

## BEATING QUALIFIED IMMUNITY ON APPEAL

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### INTRODUCTION

Qualified immunity, the doctrine that states government officials must violate clearly established law in order to face liability, is widely seen as making cases against government officials nearly unwinnable.<sup>1</sup> New developments, however, indicate that the doctrine may not be as powerful as many believe. Qualified immunity has come under attack from a cross-ideological spectrum of scholars.<sup>2</sup> And in a recent pathbreaking article, Professor Joanna Schwartz argued that qualified immunity is not an insurmountable real-world bar to suits against government officials.<sup>3</sup>

This contribution builds on Professor Schwartz's work by specifically examining qualified immunity's vulnerability at the appellate level. Even as the Supreme Court has emphasized qualified immunity's breadth, language and decisions from appellate courts have demonstrated discomfort with the doctrine. Examining the implications of this dissonance, this contribution first traces a history of the creation, expansion, and criticism of qualified immunity. Then, it challenges the belief that qualified immunity is nearly unbeatable by demonstrating that circuit courts have been surprisingly willing to reverse qualified immunity grants in recent years. Finally, based on cases where district court grants

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<sup>1</sup> See, e.g., Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 78 (2016) (finding that the "increasingly broad brush" with which the Supreme Court has categorized the qualified immunity defense will likely increase protections for government defendants); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) ("In many ways, qualified immunity's shield against government damages liability is stronger than ever."); Noah Feldman, *Supreme Court Has Had Enough With Police Suits*, BLOOMBERG (Jan. 9, 2017), <https://www.bloomberg.com/opinion/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits> (arguing that Supreme Court jurisprudence on qualified immunity has sent a clear message seeking to insulate government officials from liability); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232 (2006) (arguing the Supreme Court has increasingly treated qualified immunity like absolute immunity—that is, as a total bar on suits against government officials).

<sup>2</sup> See, e.g., Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 124 (1999) (making the progressive critique against qualified immunity's frustration of civil rights law); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 50 (2018) (making the originalist case against qualified immunity by arguing it has no basis in the text of the laws under which officials face liability).

<sup>3</sup> Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) (finding that "contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end").

of qualified immunity have been reversed on appeal, it suggests angles of attack for plaintiffs seeking to defeat the defense.

## I. HISTORY OF THE MODERN QUALIFIED IMMUNITY DOCTRINE

### A. *Establishment*

*Harlow v. Fitzgerald* established the current qualified immunity doctrine.<sup>4</sup> In *Harlow*, former Air Force employee Ernest Fitzgerald alleged that former aides to President Nixon had, while serving in the Nixon administration, conspired to fire Fitzgerald as retaliation for prospective whistleblowing.<sup>5</sup> The Court, after denying the aides' claims to absolute immunity,<sup>6</sup> found that the aides were protected by qualified immunity.<sup>7</sup> Were government officials subject to suit for frivolous claims, the Court explained, it could “dampen the ardor of all but the most resolute [officials] in the unflinching discharge of their duties.”<sup>8</sup> Accordingly, the Court established the two-pronged inquiry that continues to govern qualified immunity today: to be subject to suit, a government official must not only (a) have broken the law, but also (b)

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<sup>4</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The concept of qualified immunity existed before *Harlow* and can reasonably be traced back to *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (discussing a defense in which police officers did not claim absolute immunity, but a more limited immunity for acting in “good faith”). However, because the contours of modern qualified immunity doctrine originated in *Harlow*, this contribution begins with that case.

<sup>5</sup> *Id.* at 804–05. It was important that Fitzgerald sued for damages as qualified immunity is unavailable as a defense against claims for injunctive relief. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009) (“ . . . [Q]ualified immunity is unavailable ‘in a suit to enjoin future conduct . . . .’”) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)).

<sup>6</sup> *Id.* at 813. Absolute immunity bars *all* damage lawsuits against certain officials when they act in an official capacity. A companion case to *Harlow* established that the president enjoys absolute immunity from damage suits. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). This immunity was qualified later in *Clinton v. Jones*, which indicated that absolute immunity for the president does not typically extend to actions taken before assuming office, and it does not serve as an absolute bar to all private suits against the president while he or she is in office. 520 U.S. 681, 694–95, 705–06 (1997). In addition to the president acting in his or her executive authority, absolute immunity attaches to legislators and legislative aides acting in their legislative capacities, *see Gravel v. United States*, 408 U.S. 606, 616 (1972) (arguing that for purposes of immunity, a legislator and her aide must be “treated as one”) (quoting *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (deriving immunity for legislative acts from the Speech or Debate Clause of the Constitution), judicial officers acting within their judicial capacities, *see Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978) (noting that the Court does not hold judges liable for judicial acts), and prosecutors acting within their prosecutorial capacities. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (finding that Section 1983 incorporated prosecutorial immunity under common law tort principles).

<sup>7</sup> *Harlow*, 457 U.S. at 813.

<sup>8</sup> *Id.* at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

that law must have been “clearly established” such that a reasonable official would have known she was acting illegally.<sup>9</sup>

### B. Supreme Court Expansion

A series of Supreme Court decisions subsequently expanded the doctrine,<sup>10</sup> which now attaches to all governmental officials using discretion in their official capacities who do not enjoy absolute immunity.<sup>11</sup> Later cases broadened the language used to describe qualified immunity<sup>12</sup> and shifted the primary focus to defendants’ rights, rather than emphasizing the balance between plaintiff and defendant interests articulated in *Harlow*.<sup>13</sup> Moreover, the Court has emphasized that whether law is clearly established should be construed narrowly, such that even modestly distinct facts in a new case puts government conduct outside of clearly established law.<sup>14</sup> Finally, in *Pearson v. Callahan*, the Court granted lower courts discretion to decide either the actual violation of law prong or clearly established violation prong of qualified immunity first.<sup>15</sup> After *Pearson*, a plaintiff may not clearly establish any law for

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<sup>9</sup> *Id.* at 818–19. The Court concluded this structure was the right one to “balance” the competing values of “damages . . . to protect the rights of citizens” and “the need to protect officials . . . required to exercise discretion.” *Id.* at 807 (citing *Butz v. Economou*, 438 U.S. 478, 504–06 (1978)).

<sup>10</sup> This contribution only briefly discusses the expansion of qualified immunity. For a more detailed account, see generally Kinports, *supra* note 1.

<sup>11</sup> See Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 IND. L. REV. 187, 187–88 (1993) (noting that government officials performing discretionary functions, aside from those with absolute immunity, receive qualified immunity for their conduct). Few officials have absolute immunity; for the full list, see *supra* note 6.

<sup>12</sup> See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (noting, for the first time in a Supreme Court opinion, that the statutory or constitutional question must be ‘beyond debate’ for an official to have violated clearly established law); *id.* (substituting a rule that every reasonable officer would know that what the officer did in the given case violated a clearly established right for a prior rule that a reasonable officer would be so aware).

<sup>13</sup> Compare *Harlow*, 457 U.S. at 807 (emphasizing the balance between defendants’ and plaintiffs’ rights), with *al-Kidd*, 563 U.S. at 735 (saying qualified immunity exists to “shield[] federal and state officials from money damages” without mentioning competing interests of plaintiffs). Additionally, recent decisions have cast doubt on whether clearly established law could exist via persuasive—rather than binding—authority. Compare *al-Kidd*, 563 U.S. at 742 (reaffirming that a consensus of out-of-circuit cases could create controlling authority), with *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (noting that “to the extent” it is possible that a robust number of cases can create persuasive authority, it was not met in that case) (emphasis added). If only binding authority could create clearly established law, it would be even easier for officers to claim that no law was clearly established in a given jurisdiction.

<sup>14</sup> See *al-Kidd*, 563 U.S. at 742 (“We have repeatedly told courts . . . not to define clearly established law at a high level of generality.”).

<sup>15</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Previously, the Court had established that in qualified immunity cases, a court must first determine if the government official had violated a constitutional right, and only then proceed to the second question of

future officials even in defeat, thus perpetuating future plaintiffs' inability to prove illegal conduct was clearly established.

### C. *Criticism and Pessimism*

Criticisms of qualified immunity and its expansion are widespread and cross-ideological.<sup>16</sup> Of concern to progressives, qualified immunity frustrates civil rights claims against many government officials.<sup>17</sup> The doctrine shields police officials from liability even as police violence continues to disproportionately affect communities of color.<sup>18</sup> Justice Sotomayor, thought to be the most liberal member of the current Supreme Court,<sup>19</sup> has critiqued the “one-sided” doctrine as assuring that “palpably unreasonable conduct will go unpunished.”<sup>20</sup>

Moreover, qualified immunity has no textual basis in any congressional statute or constitutional provision; this presents a foundational concern for typically right-leaning textualists and originalists.<sup>21</sup> Indeed, this criticism has made headway with at least one conservative member of the Court: Justice Thomas has written that because qualified immunity has become an excuse for the Court to express

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whether that right was clearly established, in order to clearly establish law for the *next* plaintiff. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>16</sup> *See, e.g.*, Hassel, *supra* note 2, at 124 (making a progressive case against qualified immunity); Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1778 (2016) (arguing that the expansion of qualified immunity to preclude officer liability is particularly damaging given that Section 1983—the leading claim to which qualified immunity serves as a defense—was established specifically to give plaintiffs a means of suing government officials); Baude, *supra* note 2, at 48–49 (making the textualist and originalist case against qualified immunity); Evan Bernick, *It's Time to Limit Qualified Immunity*, GEO. J. OF L. & PUBLIC POLICY BLOG (Sept. 17, 2018) (providing additional evidence that qualified immunity goes beyond protections at common law).

<sup>17</sup> *See* Hassel, *supra* note 2, at 124 (arguing that qualified immunity's doctrinal helpfulness is outweighed by its negative impact on the development of civil rights law).

<sup>18</sup> *See, e.g.*, Lisa Rapaport, *Police Violence Takes Most Years of Life From Youth and People of Color*, REUTERS (May 7, 2018), <https://www.reuters.com/article/us-health-publichealth-police-violence/police-violence-takes-most-years-of-life-from-youth-and-people-of-color-idUSKBN1182JD> (noting that communities of color lose more years of life than whites from police violence despite being a minority of the population).

<sup>19</sup> *See* Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/> (using a metric known as “Martin-Quinn ideology scores” that indicates that Justice Sotomayor is the most liberal member of the current Court).

<sup>20</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

<sup>21</sup> *See* Baude, *supra* note 2, at 50 (noting that Section 1983, the law under which qualified immunity is frequently used as a defense, makes no reference to immunity); Bernick, *supra* note 16 (arguing that the extension of qualified immunity to “good faith” defenses goes beyond immunities at common law). *But see* Aaron L. Neilson and Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1855 (2018) (“We applaud Baude’s efforts to get the law right. But we are not persuaded that his analysis dooms qualified immunity . . .”).

“policy preferences” outside of statutory text or common-law rules, he believes that “in an appropriate case, [the Court] should reconsider [its] qualified immunity jurisprudence.”<sup>22</sup>

Despite this criticism, however, qualified immunity’s favored status in the Supreme Court appears unlikely to change. The Court has repeatedly affirmed the doctrine and has overwhelmingly, though not uniformly, found in favor of defendant officers pleading qualified immunity.<sup>23</sup> Courts are particularly loath to “indulge of unrealistic second-guessing” of police officers who must “act[] in . . . swiftly developing situation[s]” and are therefore generally willing to extend deference to officers at trial.<sup>24</sup> Many believe this means there is little hope for plaintiffs facing qualified immunity.<sup>25</sup>

## II. CIRCUIT COURT SKEPTICISM

Against the perception of qualified immunity’s robustness, Professor Schwartz’s work demonstrated that qualified immunity makes less of a practical difference in litigation than many believe. Schwartz examined a set of cases that showed that in the real world, “qualified immunity is rarely the reason that . . . cases end . . . .”<sup>26</sup> While her work briefly chronicled appeals of qualified immunity grants,<sup>27</sup> Schwartz’ article primarily focused on the relative lack of use of qualified immunity and rarity of grants of motions to dismiss as reasons that qualified immunity “fail[s] to serve its expected role” in protecting defendants from the burdens of pre-trial litigation.<sup>28</sup>

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<sup>22</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring).

<sup>23</sup> In the last twenty years, the Court has issued twenty-four opinions addressing qualified immunity. The Court has found for the defendant in twenty-one of those cases. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam); *Kisela*, 138 S. Ct. at 1154–55; *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Ziglar*, 137 S. Ct. at 1869; *Mullenix v. Luna*, 136 S. Ct. 305, 312 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (per curiam); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015); *Carroll v. Carman*, 574 U.S. 13, 20 (2014) (per curiam); *Lane v. Franks*, 573 U.S. 228, 246 (2014); *Wood v. Moss*, 572 U.S. 744, 764 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 781 (2014); *Stanton v. Sims*, 571 U.S. 3, 10–11 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658, 670 (2012); *Messerschmidt v. Millender*, 565 U.S. 535, 556 (2012); *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 378–79 (2009); *Pearson v. Callahan*, 555 U.S. 223, 243 (2009); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam); *Saucier v. Katz*, 533 U.S. 194, 209 (2001). For more on these cases, *see generally* Kinports, *supra* note 1.

<sup>24</sup> *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

<sup>25</sup> *See generally* Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633 (2013) (detailing various ways in which Supreme Court jurisprudence had made it all but impossible for plaintiffs to win against qualified immunity claims).

<sup>26</sup> Schwartz, *supra* note 3, at 50.

<sup>27</sup> *See id.* at 41.

<sup>28</sup> *Id.* at 48–49.

Building on Schwartz’s work, an examination of qualified immunity’s impact in circuit courts shows that qualified immunity is also not particularly powerful on appeal. Over a recent 800-day period, 104 cases were publicly available in which courts of appeal reviewed district court grants of a qualified immunity defense.<sup>29</sup> Of these cases, twenty-three were overturned on at least one qualified immunity-related issue on appeal.<sup>30</sup> This reversal rate—just over twenty-two percent—indicates that qualified immunity decisions are no less likely to be reversed on appeal than other cases.<sup>31</sup>

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<sup>29</sup> This study used the 800-day sample size to ensure that it examined a sufficiently large number of cases. Specifically, this study examined cases from December 3, 2017 through February 2, 2019, 400 days before and after the most recent Supreme Court decision on qualified immunity. See *Emmons*, *supra* note 23. While the sample showed that qualified immunity defenses were no more likely to avoid reversal than other cases, there was no evidence of any *recent* uptick in reversals of qualified immunity grants (in the last 100, 200, or 400 days of the sample), which the study had also examined in the data. Accordingly, this contribution argues that on balance, the entire period examined shows that qualified immunity reversals are more common than often perceived.

<sup>30</sup> See *Barton v. Martin*, 949 F.3d 938, 947 (6th Cir. 2020); *Ray v. Roane*, 948 F.3d 222, 230 (4th Cir. 2020); *Capp v. County of San Diego*, 940 F.3d 1046, 1058–59 (9th Cir. 2019); *Vanderhoef v. Dixon*, 938 F.3d 271, 281 (6th Cir. 2019); *Hupp v. Cook*, 931 F.3d 307, 321 (4th Cir. 2019); *Partridge v. City of Benton*, 929 F.3d 562, 567 (8th Cir. 2019); *Watson v. Pearson*, 928 F.3d 507, 513 (6th Cir. 2019); *Denwiddie v. Mueller*, 775 F. App’x 817, 820–21 (7th Cir. 2019); *Págan-González v. Moreno*, 919 F.3d 582, 601 (1st Cir. 2019); *Reed v. Palmer*, 906 F.3d 540, 554 (7th Cir. 2018); *Michael v. Trevena*, 899 F.3d 528, 534–35 (8th Cir. 2018); *Ross v. City of Jackson*, 897 F.3d 916, 923 (8th Cir. 2018); *Simon v. City of N.Y.*, 893 F.3d 83, 98 (2d Cir. 2018); *Strausbaugh v. Bacon*, 737 F. App’x 821, 823 (9th Cir. 2018); *Scott v. Becher*, 736 F. App’x 130, 134–35 (6th Cir. 2018); *Lawson v. Gregg*, 733 F. App’x 376, 379 (9th Cir. 2018); *McCoy v. Meyers*, 887 F.3d 1034, 1053 (10th Cir. 2018); *Sims v. Labowitz*, 885 F.3d 254, 265 (4th Cir. 2018); *Cotropia v. Chapman*, 721 F. App’x 354, 361 (5th Cir. 2018); *Keates v. Koile*, 883 F.3d 1228, 1240 (9th Cir. 2018); *Bonivert v. City of Clarkston*, 883 F.3d 865, 878 (9th Cir. 2018); *Scott v. Mid-Del Schs. Bd. of Educ.*, 724 F. App’x 650, 655 (10th Cir. 2018); *Thompson v. Virginia*, 878 F.3d 89, 101–02 (4th Cir. 2017).

<sup>31</sup> The comparison is difficult to make with exactness because of the unique procedural posture of cases on appeal from grants of qualified immunity. Certainly, the overall reversal rate of these decisions (22.12%) is higher than both the overall reversal rate for court of appeals decisions (7.8%) and the relatively higher reversal rate in civil cases (between 11.7 and 14.1%) that are finally decided by a district court. See Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Expose Confirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019), [https://law.emory.edu/elj/\\_documents/volumes/68/online/edwards.pdf](https://law.emory.edu/elj/_documents/volumes/68/online/edwards.pdf).

However, most appeals of qualified immunity grants arise on the procedural posture of a motion to dismiss or a motion for summary judgement. See *infra* note 39. Accordingly, if cases arising under such a posture are more likely to be reversed, the overall rates of reversal at the courts of appeal would be inapposite data to compare to the reversal of qualified immunity claims. However, while some believe summary judgment grants are more likely to be reversed, there is no affirmative evidence for this proposition. See J.S. CECIL & C.R. DOUGLAS, FED. JUDICIAL CTR., SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS 8–9 (1987), <https://www.fjc.gov/sites/default/files/2012/SumJdgPr.pdf> (despite “[c]oncern . . . that the courts of appeals are unsympathetic to summary judgment motions, reversing

Anecdotal examples also indicate that some circuit judges are increasingly skeptical of qualified immunity. While appellate judges writing in a majority opinion must at least appear to apply the Supreme Court’s version of qualified immunity,<sup>32</sup> judges have found it appropriate to “respectfully voice unease” with that jurisprudence in dissent or concurrence.<sup>33</sup> Judges have complained about the sky-high bar that qualified immunity creates for plaintiffs, and the problem with establishing precedential constitutional law when myriad claims are barred by qualified immunity.<sup>34</sup> In one striking example, Fifth Circuit Judge Don Willett initially concurred in upholding a grant of qualified immunity, even while criticizing the doctrine as leaving “wrongs . . . not righted, wrongdoers . . . not reproached, and those wronged . . . not redressed.”<sup>35</sup> Then, upon rehearing en banc, his concurrence morphed into a dissent. The judge launched into an even harsher critique of the doctrine, arguing that it provides for “unqualified impunity” for poorly behaving public officials “as long as [those officials] were the first to behave badly.”<sup>36</sup>

These examples should not be overstated. Explicit judicial criticism of qualified immunity remains infrequent, and no lower court judge has outright refused to apply the doctrine.<sup>37</sup> But such examples demonstrate judicial will to limit qualified immunity’s reach where possible. Paired with numerous appellate reversals of qualified immunity grants, they show that qualified immunity can be beaten on appeal.

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summary judgments in disproportionate numbers,” data from the Second and Ninth Circuits indicates that this concern is likely “based on a misconception”).

Accordingly, the comparison of qualified immunity cases with overall reversal rates has some merit, and qualified immunity reversals appear no *less* likely than other cases to be reversed on appeal.

<sup>32</sup> See *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (noting that appellate courts are bound by their “middle-management” role in the judicial hierarchy).

<sup>33</sup> *Id.*

<sup>34</sup> *Eves v. LePage*, 927 F.3d 575, 591 (1st Cir. 2019) (Thompson, J., concurring).

<sup>35</sup> *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring).

<sup>36</sup> *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019), *petition for cert. filed*, 88 U.S.L.W. 3183 (U.S. Nov. 26, 2019) (No. 19-676). Willett’s full quote chastised qualified immunity as “smack[ing] of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly.” *Id.*

That said, Willett’s instinct to narrow qualified immunity does not mean he has refused to apply the prongs. See *id.* at 477–78 (applying the two-pronged qualified immunity analysis). He has also applied qualified immunity to find it protective of defendants in at least one subsequent case. See *Keller v. Fleming*, No. 18-60081, 2020 WL 831757, at \*1, \*8 (5th Cir. 2020) (finding that a police officer was protected by qualified immunity where he picked up a mentally unstable man, drove him to the county line, and dropped him off, after which the man was subsequently hit by a car and killed).

<sup>37</sup> Nor could a lower court judge do so, given the hierarchy of our constitutional system. See, e.g., *Cole v. Carson*, 935 F.3d 444, 471 (5th Cir. 2019) (Willett, J., dissenting) (noting the requirement that lower court judges apply Supreme Court doctrine).

### III. PATHS FOR PLAINTIFFS FIGHTING QUALIFIED IMMUNITY

Three strategies may be particularly effective for plaintiff-appellants to combat qualified immunity: (A) focusing on procedural posture, (B) segmenting case facts temporally, and (C) establishing facts so outrageous that the “clearly established” law standard is ignored or lowered.

#### A. Focus on Procedural Posture

The Supreme Court has urged lower courts to consider qualified immunity defenses as early as possible in the trial process in order to protect defendants against trial and pretrial burdens.<sup>38</sup> Accordingly, most appeals arise where either (1) summary judgment or (2) a motion to dismiss has been granted for the defendant below.<sup>39</sup>

On appeal from summary judgment, facts are viewed in the light most favorable to the non-moving party—in this context, the plaintiff.<sup>40</sup> So long as the plaintiff can identify at least one material fact that (a) is disputed and (b) would change the outcome of the case if construed in the plaintiff’s favor, a court should reverse a summary judgment grant for the defendant.<sup>41</sup>

On appeal from a motion to dismiss, the defendant is subjected to “a[n] [even] more challenging standard of review than would apply on summary judgment,” as plausible allegations in a complaint that would prove clearly established law was broken are sufficient to continue to trial.<sup>42</sup> Courts have reason to resist granting qualified immunity at such early stages because the district court can “move the case incrementally

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<sup>38</sup> See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (“[Qualified immunity] is meant to give government officials a right, not merely to avoid ‘standing trial,’ but also to avoid the burdens of ‘such *pretrial* matters as discovery . . . .”’) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

<sup>39</sup> Of the twenty-three cases reviewed for this piece, eleven were appealed after a granted motion to dismiss and ten were appealed after summary judgment was granted. One case was appealed after judgment as a matter of law was granted, and one case was appealed after judgment on the pleadings was granted.

<sup>40</sup> See, e.g., *Hupp v. Cook*, 931 F.3d 307, 317 (4th Cir. 2019). *But see* *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (noting that on summary judgment, while “genuine” factual disputes must be viewed in a light most favorable to the non-moving party, this rule gives way where evidence in the record, such as a videotape, plainly contradicts the non-moving party’s version of events).

<sup>41</sup> See, e.g., *Michael v. Trevena*, 899 F.3d 528, 533–34 (8th Cir. 2018) (finding a genuine dispute over what occurred on a videotape concerning a foot injury via automobile sufficient to reverse a summary judgment grant for officers on an unlawful arrest claim).

<sup>42</sup> See *Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018) (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014)). This differs from the summary judgment standard because more record evidence is likely to exist by the time a trial reaches summary judgment that could contradict facts as stated in the plaintiff’s complaint. See *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).



forward” to protect the defendant’s qualified immunity right to avoid trial while not dismissing cases prematurely.<sup>43</sup>

This low burden drove a reversal in *Partridge v. City of Benton*.<sup>44</sup> Even when all parties conceded a child shot by police was carrying a gun and had motioned with the gun in the vicinity of the officer, a dispute as to the direction the child’s gun moved was enough to reverse and remand the case to the district court.<sup>45</sup> Similarly, in *Hupp v. Cook*, summary judgment based on an allegedly improper arrest was reversed because it was unclear if the plaintiff had cursed or was otherwise aggressive even though all agreed she was running towards the officer.<sup>46</sup>

These cases demonstrate that given the procedural advantages plaintiffs enjoy on appeal from a granted motion to dismiss or summary judgment, even minor disputed facts can generate a reversal of qualified immunity grants.

### B. *Segment the Timeline*

Segmenting a case into discrete temporal parts can defeat qualified immunity because developing facts can turn an initially reasonable action into a violation of clearly established law. For example, in *McCoy v. Meyers*, police officers barged into a hotel room and encountered plaintiff McCoy holding a gun.<sup>47</sup> After the officers yelled, “drop the gun!” for 30-45 seconds, McCoy complied and officers subdued him.<sup>48</sup> The officers put McCoy in a chokehold and he went unconscious.<sup>49</sup> The officers then handcuffed McCoy and zip-tied his legs together before reviving him.<sup>50</sup> Finally, they hit McCoy ten more times until he again passed out.<sup>51</sup>

A reasonable observer might think this conduct obviously represents excessive force. However, using even substantial amounts of force on a potentially threatening individual does not violate clearly established law,<sup>52</sup> and the court credited the officers’ argument that McCoy was not subdued when the officers first moved to arrest him (even after McCoy dropped his gun).<sup>53</sup> But the court nonetheless reversed a grant of summary

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<sup>43</sup> *Reed*, 906 F.3d at 548–49 (quoting *Jacobs v. City of Chicago*, 215 F.3d 758, 765 n.3 (7th Cir. 2000)).

<sup>44</sup> *Partridge v. City of Benton*, 929 F.3d 562 (8th Cir. 2019). This case arose under a judgment on the pleadings, but the standard of review (all genuine factual disputes construed in the light most favorable to the non-moving party) is the same under judgment on the pleadings as on summary judgment. *Id.* at 564–65.

<sup>45</sup> *Id.* at 567.

<sup>46</sup> *Hupp v. Cook*, 931 F.3d 307, 320–21 (4th Cir. 2019).

<sup>47</sup> *McCoy v. Meyers*, 887 F.3d 1034, 1039 (10th Cir. 2018).

<sup>48</sup> *Id.* at 1040.

<sup>49</sup> *Id.* at 1040–41.

<sup>50</sup> *Id.* at 1042.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1048–49 (distinguishing McCoy’s case from precedential cases where the suspect was restrained, and substantial force was therefore clearly unreasonable).

<sup>53</sup> *Id.*

judgment for the officers by separating the timeline into two pieces: “pre-restraint” and “post-restraint.”<sup>54</sup> While the officers enjoyed qualified immunity for the “pre-restraint” period, once McCoy was handcuffed and zip-tied, it was clear to any reasonable officer that continued force violated clearly established law.<sup>55</sup>

Similar considerations led to an analogous result in *Bonivert v. City of Clarkston*.<sup>56</sup> In *Bonivert*, officers responded to a domestic violence call.<sup>57</sup> After the suspect refused the officers entry into his home, the officers forced their way through the home’s back door.<sup>58</sup> The court held that such an action might have been reasonable after initially receiving the call.<sup>59</sup> However, after arriving at the scene, the officers had seen and spoken with the people previously in danger—making it clear that there was no exigency justifying forced entry.<sup>60</sup> Accordingly, it was “clearly established” that the officers’ attempts to force their way into the suspect’s home were unreasonable.<sup>61</sup>

These cases show that for plaintiffs, there is power in segmenting factual timelines. Developing facts may change reasonable actions into clearly unreasonable ones, and an officer is not entitled to qualified immunity unless the defense applies *throughout* a given encounter.

### C. Emphasize Egregious Facts

Emphasizing “bad facts” for the opposing party provides a unique opportunity in the qualified immunity context for two reasons. First, where the “unlawfulness of the [defendants’] conduct is sufficiently clear,” the defendant may be liable even if the law broken has not been established by precedential cases.<sup>62</sup> For instance, in *Simon v. City of New York*, the Second Circuit found that an officer who detains a plaintiff for eighteen hours over two days in violation of a witness detention warrant is not entitled to qualified immunity.<sup>63</sup> This conduct was so blatantly illegal that the court did not “need [to] decide” whether the law against

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<sup>54</sup> *Id.* at 1048.

<sup>55</sup> *Id.* at 1049–53.

<sup>56</sup> *Bonivert v. City of Clarkston*, 883 F.3d 865 (9th Cir. 2018).

<sup>57</sup> *Id.* at 869.

<sup>58</sup> *Id.* at 870–71.

<sup>59</sup> *Id.* at 878.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 879.

<sup>62</sup> *Simon v. City of New York*, 893 F.3d 83, 97 (2d Cir. 2018) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)). *See also* *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377 (2009) (noting that it would be unreasonable to believe that *all* factual situations would be covered by clearly established law because “[t]he easiest cases don’t even arise”) (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

<sup>63</sup> *Simon*, 893 F.3d at 88.

such a detention was clearly established in order to find a Fourth Amendment violation.<sup>64</sup>

Second, even where this exception does not apply, focusing on uniquely outrageous facts may lead courts to apply more lenient definitions of clearly established law. Courts have discretion to find clearly established law at different levels of generality because the Supreme Court has given contradictory guidance on how specific a law must be to qualify as clearly established.<sup>65</sup> For example, in *Thompson v. Virginia*, the Fourth Circuit overturned a qualified immunity grant for officers who gave a suspect a “rough ride.”<sup>66</sup> The court held that while there was no on-point factual precedent specifically concerning rough rides, a broad rule existed that prison officials may not “maliciously harm a prisoner on a whim.”<sup>67</sup>

Appealing to particularly outrageous facts, therefore, may permit the court to either avoid conducting the clearly established law analysis or view clearly established law more broadly.

#### CONCLUSION

The Supreme Court’s qualified immunity jurisprudence remains intractably favorable to government defendants. Despite this reality, evidence shows that qualified immunity is not the unbeatable defense it is often portrayed to be. In challenging qualified immunity defenses, plaintiffs in appellate courts should focus on procedural posture, segmenting the factual history, and emphasizing particularly egregious facts. These strategies give plaintiffs a fighting chance to succeed on civil rights claims against governmental officials.

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<sup>64</sup> *Id.* at 97.

<sup>65</sup> *Compare, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (“existing precedent must have placed the statutory or constitutional question beyond debate”), *with, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (noting that “officials can still be on notice that their conduct violates [clearly] established law even in novel factual circumstances” and prior cases need not have “fundamentally similar” or even “materially similar” facts).

<sup>66</sup> *Thompson v. Virginia*, 878 F.3d 89, 97 (4th Cir. 2017).

<sup>67</sup> *Id.* at 105. *See also* *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (in a particularly egregious search case where officers asked a minor suspect to show them his erect penis to match a description, the court distinguished prior cases upholding sexually invasive searches because the plaintiff was a minor and the search was particularly invasive).