidd* reversed a Ninth Circuit decision denying immunity in reliance on *Hope*. Adding

¹⁶² *Id.* (emphasis added).

¹⁶³ See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[O]ur cases establish that the right the official is alleged to violate must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that *a* reasonable official would understand that what he is doing violates that right."); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which *a* reasonable person would have known.") (emphasis added).

¹⁶⁴ Although it is surprising that no Justice opposed this addition, it is not clear whether they were unaware of the addition or they actually agreed with it. See generally *Ashcroft v. al-Kidd*, 131 S. Ct. 2074. While sitting in the Second Circuit, Justice Sotomayor wrote a concurrence touching on this distinction. *Walczyk v. Rio*, 496 F.3d 139, 169 (2d Cir. 2007) (Sotomayor, J., concurring) ("Whether reasonably competent officers could disagree about the lawfulness of the conduct at issue, however, is not the same question the Supreme Court has repeatedly instructed us to consider: whether 'it would be clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted.'") (citing *Saucier*, 533 U.S. at 202) (emphasis in original).

¹⁶⁵ *Al-Kidd*, 131 S. Ct. at 2083.

¹⁶⁶ 659 F.3d 359 (5th Cir. 2011) (en banc).

¹⁶⁷ *Id.* at 382.

to the perplexity is that, in its next major “clearly established” opinion after *Hope*, the Supreme Court granted qualified immunity because there were no cases that “squarely govern[ed].” That said, this case does not call on us to decide whether the Court’s statements in *Hope* survive *Al-Kidd*: the constitutional issue in this case is far from “beyond debate,” as evidenced by a large body of oft-conflicting case law and the variety of opinion among members of this Court. We leave for another day the question of whether and when a constitutional violation may be so “obvious” that its illegality is clear from only a generalized statement of law.¹⁶⁸

DEAN CHEMERINSKY: The heightened standard is facially apparent in the test’s phrasing. The *Harlow* standard for thirty years focused on whether it was clearly established law that “a” reasonable officer should know; now it must be law that “every” reasonable officer should know.¹⁶⁹ Now, after *Ashcroft v. Al-Kidd*, it must be a right that is beyond dispute.¹⁷⁰ Why did no Justice challenge this? Perhaps it was that Justice Scalia did not call attention to the shift and the other Justices simply did not notice the change in the law.¹⁷¹

Therefore, courts are able to grant qualified immunity and dismiss Section 1983 claims by requiring an exact case on point from a high level court and the recently implemented heightened standard for proving a clearly established law.

¹⁶⁸ *Id.* at 373 (footnotes omitted). See also *Mattos*, 661 F.3d at 448 (“We cannot conclude . . . that ‘every ‘reasonable official would have understood’ . . . beyond debate’ that tasing Brooks in these circumstances constituted excessive force.”); *De Contreras v. City of Rialto*, 894 F. Supp. 2d 1238, 1252 (C.D. Cal. 2012) (“The Supreme Court recently emphasized the high burden that must be met for a plaintiff to overcome qualified immunity, replacing *Anderson*’s language of ‘a reasonable official’ with ‘every reasonable official’ and stating that ‘existing precedent must have placed the statutory or constitutional question beyond debate.’”). But see *Morgan*, 659 F.3d at 393 (Dennis, J., specially concurring in parts and not joining in other parts) (“The Supreme Court’s recent decisions in *Camreta v. Greene*, 131 S. Ct. 2020 (2011), and *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), do not overrule *Hope*, *Lanier*, or any case in that line.”).

¹⁶⁹ See *Harlow*, 457 U.S. at 818 (requiring a reasonable person); see also *Al-Kidd*, 131 S. Ct. at 2083 (requiring every reasonable official).

¹⁷⁰ *Al-Kidd*, 131 S. Ct. at 2083.

¹⁷¹ See generally *id.*

V. CONCLUSION

PROFESSOR BLUM: Looking through any lens, it is difficult to avoid the conclusion that the Roberts Court is strongly pro-immunity. The scope of absolute immunity has been expanded to include prosecutors engaged in administrative functions¹⁷² and witnesses before grand juries.¹⁷³ With respect to qualified immunity, it appears the Court is ready to afford the protection to various categories of private actors working with government officials, and *Richardson* will be confined to its facts.¹⁷⁴ The standard for determining when the law is clearly established has been ratcheted up. *Hope*, while not overruled, is largely ignored or distinguished by both the Supreme Court and lower courts. Beyond the issue of how one determines whether the law is clearly established, many other questions regarding the qualified immunity defense to Section 1983 claims remain unanswered.¹⁷⁵ For litigators in this area, it is imperative to keep up with the many twists and turns that may result from Supreme Court cases that often confuse more than clarify the issues. One thing is certainly clearly established. Whether you represent plaintiffs or de-

¹⁷² *Van de Kamp*, 555 U.S. at 344.

¹⁷³ *Rehberg*, 132 S. Ct. at 1506.

¹⁷⁴ *Filarsky*, 132 S. Ct. at 1667.

¹⁷⁵ PROFESSOR SCHWARTZ: One of the biggest issues that is unresolved is, does qualified immunity protect reasonable mistakes of fact. See generally Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as It Applies to Fourth Amendment Excessive Force Cases*, 21 *TOURO L. REV.* 571, 577-78, 591-92 (2005). There is Supreme Court authority that it protects only reasonable mistakes of law; however, Justice Kennedy wrote in dissent that it also protects reasonable mistakes of fact. See, e.g., *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) (“While the constitutional violation prong concerns the reasonableness of the officer’s *mistake of fact*, the clearly established prong concerns the reasonableness of the officer’s *mistake of law*.”). But see *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting) (“Our qualified immunity doctrine applies regardless of whether the officer’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”). See also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

PROFESSOR BLUM: Additionally, issues of the role of the judge and the jury as fact finders also arise when there is a dispute regarding qualified immunity and there are material facts that have to be decided by the jury. If the case goes to the jury, there should be special interrogatories given to the jury on the questions of fact. Although the judge ultimately decides the question of law, that decision will be based on the jury’s findings of fact; thus, factual, detailed and specific questions are essential—general interrogatories are not helpful. See *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (“To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question.”).

fendants in these cases, you have a tough job, and staying on top of the law, as murky as it may be, is essential.