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## Qualified Immunity and Excessive Force: A Greater or Lesser Role for Juries?

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# QUALIFIED IMMUNITY AND EXCESSIVE FORCE: A GREATER OR LESSER ROLE FOR JURIES?

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The *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts towards the more relevant inquiry of whether the law puts officials on fair notice that the described conduct was unconstitutional.<sup>1</sup>

We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.<sup>2</sup>

## I. INTRODUCTION

In the past thirty-five years the largest roadblock in any viable civil rights case involving excessive force under the Fourth Amendment of the Constitution has been the doctrine of qualified immunity. At its most fundamental level, qualified immunity was intended to allow the state in its many forms to act with enough freedom to protect itself and its citizenry. Qualified immunity affords broad deference to the actions of the officers of any given governmental entity.

The Supreme Court has long battled with defining qualified immunity specifically enough to allow lower courts to make decisions, but broadly enough to allow lower court decision making to thrive. The Court initially set broad parameters for qualified immunity, requiring plaintiffs to show that officials violated a constitutional right and that the right was clearly established. These two factors have become the two-prong analysis for all qualified immunity: prong one, whether a constitutional right was violated, and prong two, whether the right was clearly established at the time of the violation. This broad definition left much up to the circuit courts to decide how to proceed. The cases in the previous decades have not answered many questions, have even invited some new ones, and have allowed the circuits to fashion case law to answer these questions. Policy questions that had to be addressed included which prong of the analysis should be addressed first, what

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1. *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (internal quotations and citations omitted).

2. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

constitutes law that puts officials on notice that their actions are unconstitutional, and how broadly or narrowly should the qualified immunity analysis be undertaken.

The Tenth Circuit Court of Appeals has decided many of these issues over the years to fill in the inevitable cracks left by Supreme Court decisions. Those Tenth Circuit decisions hint at a shift in previous qualified immunity analysis. In its earlier qualified immunity decisions, the Tenth Circuit developed a sliding scale system to handle the difficult issues around the second, “clearly established law” prong. In seeking to clarify the often nebulous concept of when are officials on notice that their actions would violate a constitutional right, the Tenth Circuit granted qualified immunity time and again to defendants in use of force cases by concluding that law enforcement officers were not sufficiently on notice that their particular actions violated a right.

In the past several years, though, the Tenth Circuit has laid down case law that indicates a shift in the second prong analysis. There have been cases where qualified immunity was denied specifically because many major use of force issues have now, after decades of litigation and hundreds of fact patterns, been addressed by the Court and thereby are held to be clearly established. What stands out is the Court’s willingness to state that the situation has been dealt with in one of two ways, either specifically or with enough previous review of pertinent similarities to put the reasonable law enforcement officer on notice of the general parameters of the level and types of force that courts consider reasonable or excessive under the Constitution. The Tenth Circuit has come to this shift through cases that emphasize not only that many issues in excessive force have been heard and decided, but also that there are elemental factors to consider, and in a fact intensive inquiry. These recent Tenth Circuit cases show that the key question in many cases has shifted from the second prong inquiry, whether the case law is clearly established—a judge-answered question—to the first prong inquiry, whether the officer violated a constitutional right, or in the language of an excessive force case, whether the officer’s use of force was reasonable—a question for a jury.

For both the victims of law enforcement officers’ alleged use of excessive force and their lawyers, the Tenth Circuit’s shift moves in a desirable direction toward a greater role for juries in deciding the first prong of the qualified immunity inquiry—whether an officer violated a constitutional right. This shift, however, has been imperiled, if not rejected and abandoned. In late 2015, the Supreme Court decided *Mullenix v. Luna*<sup>3</sup> and remanded the Tenth Circuit case *Aldaba v. Pickens*<sup>4</sup> to be reconsidered in light of *Mullenix*. While this article was being written, the Tenth Circuit published its *Aldaba* decision on remand just before the end of 2016, and a few days into 2017 the Supreme Court reversed the Tenth Circuit again, in *White v. Pauly*.<sup>5</sup> Those recent Supreme Court decisions, discussed below, suggest a revival of the second prong inquiry into whether the law was clearly established as an obstacle to presenting the jury with the first prong question of reasonableness.

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3. *Mullenix v. Luna*, 136 S. Ct. 305 (2015).

4. *Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016).

5. *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam).

## II. BRIEFLY, THE DEVELOPMENT OF QUALIFIED IMMUNITY

As sovereign powers, the states enjoy complete immunity unless expressly waived.<sup>6</sup> Immunity as a doctrine generally has shifted since the 1950s, some government officials being entitled to absolute immunity,<sup>7</sup> and some to qualified immunity.<sup>8</sup> Qualified immunity doctrine applies not to government entities, but to individual government officials.<sup>9</sup> And liability against government entities cannot be based on vicarious liability arising from the actions of individual government actors.<sup>10</sup>

Qualified immunity developed in the context of case law rising from 42 U.S.C. Section 1983, which permits citizens to hold state government officials accountable for their actions through civil suit. This authorization to hold state officials accountable has existed in tension with the Supreme Court's belief that officers should not be punished for the reasonable belief that they are acting correctly under the law when the law itself is not clearly established.<sup>11</sup> The Supreme Court held in *Pierson v. Ray* that fairness to government officials required excusing them from liability for acting under a statute they reasonably believed to be valid but that later was held to be unconstitutional.<sup>12</sup> Over time as lower courts struggled with the parameters of qualified immunity, the Supreme Court has continued to address and refine its holdings. In *Harlow v. Fitzgerald*, the Supreme Court finally broadened

6. See U.S. Const. amend XI ("The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). The Eleventh amendment was passed in response to *Chisolm v. Georgia*, see John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 20 (1999). In *Chisolm v. Georgia*, 2 U.S. 419 (1793), the State of Georgia was sued by the estate of a South Carolina citizen asserting jurisdiction under Article III, Section 2, and claiming judicial power extended to "controversies between a State and Citizens of another State."; see also, *Alden v. Maine*, 527 U.S. 706, 756–757 (1999) (blanket immunity exists for government); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.) ("Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."). But see *Ex Parte Young*, 209 U.S. 123, 193–194 (1908) (immunity exists for States unless expressly waived or abrogated by Congress);

7. See e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982) (entitling the president to absolute immunity); *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (legislators).

8. See e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (entitling qualified immunity to executive branch officers); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school board officials).

9. See *Monroe v. Pape*, 365 U.S. 167, 191 (1961) (often held for the position that §1983 allows suits against government actors, and not government, therefore qualified immunity too only applies to the actors, and the entity), *overruled by* *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

10. *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) (holding that doctrine of respondeat superior not available to subject government entities to liability for unconstitutional actions of its employees); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1280 (10th Cir. 2008) (not requiring proof of direct participation to hold supervisor liable for constitutional violations).

11. *Pierson*, 386 U.S. 547, 555 (1967).

12. *Id.*

qualified immunity to cover all government officials undertaking their discretionary functions.<sup>13</sup>

In Fourth Amendment use of force cases, an individual officer will nearly always move for summary judgment based on qualified immunity.<sup>14</sup> At summary judgment, where most qualified immunity issues are decided, the burden on the plaintiff is heavy,<sup>15</sup> despite the case law rhetoric that summary judgment is not preferred to trials.<sup>16</sup> A plaintiff who loses at summary judgment never gets the facts before a jury, whose role is to decide “questions of human behavior, reasonableness, and state of mind.”<sup>17</sup> When a defendant asserts qualified immunity at summary judgment, the plaintiff must satisfy the two pronged qualified immunity analysis: Prong one, that the defendant violated a constitutional right, and prong two, that the constitutional right was clearly established at the time the officer took the actions that are the subject of the inquiry.<sup>18</sup> “[O]nce the plaintiff makes this showing . . . the defendant must show that there are no material factual disputes as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time.”<sup>19</sup>

Which prong should be addressed first matters because if the second prong, whether the law was clearly established, is addressed first, then the case can be decided without ever addressing whether the facts of the case establish a constitutional violation. In doing so, a court may deny the plaintiff’s claim even if there *was* a constitutional violation. Addressing this “order of battle” by deciding the first prong first perhaps does not benefit the plaintiff in the instant case, it at least builds the case law and thus “clearly establishes” the right to the benefit of future plaintiffs, both in the success of their lawsuits and ideally the modification of future defendant behavior. However, by opting against addressing the prong one inquiry, the court does not create the case law that *would* put the *next* defendant on notice—barring future plaintiffs and letting officials continue the behavior.<sup>20</sup>

The Supreme Court has most recently held that which of the two prongs is addressed first in the qualified immunity analysis is at the discretion of the court in light of the circumstances at hand.<sup>21</sup> The Tenth Circuit, though, has indicated through

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13. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

14. Qualified immunity is a legal defense designed to shield state actors from liability if their actions do not violate clearly established law “of which a reasonable person would have known.” *See id.*

15. Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995).

16. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment” or that the summary judgment doctrine should “denigrate the role of the jury.”).

17. Arthur Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1132 (June 2003).

18. Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009), citing Saucier v. Katz, 533 U.S. 194, 201 (2001).

19. Axson-Flynn v. Johnson, 356 F.3d 1277, 1300 (10th Cir. 2004).

20. On the very rare occasion, a court will skip the second prong because the conduct itself is so clearly egregious as to not necessitate searching to see if a case has addressed it. *See, e.g.,* Hope v. Pelzer, 536 U.S. 730 (2002).

21. Pearson v. Callahan, 555 U.S. 223, 226 (2009) (outlining situations where addressing a lack of a right first may be dispositive of the question); Harapat v. Vigil, 676 F.Supp.2d 1250 (Dist. Ct. N.M. 2009)

its decisions that the circuit prefers first addressing the first prong, the violation of a constitutional right.<sup>22</sup>

Qualified immunity has been controversial since its inception, garnering support from those who feel officers should have unfettered ability to do their jobs<sup>23</sup> but opposition from those who feel “[q]ualified immunity substantially advantages defendant police officers.”<sup>24</sup> Critics point out that “summary judgment creates a systemic pro-defendant bias due to the pressure on judges to move their dockets along by terminating cases rather than letting them proceed to trial.”<sup>25</sup> There is both an academic and a practitioner concern too that officers’ conduct may not be influenced by judicial decisions regarding the propriety of the use of force, which is a major criticism of the qualified immunity doctrine generally.<sup>26</sup>

### A. Prong 1: Violating an Existing Right—Excessive Force

An individual within the United States has a right to be free from an *unreasonable* search and seizure by a government official.<sup>27</sup> “[W]hen an officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”<sup>28</sup>

The issues around the reasonableness of force used by government officials, usually law enforcement officers, slowly developed over several decades starting in the 1950s.<sup>29</sup> Early analysis of uses of force established claims derived from various constructions, including the Due Process Clause.<sup>30</sup> It took decades for the Supreme Court to establish that use of excessive force by an officer is a seizure, and that use

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(reviewing how well established various rights were before denying summary judgment, finding issues of fact for a jury existed regarding the violation of those rights).

22. See *Cortez v. McCauley*, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (“First, the plaintiff must establish the defendant violated a constitutional right. If no constitutional violation is established by the plaintiff’s allegations or the record, our inquiry ends. But if a constitutional right was violated, we next ask if the constitutional right was clearly established.”).

23. See, e.g., Jeffrey D. May, *Determining the Reach of Qualified Immunity in Excessive Force Litigation: When is the law “Clearly Established,”* 35 AM. J. TRIAL ADVOC. 585 (2011–12).

24. Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1387 (2011–2012).

25. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522 (2007).

26. See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 135 (2009) (“The cases in which a violation of the Fourth Amendment has been found and qualified immunity is granted to the defendants are even more analytically disingenuous.”); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision Making*, 57 UCLA L. REV. 1023, 1067 (2010) (arguing that a substantial disconnect exists between officer decisions on the ground and how a court decides a case, making it unlikely officers are deterred by case outcomes).

27. U.S. CONST. amend. IV (emphasis added).

28. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

29. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (using the Due Process Clause as the basis for finding excessive force based on a ‘shocks the conscience’ standard); *Terry*, 392 U.S. at 28–29; *Scott v. United States*, 436 U.S. 128, 137 (1978); *United States v. Place*, 462 U.S. 696, 703 (1983); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

30. *Rochin*, 342 U.S. at 207–208; *Johnson v. Glick*, 481 F.2d 1028, 1032–33 (2d Cir. 1973), *overruled by Graham v. Connor*, 490 U.S. 386 (1989).

of force, outside of a prison setting,<sup>31</sup> is a Fourth Amendment question.<sup>32</sup> The Fourth Amendment requires a specified “reasonableness” standard analysis of an officer’s actions balanced against an individual’s rights.<sup>33</sup> While an officer’s actions are to be analyzed considering the situation the officer faced at the time the officer made the decision,<sup>34</sup> those actions are at the same time to be taken in a totality of the circumstances review that includes analysis of the reasonableness of “not only when a seizure is made, but also how it is carried out.”<sup>35</sup> Earlier cases applied a broad, spectrum analysis (a case-by-case) basis in determining when the force used by law enforcement was reasonable or excessive.<sup>36</sup>

The undisputed foundation of a Fourth Amendment use of force violation analysis finally came with the Supreme Court’s decision in *Graham v. Connor*.<sup>37</sup> The *Graham* Court began by agreeing that a court needs to balance the “nature and quality” of the “intrusion” on the individual’s right “against the countervailing governmental interests at stake.”<sup>38</sup> Seeing the difficulty that both law enforcement officials and the lower courts subsequently reviewing law enforcement action experienced with the standard, the *Graham* Court provided specific factors to consider in determining whether the officer’s actions were objectively reasonable.<sup>39</sup> That analysis<sup>40</sup> requires careful attention to the facts and circumstances of each

31. See *Garner*, 471 U.S. 1, 7 (1985); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (applying the Eighth Amendment to a situation involving a government official’s use of force in a prison context); *Graham*, 490 U.S. at 394 (“In most instances . . . either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments . . . are the two primary sources of constitutional protection against physically abusive governmental conduct.”).

32. *Graham*, 490 U.S. at 395 (“[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment. . . .”).

33. *Graham*, 490 U.S. at 395; *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009).

34. *Graham*, 490 U.S. at 395–97; *Phillips v. James*, 422 F.3d 1075, 1080 (10th Cir. 2005).

35. *Garner*, 471 U.S. at 8.

36. *United States v. Place*, 462 U.S. 696, 703 (1983) (“When the nature and extent of the detention are minimally intrusive of the individual’s Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.”).

37. *Graham*, 490 U.S. 386.

38. *Id.* at 396 (citing *Place*, 462 U.S. at 703).

39. See *Graham*, 490 U.S. at 396.

40. *E.g.*, *Estate of Booker v. Gomez*, 745 F.3d 405, 421 (10th Cir. 2014) (court may lump together officers’ conduct, or analyze it individually); *id.* at 423 (force may fall under fourteenth amendment if force undertaken in malice or excessive zeal – but is uncommon and less preferred to the fourth amendment – and analysis considers first, the relationship between the amount of force used and the need for it, second, the nature of the injury, and third, the state actor’s motive); *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1208 (10th Cir. 2008) (fourth amendment analysis requires *some* level of physical injury but “[w]e have consistently rejected a bright-line rule requiring plaintiffs to demonstrate physical injury when bringing excessive force claims.”); see *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001) (explaining that “[p]hysical injury may be the most obvious injury that flows from the use of excessive force,” but “declin[ing] to adopt a ‘bright-line’ standard dictating that force cannot be ‘excessive’ unless it leaves visible cuts, bruises, abrasions or scars”); *id.* (courts may also consider that the fourth amendment is not confined to a right to be secure against physical harm and includes a right to “liberty, property and privacy interests—a person’s ‘sense of security’ and individual dignity.”); *Harapat v. Vigil*, 676 F. Supp. 2d 1250, 1269 (D.N.M. 2009) (the injury need not be excessive, only actual, while rejecting Defendant’s argument that at least the officer did not “mercilessly beat” the plaintiff).

particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.<sup>41</sup>

The *Graham* factors provided some light in a murky tunnel and were recognized by courts to be non-exclusive and couched within a totality of the circumstances analysis.<sup>42</sup> The approach looks at the situation at the time the officer faced it and does not take a 20/20 hindsight view in deciding if the officer's actions were objectively reasonable.<sup>43</sup>

While *Graham* provides a general analysis for excessive force, the Court in *Tennessee v. Garner*,<sup>44</sup> put forth additional factors to consider if the use of force is deadly force.<sup>45</sup> When an officer uses deadly force, that force is reasonable only if a reasonable officer in that officer's position would have had probable cause to believe that there was a "threat of serious physical harm to themselves or to others."<sup>46</sup> What deadly force is remains an open question but is generally defined as such force that "create[s] a substantial risk of causing death or serious bodily harm."<sup>47</sup>

While *Garner* held that there needs to be a threat of serious physical harm to the officer to allow the use of deadly force, the Tenth Circuit clarified in *Estate of Larsen* how to analyze the threat to an officer in evaluating that officer's use of deadly force:

- (1) whether the officers ordered the suspect to drop his weapon, and the suspect's compliance with police commands;
- (2) whether any hostile motions were made with the weapon towards the officers;
- (3) the distance separating the officers and the suspect; and
- (4) the manifest intentions of the suspect.<sup>48</sup>

The fact finder makes the first prong inquiry, which is a mixture of the totality of the circumstances justifying using force under *Graham*, the use-of-deadly-force factors specified in *Larsen*, and "whether the officers were in danger at the precise moment that they used force."<sup>49</sup> An officer who has a reasonable but mistaken belief that the suspect is likely to fight back is justified in using more force

41. *Graham*, 490 U.S. at 396.

42. See, e.g., *Pauly v. White*, 814 F.3d 1060, 1070 (10th Cir. 2016) *vacated on other grounds*, 137 S. Ct. 548 (2017).

43. *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1313 (10th Cir. 2009).

44. *Tennessee v. Garner*, 471 U.S. 1 (1985).

45. See, e.g., *Estate of Booker*, 745 F.3d at 424.

46. *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008); *Tennessee*, 471 U.S. at 11 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

47. *Jiron v. City of Lakewood*, 392 F.3d 410, 415 n.2 (10th Cir. 2004) (citation omitted); see also *Thomson*, 584 F.3d at 1313 n.3 (discussing at length definition of deadly force before concluding how the Model Penal Code definition is treated under qualified immunity analysis is not yet decided); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (discussing at length the definition under the Model Penal Code and acceptance of that definition in various legal jurisdictions).

48. *Estate of Larsen*, 511 F.3d at 1260.

49. *Phillips v. James*, 422 F.3d 1075, 1083 (10th Cir. 2005) (internal quotation marks omitted).



than is actually needed.<sup>50</sup> Deadly force “encompasses a range of applications of force, some more certain to cause death than others” and a court must take into account the breadth of force options in evaluating reasonableness.<sup>51</sup>

### B. Prong 2: Clearly Established—The Right to be Free from Excessive Force

“Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue.”<sup>52</sup>

*Harlow*, in broadening qualified immunity to cover all government officials, also added the confusing language that created enormous litigation for the decades to follow: to lose the protection of qualified immunity, an officer need to have violated “clearly established” law of which a “reasonable person would have known.”<sup>53</sup> To be clearly established, precedent from either the Supreme Court or from the circuit court of appeals in which the incident occurred must be on point, or the clearly established weight of authority from other courts must agree with plaintiff’s contention.<sup>54</sup> There remain many observers who question qualified immunity generally and the necessity of unearthing a case on point.<sup>55</sup> For example, the Fifth Circuit has been less willing to look at other circuits for case law in determining where “clearly established law” rises. Lower courts struggled for years to find the right approach to decide what clearly established law was under *Harlow*. Early in the new millennium, the Supreme Court responded with two cases, *Saucier v. Katz*<sup>56</sup> and *Hope v. Pelzer*,<sup>57</sup> appeals from what were viewed as paradigm circuits for their different approaches to the clearly established issue.<sup>58</sup>

*Saucier* involved a sixty-year-old veterinarian who protested a Vice President Gore speech and was arrested by two military police officers.<sup>59</sup> The *Saucier* Court addressed a lower court’s bypass of the second prong, stating that merely finding a fourth amendment violation does not satisfy prong two in excessive force cases.<sup>60</sup> In reviewing the established law at the time, and specifically rejecting the idea that the *Graham* factors *de facto* puts all defendants on notice for all uses of

50. *Estate of Larsen*, 511 F.3d at 1260.

51. *Cordova v. Aragon*, 569 F.3d 1183, 1189 (10th Cir. 2009).

52. *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014).

53. *Harlow*, *supra* note 13, at 818.

54. *Cortez v. McCauley*, 478 F.3d 1108, 1114–15.

55. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL OF RTS. J. 913, 955 (2015) (“Even if one can agree on what the ‘right’ in question is, there is lingering uncertainty about where one looks to decide whether the law was clearly established. What law counts?”).

56. *Saucier v. Katz*, 533 U.S. 194 (2001), receded from by *Pearson v. Callahan*, 555 U.S. 223 (2009).

57. *Hope v. Pelzer*, 536 U.S. 730 (2002).

58. See 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, 573–574 (2005–2006).

59. *Saucier*, 533 U.S. at 197–98.

60. *Id.* at 200.

force, the Court noted it is “sometimes a hazy border between excessive and acceptable force,” and qualified immunity was in place to protect the reasonably mistaken officer.<sup>61</sup> The Court directed lower courts to take a more fact-driven approach to their qualified immunity analyses by *first* addressing whether a constitutional right was violated, requiring courts to address the underlying facts of the case.<sup>62</sup> The Court’s decision shifted the burden towards plaintiffs to find and argue a more fact-specific case on point to make a showing that the law was clearly established.

In contrast, the following year, the Supreme Court decided *Hope v. Pelzer*, where corrections officers left an inmate secured to a hitching post for seven hours in the sun without a shirt, bathroom breaks, or water.<sup>63</sup> The Court took a big step when it ruled that sometimes, even when there is not a case on point, actions are blatantly unconstitutional.<sup>64</sup> “[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.”<sup>65</sup> Consequently, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>66</sup> This common sense conclusion gave the lower courts greater freedom to reject qualified immunity claims. Even if the alleged misconduct might not be covered by a case 100 percent “on point,” a court could hold that the very force in question would violate the Fourth Amendment.

The Court has since stepped back from its expansive and common sense ruling in *Hope*, emphasizing that the right must be established “in a more particularized, and hence more relevant, sense” and that “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”<sup>67</sup> It did so, however, without overruling *Hope*.<sup>68</sup> The Supreme Court has stepped back from *Saucier*, receding from its direction that lower courts consider the first prong first, and leaving it to the lower courts to decide which prong to address first.<sup>69</sup>

Even after the Supreme Court pulled back from *Hope*, the Tenth Circuit took the Court’s decision in *Hope* to mean it could shift away from the “scavenger hunt for prior cases with precisely the same facts.”<sup>70</sup> The Tenth Circuit noted that it could now undertake “the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional.”<sup>71</sup> Over time, the Tenth Circuit developed a “sliding scale” to determine if the law is clearly established,

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61. *Id.* at 205–06 (internal citations omitted).

62. *Id.* at 205 (citing *Graham*, 490 U.S. at 396).

63. *Hope v. Pelzer*, 536 U.S. 730, 735 (2002).

64. *Id.* at 730 (citing *United States v. Lanier*, 520 U.S. 259 (1997)). Both the Seventh and Tenth Circuits had presaged the ruling and analysis in *Hope*. See *Holland*, 268 F.3d at 1197; *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (1990).

65. *Hope*, 536 U.S. at 741 (citations omitted) (internal quotation marks omitted).

66. *Id.*

67. *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (internal punctuation omitted).

68. See *Pearson*, 555 U.S. at 236.

69. *Id.*

70. *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (citations omitted) (internal quotations omitted).

71. *Id.* at 1284 (citations omitted) (internal quotations omitted).

stating that “[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.”<sup>72</sup> Moreover, even if a specific prior case cannot be located, officers are on notice that their actions violate the Constitution if those actions do not pass the *Graham* reasonableness test.<sup>73</sup> Although the general factors outlined in *Graham* are insufficiently specific to render every novel use of force excessive and therefore unreasonable, the Tenth Circuit also held “[w]e cannot find qualified immunity wherever we have a new fact pattern.”<sup>74</sup>

*Holland ex rel. Overdorff v. Harrington* illustrates the point that there need not always be a case factually on point if the conduct itself meets factors, or concepts, previously established.<sup>75</sup> There, sheriffs who deployed a SWAT team that “[h]e]ld . . . children directly at gunpoint after the officers had gained complete control of the situation” were held not entitled to qualified immunity and therefore liable under *Garner* for an excessive use of force.<sup>76</sup> The Tenth Circuit acknowledged not ruling before on a similar *factual* situation, yet, using a common sense approach, concluded that because there were no grounds upon which reasonable officers could have concluded they had legitimate justification for the conduct in question, they were not entitled to qualified immunity.<sup>77</sup>

Looking at the direction that the Tenth Circuit has taken generally, now a district court within the circuit may more freely look at a case as it should be reviewed, on a case-by-case basis, to determine whether officers are *fairly* on notice that their conduct may be unconstitutional. The Tenth Circuit has not been strict about needing a case that is an exact factual match to establish the law.<sup>78</sup> For example, in *Weigel v. Broad*, the Tenth Circuit looked at the actions of officers who secured a suspect with his hands behind his back, laid him face down and applied knee pressure to his upper torso.<sup>79</sup> The district court found that the conduct could be found excessive, but that the facts were distinguishable from an earlier case, so the officers were not on notice. In the previous case, *Cruz*, officers hog-tied the plaintiff.<sup>80</sup> The Tenth Circuit in *Weigel* disagreed that facts should be construed so narrowly.<sup>81</sup> Defining the right at a higher level of generality, the court held that it

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72. *Pauly v. White*, 814 F.3d 1060, 1075 (10th Cir. 2015), *vacated on other grounds*, 137 S.Ct. 548 (Jan. 9, 2017).

73. See *Casey*, 509 F.3d at 1284 (“Thus, when an officer’s violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law.”).

74. *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (internal citation omitted).

75. *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1193 (10th Cir. 2001).

76. *Id.* The Court’s use of *Garner* can be seen as a finding that a *show* of deadly force without the proper justification can constitute excessive use of force.

77. See *Holland*, 268 F.3d at 1197.

78. *Weigel v. Broad*, 544 F.3d 1143, 1153 (10th Cir. 2008) (Plaintiff *not* required to show that the “very act in question” was previously held unlawful).

79. *Weigel*, 544 F.3d at 1148.

80. *Id.* at 1153–54.

81. *Id.* at 1154.

had addressed all manner of restraint that places a suspect in danger of positional asphyxia was a constitutional violation.<sup>82</sup>

A court in a qualified immunity review of whether the law was clearly established may also cobble together holdings of more than one case to show that reasonable officers should have known their use of force was unconstitutional.<sup>83</sup> For example, in *Pauly*, an officer approached a home without announcing himself, positioned himself behind a low wall and shot the homeowner who exited his home with a weapon to protect it.<sup>84</sup> The Tenth Circuit's analysis pieced together nearly a dozen cases, all under the *Graham* factor matrix, to analyze the officer's actions and find the law was clearly established as to his conduct.<sup>85</sup>

Though the Tenth Circuit has expressly stated it does not need a case completely on factual point,<sup>86</sup> it recently had one of its judgments vacated by the Supreme Court for reconsideration in light of *Mullenix*, another decision that came down at the same time.<sup>87</sup> In *Aldaba*, police were called to help with a mentally ill patient at a hospital who was not responsive to commands and thus tased, slammed against a wall and pinned to the ground while restrained.<sup>88</sup> The Court's vacation of the Tenth Circuit's decision in *Aldaba* suggests that the Court disagreed with the Tenth Circuit's finding that the law was clearly established that deadly force cannot be used against a fleeing felon who does not pose a sufficient threat of harm to officers or others.<sup>89</sup> The Supreme Court vacated the holding in *Aldaba* without explanation. The *Aldaba* Court merely referenced *Mullenix* and commanded the Tenth Circuit to reconsider in light of it. The two cases are factually and situationally dissimilar, including how the lower circuits handled the construction of what the state of the law was. The dissimilarity between the cases makes the Supreme Court's guidance to the Tenth Circuit murky. The Tenth Circuit is left knowing their *Aldaba* decision displeased the Court, but with no direct explanation as to why. The Supreme Court's vague remand also makes questionable previous Tenth Circuit decisions. For example, in *Weigel*, the Tenth Circuit flirted with a higher level of generality analysis, which the Supreme Court now *indicates* it will not approve, but never reviewed and did not explicitly address.

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82. *Id.* (“We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself.”).

83. *See, e.g.*, *King v. Hill*, 615 F. App'x 470, 479 (10th Cir. 2015).

84. *Pauly v. White*, 814 F.3d 1060, 1066–67 (10th Cir. 2015).

85. *Id.*, at 1076–84.

86. *See Weigel v. Broad*, 544 F.3d 1143, 1153 (10th Cir. 2008) (“The plaintiff is not required to show, however, that the very act in question previously was held unlawful in order to establish an absence of qualified immunity.” (quoting *Cruz v. City of Laramie*, 239 F.3d 1183, 1187 (10th Cir. 2001))).

87. *Pickens v. Aldaba*, 136 S. Ct. 479 (2015) (mem.), *vacating* 777 F.3d 1148 (10th Cir. 2015) (vacating and remanding “for further consideration in light of *Mullenix v. Luna*.”).

88. *See Aldaba v. Pickens*, 777 F.3d 1148, 1152–53 (10th Cir. 2015), *vacated*, 136 S. Ct. 479.

89. *See Mullenix v. Luna*, 136 S. Ct. 305, 308–309 (2015).

### III. STRENGTHS AND WEAKNESSES OF QI AS A DOCTRINE APPLICABLE TO FOURTH AMENDMENT USE OF FORCE CLAIMS

Qualified immunity has been a divisive doctrine since its inception.<sup>90</sup> Proponents value qualified immunity because it shields officers when their actions do not violate a right or when in doing so, they were not reasonably aware of the contours of that right. Detractors argue that qualified immunity often simply denies a plaintiff the opportunity to have a jury decide whether an officer's conduct was reasonable, or not.<sup>91</sup> The doctrine has long been viewed as both minimizing an individual's right to be free from unreasonable governmental seizures, and expanding a government actor's ability to use force, to include those times when the actor claims to be or acts ignorant as to when force may reasonably be used.<sup>92</sup> At its simplest level, the operative language of qualified immunity has shifted from what a reasonable "official" would have known to "every reasonable official," regardless of what he or she would—or should—have known.<sup>93</sup>

Ongoing concern has been expressed as courts split hairs over clearly established law based on exact fact patterns,<sup>94</sup> or the slowness of the judicial system to recognize new instruments of force, such as tasers.<sup>95</sup> This raises real and obvious questions about the next technologies law enforcement will inevitably develop and use, possibly with impunity, simply depending on how a circuit chooses to frame the clearly established prong of the qualified immunity analysis.<sup>96</sup> The danger is that such analysis condors—or invites—precisely the most outrageous conduct that most concerned the Framers when they decided to limit governmental intrusion upon an

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90. See e.g., Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 617–18 (1998) ("Actions under section 1983 can involve any one or more of a dizzying array of constitutional claims. . . . [t]hese claims can be brought against an equally broad range of government officials. . . . [t]he variety of claims and defendants notwithstanding, the Supreme Court has articulated a one-size-fits-all test for determining whether any particular executive official is entitled to receive a qualified immunity from suit." (footnotes omitted)).

91. See e.g., *Scott v. Harris*, 550 U.S. 372, 395 (2007) (Stevens, J., dissenting) ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.").

92. See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124 (2009) ("Qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power.").

93. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 655 (2013) (emphasis added) (citing the shift in language from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) to *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)).

94. See *Mattos v. Agarano*, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Schroeder, J., concurring) ("Nevertheless, the Supreme Court's opinion in [*Ashcroft v. al-Kidd*] appears to require us to hold that because there was no established case law recognizing taser use as excessive in similar circumstances, immunity is required.").

95. See generally Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342 (2012).

96. See, e.g., *id.* at 1387 & n.258 (citing law enforcement's development of a "beam" that creates "an unbearable heating sensation in its targets" as an example as the next generation of technological weapons the uses of which will evade the scrutiny of juries for years if not decades to come, specifically under the courts' ability to find no right has been clearly established without ever reaching the cutting edge question of whether a constitutional harm occurred (quoting C.J. Lin, *Authorities at Castaic Jail Poised to Use Assault Intervention Device*, L.A. DAILY NEWS (Aug. 20, 2010, 12:01 AM), <http://www.dailynews.com/article/zz/20100820/NEWS/100829895>)).

individual person.<sup>97</sup> In that vein, claims involving uses of force are even more unlikely to be successful under the qualified immunity matrix.<sup>98</sup>

All of this has arisen from the Supreme Court's attempts to make more objective and clearly discernable the legal analysis of each case.<sup>99</sup> By doing so, however, the Court's jurisprudence has pushed the question more firmly into prong 2, the venue of the courts' decision making as a matter of law, and further from prong 1, which may involve factual inquiry by a jury. The result is that plaintiffs' claims are smothered by a blanket application of a doctrine of what is more often absolute and less often qualified immunity.<sup>100</sup> Commentators disagree with the courts' taking of the objective reasonableness question into their own hands, thus negating a plaintiff's day in court and giving away the jury opportunity to decide the facts.<sup>101</sup> Some judges are of the opinion that the jury is the wrong place for decisions to be made in the legal system.<sup>102</sup> But many judges, district and appellate, believe otherwise. To them, a jury is both a useful and necessary tool in the judicial system.<sup>103</sup> If *Saucier* is correct, that qualified immunity is there for the "hazy border,"<sup>104</sup> then summary judgment is there for when the conduct clearly must be found to have been a reasonable use of force, and the jury is there for when it is not so clear or when any question about what in fact occurred remains.<sup>105</sup> As one district judge plainly stated, it should be that "[i]n a Fourth Amendment case, despite the

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97. *Id.* at 1388 ("It may now be that, with each technological development in police weapons, even egregious constitutional violations will fail to result in the opportunity for a jury trial.").

98. See generally ABA SECTION OF STATE & LOCAL GOV'T LAW, *SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION* 46–53 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3rd ed. 2006) (discussing the qualified immunity defense and the clearly established federal law element).

99. See e.g., *Saucier v. Katz*, 533 U.S. 194, 206 (2002) ("Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." (citation omitted) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000))).

100. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 274 (2006) ("The Court's efforts to transform qualified immunity into a purely legal, nonfactual inquiry can be seen as an effort to unqualify immunity. This subtle but important change makes qualified immunity increasingly like absolute immunity.").

101. Karen Blum, *Section 1983 Litigation: The Maze, The Mud, and the Madness*, 23 WM. & MARY BILL RTS. J 913, 951 n.259 (2015) (disagreeing "that the question of 'objective reasonableness' under the Fourth Amendment should always be a question for the court rather than a jury").

102. See Jeffrey Toobin, *Rights and Wrongs*, THE NEW YORKER (May 27, 2013), <http://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2> (quoting the Honorable Shira Scheindlin, United States District Judge for the Southern District of New York, "I don't love trials. They are not a good way to tell a story." She went on, "What I really like to do is write opinions. There you get to do what you think is right, what you believe in. You're pushing the margins of the envelope, being willing to be creative.").

103. See, e.g., *Martin v. City of Albuquerque*, 147 F. Supp. 3d 1298, 1315 (D.N.M. 2015) ("As smart as any federal judge may be, in a democratic society, judges largely lack the wisdom of the collective and the ability of many in an increasingly complex society, and should be hesitant to impose their vision of the world on their community.").

104. See *supra* text accompanying note 62.

105. See, e.g., *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1253–54 (10th Cir. 2013) ("And 'where there is a question of fact or "room for a difference of opinion" about the existence of probable cause, it is a proper question for a jury. . . . ' [P]rinciples from probable cause cases are equally applicable to our excessive force cases").

ways judges dress it up in a lengthy jury instruction, the Court basically hands a copy of the Bill of Rights to the jury and asks: ‘What is reasonable? What is excessive?’<sup>106</sup> Yet, as noted above, the qualified immunity doctrine often ensures that the question of reasonableness simply does not make it to a jury.

#### IV. WHAT FORCE HAS BEEN REVIEWED

The factors put forth in *Graham* and *Garner*, as well as in *Larsen*, all point to an analysis that considers the conduct of the suspect, the weapons present and the ultimate conduct of the officer. This has melded into the Tenth Circuit standard where the more excessive the force, the less on point a case need exist to put an officer on notice.<sup>107</sup> Similarly, the Tenth Circuit cases show that the less resistive a suspect is, and the lower the crime perceived, the lower the threshold for force to be used, both at all and in terms of what will be held to be excessive.<sup>108</sup> Choke holds,<sup>109</sup> compliance techniques,<sup>110</sup> and even handcuffing may constitute excessive force depending on the totality of the circumstances as a reasonable officer would have perceived those circumstances.<sup>111</sup> To that end, the Tenth Circuit has stated generally

106. *Martin*, 147 F. Supp. at 1314.

107. *Pauly v. White*, 814 F.3d 1060, 1075 (10th Cir. 2015), *vacated on other grounds*, 137 S. Ct. 548 (2017).

108. *See Davis v. Clifford*, 825 F.3d 1131, 1135 (10th Cir. 2016) (“The severity of Davis’ crime weighs against the use of anything more than minimal force because the charge underlying her arrest—driving with a suspended license for failing to provide proof of automobile insurance—is a misdemeanor. . . . Clifford and Fahlsing are alleged to have shattered Davis’ car window and pulled her through the broken window by her arms and hair; this degree of substantial force plainly would exceed the minimal amount proportional to her misdemeanor.” (citing COLO. REV. STAT. § 42–7–422 (2016))); *Perea v. Baca*, 817 F.3d 1198, 1203 (10th Cir. 2016) (“[A]n officer can effect an arrest for even a minor infraction, [a] minor offense—at most—support[s] the use of minimal force.”); *Cavanaugh*, 625 F.3d at 665 (finding the use of Taser gun is unconstitutional where the jury could “conclude that [the victim] did not pose an immediate threat” to officer or others and where victim was not actively resisting); *Cortez v. McCauley*, 478 F.3d 1108, 1128 (10th Cir. 2007) (finding excessive force where plaintiff did not “actively resist[ ] seizure” and “cooperated fully”); *accord Morris v. Noe*, 672 F.3d 1185, 1195 (10th Cir. 2012) (holding the amount of force should be reduced for a misdemeanor); *Fisher v. City of Las Cruces*, 584 F.3d 888, 895 (10th Cir. 2009) (stating the commission of a petty misdemeanor weighs in favor of using minimal force).

109. *Estate of Booker v. Gomez*, 745 F.3d 405, 425 (10th Cir. 2014) (stating that a carotid restraint, if contrary to training and held for a significant period of time, could be found to be excessive force).

110. *See Morris*, 672 F.3d at 1198 (finding that it was excessive to use a forceful take down on misdemeanorant who posed no threat to officers or others and did not resist or flee); *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008) (“[F]orce adequate to tear a tendon is unreasonable against a fully restrained arrestee.”); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (finding excessive force to apply pressure on the back of a subdued and/or incapacitated suspect lying face down); *Cortez*, 478 F.3d at 1131 (finding that an individual who was not a target of an investigation, where no evidence supported that she was a threat and gave no indication of flight had excessive force used against her when officers took her by the arm, escorted her from her home and was locked in the back of a police vehicle).

111. *A.M. v. Holmes*, 830 F.3d 1123, 1154 (10th Cir. 2016) (finding that minor status of arrestee does not change the handcuff analysis); *Fisher*, 584 F.3d at 901 (finding that handcuffing in a manner that aggravates a known injury or creates a serious risk of trauma constitutes excessive force); *Cortez*, 478 F.3d at 1129 (“[U]nduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff’s timely complaints (or was otherwise made aware) that the handcuffs were too tight.”).

that “less lethal munitions” can be used excessively.<sup>112</sup> This includes mace or pepper spray<sup>113</sup> as well as tasers<sup>114</sup> and presumably includes any future “less lethal” weapon later developed. Of course, as held under *Garner* and subsequent cases, shootings can be excessive force. Indeed, the scope of use of force has been well covered, not only across the circuits, but in the Tenth Circuit.<sup>115</sup>

Despite that much of the use of force landscape has been covered, questions remain as to the “clearly established” prong and how that prong will develop in future cases. Although a large number of fact patterns have been, and continue to be, reviewed, novel situations will continue to arise. Some circuits, including the Tenth Circuit, as well as the Supreme Court have indicated that novelty alone will not warrant qualified immunity if previous cases put an officer clearly on notice of the law.<sup>116</sup> If the courts remain true to this principle, one can reasonably conclude that the parameters of the law have come enough into focus that officers generally ought to be on notice of what actions will constitute excessive force. The question should be one for—and seems to have been shifting towards—jury review: did the officer act reasonably under the circumstances?<sup>117</sup>

The following are a select few Tenth Circuit opinions that point to a court of appeals that has seen enough fact patterns to start to agree that juries are better situated than judges to analyze the facts and render judgment on the actions of officers in regard to this fundamental question.

## V. RECENT CASES—THE SHIFTING REVIEW

This selection of cases with fact patterns subject to court analysis signals that in the last few years, qualified immunity is no longer the likely bet for defendants it once was in the Tenth Circuit.<sup>118</sup> Where the tone of cases once revealed a court willing to take nearly every opportunity to end a plaintiff’s excessive force lawsuit against an officer at the summary judgment stage, the more recent cases suggest that the Tenth Circuit is increasingly willing to review qualified immunity through a lens that focuses on whether the question of use of force ought to be given to the jury.

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112. See *Savannah v. Collins*, 547 F. App’x 874, 877 (10th Cir. 2013) (police dog); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1291 (10th Cir. 2008) (finding that ordering a SWAT team to use bean bags, tear gas, and pepper ball rounds can constitute excessive force); *Fogarty*, 523 F.3d at 1161 (stating that use of mace and pepper spray can constitute excessive force).

113. *Fogarty*, 523 F.3d at 1161.

114. *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 667 (10th Cir. 2010) (holding that an officer could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007) (finding that immediate use of taser against nonviolent misdemeanant not fleeing or resisting arrest can constitute excessive force).

115. Westlaw search run September 23, 2016 using the search criteria: “excessive force” AND “qualified immunity” yielded 255 Tenth Circuit cases that considered use of force on a qualified immunity motion; the search to all federal courts was internally limited by Westlaw to 10,000 results and showed 2,185 reported cases in the courts of appeals and 24 in the Supreme Court that matched the criteria.

116. See *Hope v. Pelzner*, 536 U.S. 730, 741 (2002); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (10th Cir. 2001); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 865 (7th Cir. 1990).

117. See *Martin v. City of Albuquerque*, 147 F. Supp. 3d 1298, 1329 (D.N.M. 2015).

118. Another Westlaw search run September 23, 2016 using the search criteria: “excessive force” AND “qualified immunity” and limited to 10th Circuit cases in the past three years yielded 41 results.



The review of cases starts with *Larsen*. While it admittedly is an outlier in time and with a result ultimately different than those found in the more recent cases—it found qualified immunity for the officer—*Larsen* signaled the Tenth Circuit’s earliest attempt to more clearly decipher deadly force precedent from the Supreme Court and provide guidance to the lower courts. And it is the seminal use of deadly force case to which the subsequent cases reviewed below most often refer.

#### A. *Larsen*—Setting the Stage for Use of Deadly Force Review

In 2008, the Tenth Circuit decided *Larsen*, affirming the lower court’s granting of summary judgment for an officer who used deadly force against a man with a large knife in his hand while outside his own home.<sup>119</sup> While the granting of qualified immunity was unremarkable, *Larsen* spelled out a new, more detailed standard, beyond the *Graham* factors, when analyzing a Fourth Amendment use of force claim on a qualified immunity motion.<sup>120</sup> Recognizing an officer often acts in an instant, and adopting the notion that an officer need not “await the glint of steel” before acting, the *Larsen* court laid out four non-exclusive guiding factors to consider the reasonableness of the officer’s belief that someone holding a knife or other weapon was a threat allowing for the use of deadly force:

- (1) whether the officers ordered the suspect to drop his weapon, and the suspect’s compliance with police commands;
- (2) whether any hostile motions were made with the weapon towards the officers;
- (3) the distance separating the officers and the suspect; and,
- (4) the manifest intentions of the suspect.<sup>121</sup>

Using these factors as a guidepost, the court employed a totality of the circumstances analysis enumerating eleven points of fact—focused on *Larsen*’s aggressive movements and the officer’s need to make a split-second decision—to find the officer’s use of deadly force objectively reasonable.<sup>122</sup>

The facts of the case pointed at this outcome, but the analysis accomplished two things in the Tenth Circuit. First, this new, additional set of factors synthesized the Tenth Circuit’s past precedent and brought that precedent within the framework of various Supreme Court cases that provided guidance for analyzing use of force. This synthesis signaled the beginning of the Tenth Circuit’s trend towards a case-by-case analysis of the qualified immunity issue in use of force cases. Second, *Larsen* established an analysis based on a set of factors that would thereafter be applied to use of force cases involving a subject with a weapon. Much like *Graham* did, *Larsen* set out factors that, when considered by a court, establish *Larsen* as the case on point putting a reasonable officer on notice. This is a step away from the dead-on factual precedent search and shifts the burden from the citizen subjected to excessive force towards the government actors deemed to be on notice as to the contours of

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119. Estate of *Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1258 (10th Cir. 2008).

120. *Id.* at 1260.

121. *Id.*

122. *Id.* at 1260–61.

reasonable force. The inquiry then may focus on whether that citizen's clearly established right to be free from excessive force was violated.

### **B. Tenorio—A Question of Reasonable Action and Officer Knowledge**

In May 2014, a New Mexico federal district court ruled against Defendant Officer Brian Pitzer on his Opposed Motion for Summary Judgment on Qualified Immunity Grounds.<sup>123</sup>

Tenorio's sister-in-law called 911 and told the dispatcher that Tenorio had a knife to his own throat, was intoxicated and that she was fearful he might hurt himself or her sister.<sup>124</sup> Officers were aware that Tenorio had the knife to his throat, he was in the kitchen with his wife, brother and sister-in-law, had been violent in the past and took medications for seizures.<sup>125</sup> Officers arrived minutes later, made no plan for engaging Tenorio, encountered Tenorio's sister-in-law outside the home and immediately made the decision to "go lethal."<sup>126</sup> The officers did not announce themselves upon entering and, once inside, the officers drew out Mrs. Tenorio and Tenorio's brother, and ordered Tenorio out of the kitchen.<sup>127</sup> Tenorio walked into the room where the officers were located at "average" speed holding a small knife in his hand, loosely at his right side.<sup>128</sup> As Tenorio entered the room, Officer Pitzer yelled three times, "Put the knife down!" and, after Tenorio had walked two and one-half steps into the room, shot Tenorio.<sup>129</sup>

The district court agreed with both of Tenorio's arguments against qualified immunity, first, that Pitzer did not have a reasonable belief that Tenorio posed a serious threat of harm to anyone, and, second, what was in essence a danger creation theory argument, that Pitzer and the other officers escalated the situation and created their own need for the use of deadly force.<sup>130</sup>

The Tenth Circuit, in a 2-1 decision, affirmed the denial of qualified immunity.<sup>131</sup> The tone of the opinion was reluctant—the court spoke of "the facts that we must accept on this appeal" and that "the evidence was sufficient" for a jury to find the officer was unreasonable without having to "parse the evidence to say precisely what version the jury needed to believe" to do so.<sup>132</sup> The first key take away is in regard to the second prong of qualified immunity: that neither the majority nor the dissent took issue with the fact that by this time the law was clearly established about a knife wielding suspect. The second takeaway is in regard to the treatment of the first prong of qualified immunity. The court's decision evidenced the majority's deference to the district court's rendition of the facts. Based on those facts, the court

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123. *Tenorio v. Pitzer*, No. CV 12-01295 MCA/KBM, 2014 WL 11429062, at \*5 (D.N.M. May 28, 2014), *aff'd*, 802 F.3d 1160 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1657 (2016).

124. *Id.* at \*2.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at \*3-4.

131. *Tenorio v. Pitzer*, 802 F.3d 1160, 1165 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1657 (2016).

132. *Id.* at 1165-66.

believed a jury *could* find the officer's actions objectively unreasonable. Because the court held that under the second prong, the law was clearly established, the court could then focus on the facts of the case, and did so properly in the light most favorable to the plaintiff. The court directed the case go to a jury to decide. Contrast the dissent's analysis, which took the same facts and railed on the majority for believing a difference exists between a suspect "charging" an officer with a knife, and "advancing" upon the officer.<sup>133</sup> While the dissenting judge complained that this holding protects all but the most rampaging knife holders, the dissent ignored that the majority did not hold *for* the plaintiff, but instead *against* immunity for the officers on summary judgment, thus allowing the case to proceed to trial. For the dissenting judge, a jury had, or should have had, *absolutely no* say in this excessive force case—a view that did not carry the day, at least, in the *Tenorio* case.

### C. *Maresca*—Officer Mistakes and Unreasonable Detention

A family was driving home from a camping trip in their red, 2004 Ford F-150 truck when an officer, two months out of the academy, ran the license plate.<sup>134</sup> Because the officer had entered the plate number incorrectly, the plate came back on an expired registration for a stolen vehicle.<sup>135</sup> The officer was trained to run a plate a second time and/or to call it in to dispatch for verification—which was also indicated by the NCIC screen. The officer did so but did not wait for a response before effecting a felony stop.<sup>136</sup> The officer also failed to look at the description of the vehicle for that plate as noted on the screen, a maroon, 2009 Chevrolet sedan.<sup>137</sup> The officer and a second officer who had been in his own car behind the first, approached the truck with their guns drawn.<sup>138</sup> The officers forced Mr. and Mrs. Maresca to exit the vehicle at gun point, raise their shirts from their waists and back towards the officers before lying on the ground.<sup>139</sup> Mr. Maresca, a retired officer, pleaded with the officers to run his information because there was no reason for the felony stop.<sup>140</sup> Other officers arrived to assist the felony stop and the Marescas' three minor children were all made to exit in the same manner, at gun point, and to lie prone on the ground near their parents.<sup>141</sup> With guns trained on their heads, Mrs. Maresca and one of the boys were in hysterics, believing that they were about to be shot.<sup>142</sup>

On cross motions for summary judgment, the district court, Tenth Circuit Judge Paul J. Kelly, sitting by designation, dismissed the Marescas' state law claims without prejudice and granted the defendant officers' motion for summary judgment

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133. *Id.* at 1170 (Philip, J. dissenting).

134. *Maresca v. Bernalillo County*, 804 F.3d 1301, 1304 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2509 (2016).

135. *Id.* at 1304.

136. *Id.* at 1304–1305.

137. *Id.* at 1304.

138. *Id.* at 1305.

139. *Id.* at 1305.

140. *Id.* at 1304–1305.

141. *Id.* at 1305–1306.

142. *Id.* at 1306.

on qualified immunity grounds on all of the Plaintiffs' federal claims, including excessive force.<sup>143</sup> The court reasoned that the mistaken entry of the license plate number still created reasonable suspicion, allowing the traffic stop, and in that analysis, everything that followed.<sup>144</sup> The court also ruled that the force was reasonable and necessary in light of the felony stop decision made by the officers.<sup>145</sup>

The Tenth Circuit disagreed. It reversed the district court and granted Plaintiff's motion for summary judgment against Officer Fuentes for arresting them unlawfully without probable cause.<sup>146</sup> The Tenth Circuit rightfully dissected into a two-part inquiry what the district court mashed together, the reasonable suspicion to pull a vehicle over, and the probable cause necessary to effect a *felony* stop—and therefore an arrest and the degree of use of force that may reasonably attend a felony stop.<sup>147</sup> The Tenth Circuit noted that the officer's error was objectively unreasonable and that the officer ignored the "readily available exculpatory evidence."<sup>148</sup> Because of this, the arrest was not based on probable cause, and therefore, was unconstitutional as a matter of law.<sup>149</sup>

The Tenth Circuit then looked at the excessive force claim against Officer Fuentes and found the law was clearly established by accepting plaintiff's argument that any force used in the wake of an arrest without probable cause violated the Fourth Amendment, but that a fact question remained for the jury.<sup>150</sup> The court focused on the compliance and lack of threat any Maresca family member posed to the officers.<sup>151</sup> It held that the law was clearly established that pointing firearms at persons "inescapably involves the immediate threat of deadly force" and requires at least a perceived risk of injury or danger on the officers, that an officer may be liable for not stopping other officers from using excessive force, and that using that level of a show of force against a nine-year-old was objectively unreasonable.<sup>152</sup> In denying summary judgment for both parties, the court observed that the parties disputed the material facts underlying the use of force question, and held it was for a jury to decide the reasonableness of Officer Fuentes' actions after finding the facts.<sup>153</sup>

#### **D. Pauly—Danger Creation and Jury Questions**

Daniel Pauly was involved in a road rage incident in which he was followed and confronted by the other driver when he pulled off the interstate.<sup>154</sup> Unbeknownst

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143. *Id.* at 1304.

144. Memorandum Opinion and Order, *Maresca v. Bernalillo Co.*, No. CV 13-00733 PJK/KBM (D.N.M. August 19, 2014), ECF No. 76.

145. *See id.*

146. *Maresca*, 804 F.3d at 1312.

147. *See id.* at 1309–10.

148. *Id.* at 1310–11.

149. *See id.* at 1312.

150. *Id.* at 1313–15.

151. *Id.* at 1313–14.

152. *Id.* at 1314.

153. *Id.* at 1316.

154. *Pauly v. White*, 814 F.3d 1060, 1065 (10th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 548 (2017).

to Pauly, the other driver also called 911 and reported him as a drunk driver.<sup>155</sup> Pauly drove away to his home in a rural wooded area up on a hill.<sup>156</sup> An officer received the 911 dispatch and spoke with the other driver.<sup>157</sup> Two other officers joined the first, released the other driver and decided that despite not having enough evidence or probable cause to arrest Pauly, two officers would go to the home registered to his car and speak with him while one remained at the off ramp.<sup>158</sup> The officers parked away from the Pauly home without their overhead lights on and approached on foot.<sup>159</sup> For “officer safety” the officers snuck up on the house, using their flashlights as little as possible and stayed quiet.<sup>160</sup> Pauly and his brother, inside the home, saw the flashlights and, believing the road rage drivers had come, armed themselves, shouting to the people outside to identify themselves.<sup>161</sup> The officers claim they stated one time that they were state police amidst many commands to open the door, which Pauly and his brother did not hear.<sup>162</sup> Pauly decided to call 911 but before he could, he heard “We’re coming in” several times and went to defend his home with his brother.<sup>163</sup> At this point, the other officer approached the back of the house, and took up a position opposite the two officers.<sup>164</sup> Pauly stepped partially outside, may have fired two warning shots to try to scare the intruders off, and was shot at and killed by an officer.<sup>165</sup>

The Tenth Circuit affirmed the district court’s denial of qualified immunity to the officers, analyzing not only the degree to which the officers were in danger at the precise moment they used force, but also whether the officers’ own “reckless or deliberate conduct” leading up to and in effecting the seizure (using the force) “created the *need* to use force.”<sup>166</sup> The court noted that the *Graham* factors, as well as the more detailed *Larsen* factors, are considered together with the circumstances leading up to the officer’s decision.<sup>167</sup> The court noted as well that an officer’s use of deadly force in self-defense is not necessarily, without more, constitutionally reasonable.<sup>168</sup>

The court first looked at the two officers who approached the house initially, neither of whom shot Pauly to death.<sup>169</sup> The analysis focused on the stealthy manner in which the officers approached the house, creating the stand-off situation with the Pauly brothers.<sup>170</sup> The court also considered how the actions of the two officers

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1066.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1066–67.

166. *Id.* at 1064, 1071.

167. *Id.* at 1070.

168. *Id.* at 1071.

169. *Id.* at 1067, 1072.

170. *Id.* at 1072–74.

which arguably led to the third officer killing Samuel might render them liable.<sup>171</sup> The court acknowledged that the Pauly brothers had a Second Amendment right to self-defense, a right that was strongest in their own home, when officers approached.<sup>172</sup> A factual dispute existed whether the officers adequately announced their presence and could be seen by those inside the home, and the court held that a jury could find the brothers acted reasonably in defending their home.<sup>173</sup>

The third officer, arriving after the initial exchange, was not subject to the same analysis as the other two officers.<sup>174</sup> The facts and circumstances for the third officer who arrived later on the scene and heard only “We have guns” was unique in the case law.<sup>175</sup> Despite the novelty of the situation, the court applied the *Graham* and *Larsen* factors to the officer’s actions, and ultimately found that a jury could find the actions objectively unreasonable.<sup>176</sup>

The court then reaffirmed that its analysis “requires careful attention to the facts and circumstances of each case.”<sup>177</sup> The court also disagreed with the dissent’s sweeping application of *Wilson*, in which officers in the open and close to a suspect were found to have reasonably used deadly force when a suspect aimed a gun at them.<sup>178</sup> The majority distinguished *Wilson*, which it concluded did not hold that any time a gun is aimed at officers who respond with deadly force they may have acted reasonably. The court noted that in this case the officer who killed Pauly was fifty feet away and behind a stone wall *and* that while the dissent focused on facts in favor of the officer, the traditional and unwavering standard on summary judgment is the facts taken in the light *most favorable to the non-moving party*, in this case the plaintiff.<sup>179</sup> The court painstakingly observed that no conclusion at the summary judgment stage was certain, but that a jury could find these facts to be true and decide in favor of the Plaintiff. Contrary to the dissent’s willingness to take the use of force question away from the jury, the majority held that where a jury could find facts that led to a plaintiff’s verdict on a use of force question, it is not the court’s job to decide the case on its merits.

#### **E. *Aldaba* and *Mullenix*—Tenth Circuit Holding Vacated**

Officers responded to a call at a hospital. Doctors informed the officers that a patient, Leija, was mentally ill and in need of medical care. The patient was in the hallway, “visibly agitated and upset, and yelling and screaming that people were trying to poison and kill him.” The officers tried to talk Leija into returning to his room, and commanded him to do the same, with no effect.<sup>180</sup> When Leija “failed to

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171. *Id.* at 1072.

172. *Id.* at 1072 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008)); *State v. Boyett*, 2008-NMSC-030, ¶ 18, 185 P.3d 355 (not requiring entry into the home to allow the defense).

173. *Pauly*, 814 F.3d at 1073.

174. *Id.* at 1076.

175. *Id.* at 1077. This uniqueness was pointed out not only by the majority but also by the dissenting circuit judge. *See id.* at 1089 (Moritz, J., dissenting).

176. *Id.* at 1076–82.

177. *Id.* at 1080 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

178. *Id.* at 1082 (citing *Wilson v. Meeks*, 52 F.3d 1547, 1549 (10th Cir. 1995)).

179. *Id.* at 1081–82.

180. *Aldaba v. Pickens*, 777 F.3d 1148, 1152–53 (10th Cir. 2015), *vacated*, 136 S. Ct. 479.

comply” with the officer’s commands, they fired a taser at him, grabbed him and thrust him “face-first against a wall,” and tased him a second time before using a compliance technique to take Leija to the ground.<sup>181</sup> Leija fell face-down, with the officers behind and on top of him, who then handcuffed Leija.<sup>182</sup> Leija then grunted and vomited clear fluid before dying shortly thereafter.<sup>183</sup> The district court found issues of fact about the degree of force used, Leija’s level of resistance and the officer’s knowledge of Leija’s mental health condition, which precluded summary judgment.<sup>184</sup>

The Tenth Circuit upheld the district court, agreeing that the law was clearly established as to the officers’ various uses of force, and that it was a jury question regarding the disputed facts, admonishing the dissent that the court is to take the facts found by the district court as true and construe them in the light most favorable to the non-moving party—per the well-established standard for summary judgment.<sup>185</sup> In finding a constitutional violation and that the law was clearly established, the *Aldaba* court focused on the *Graham* factors generally, while also drilling down specifically to cases about tasers, officer responses to mentally ill suspects and restraint positions that asphyxiate suspects.<sup>186</sup>

The Supreme Court granted certiorari and in a one-sentence *per curiam* ruling, vacated and remanded to the Tenth Circuit for reconsideration in light of *Mullenix*.<sup>187</sup> In *Mullenix*, officers attempted to stop, based on an arrest warrant, a fleeing vehicle. The vehicle was heading for tire spikes when another officer along the car’s path shot at the car six times in an attempt to disable the vehicle and instead killed the driver, coincidentally also named Leija.<sup>188</sup> The *Mullenix* Court addressed only the second prong of the “qualified immunity question” and expressly declined to address the first prong, whether the use of deadly force constituted a Fourth Amendment violation.<sup>189</sup> The Court rejected the Fifth Circuit’s application of the too general rule that an “officer may not ‘use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others’” but declined to further specify how much more specific a court needs to be when addressing the second prong of the qualified immunity issue.<sup>190</sup> The *Mullenix* Court restated what it had held previously in *Anderson*, *Saucier* and *Al-kidd*, that in addressing the qualified immunity question, the lower courts must focus on whether the “violative nature of *particular* conduct is clearly established[,]” that that analysis “must be undertaken in the light of the specific context of the case,” and that the legal precedents must put the question “beyond debate.”<sup>191</sup> For purposes of *Aldaba*, the Supreme Court’s

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181. *Id.* at 1153.

182. *Id.*

183. *Id.*

184. *Id.* at 1153–54.

185. *Id.* at 1154 n.1, 1161.

186. *Id.* at 1154–61.

187. *Pickens v. Aldaba*, 136 S. Ct. 479 (2015) (mem.), *vacating* 777 F.3d 1148 (10th Cir. 2015), *remanded to* 844 F.3d 870 (10<sup>th</sup> Cir. 2016).

188. *Mullenix v. Luna*, 136 S. Ct. 305, 306–307 (2015).

189. *Id.* at 308.

190. *Id.* at 308–309 (quoting *Luna v. Mullenix*, 773 F.3d 712, 725 (5<sup>th</sup> Cir. 2014)).

191. *Id.* at 308 (emphasis in original, internal citations omitted).

message to the Tenth Circuit could only have been “not to define clearly established law at a high level of generality,” but the Supreme Court offered no specific guidance.<sup>192</sup>

The interplay between the Tenth Circuit decision that the Supreme Court reversed and the high court’s ruling in *Mullenix* creates questions. First, the Supreme Court appears not to have taken issue with the Tenth Circuit’s treatment of the facts themselves because that was not noted in the *per curiam* decision. Thus, the finding of a constitutional violation was likely not the issue the Supreme Court wanted reconsidered, leaving for reconsideration the lower court’s finding of clearly established law, which was what the Court had addressed in *Mullenix*. But in finding the law clearly established, the Tenth Circuit did more than merely state the general rule, which was the Fifth Circuit’s failing that led to the reversal in *Mullenix*. The Tenth Circuit in *Aldaba* painstakingly pieced together various decisions about taser use, warnings, compliance measures and treatment of mentally ill persons under Tenth Circuit and other circuits’ precedents.<sup>193</sup> The dissenting judge’s analysis in *Aldaba* had focused on the first prong and interpreted the facts before the court differently than did the majority, but made no issue of the second prong.<sup>194</sup>

On remand, the Tenth Circuit ordered supplemental briefing and has had that briefing since January 8, 2016 with no opinion yet issued at the time of the writing of this article.<sup>195</sup> In their supplemental briefings, appellant officers took the lead of the dissenting opinion in the Tenth Circuit and focused on the first prong of the qualified immunity issue, arguing that Leija was dangerous and force was reasonably used, and that case law allowed a tasing “against a threatening or aggressive person who must be detained.”<sup>196</sup> In addition, bolstered by *Mullinex*, the officers’ brief argued that it was not “beyond debate” that the law “clearly” rendered their *exact* actions unconstitutional.<sup>197</sup> Appellee countered by pointing out that even after *Mullenix*, on prong two there need not be a case “directly on point” and that cases must simply place the “constitutional question beyond debate.”<sup>198</sup> Reviewing the Tenth Circuit majority’s proper application of multiple cases outlining use of tasers, use of force on the mentally ill and pressure on restrained suspects, the Appellee argued to the Tenth Circuit on remand that its original decision remained correct.<sup>199</sup>

What the Tenth Circuit will do in light of the vague admonition from the Supreme Court is uncertain. The Fifth Circuit in *Mullenix* focused on a broadly stated rule, previously rejected by the Supreme Court, in an area where previous decisions

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192. *Id.* at 308–309.

193. *Aldaba*, 777 F.3d at 1154–61.

194. *Id.* at 1161–71, J. Philips (dissenting).

195. September 29, 2016.

196. Appellants’ Supplemental Brief at 14, *Aldaba v. Pickens*, 844 F.3d 870 (10<sup>th</sup> Cir. 2016) (No. 13–7034). The brief explains that officers were “called by a hospital to forcibly detain” Leija in a “tense, emergency situation” where they needed to use force so that Leija could receive “necessary treatment,” even as he was bleeding and shaking his fists at officers. *Id.* at 6–10.

197. *Id.* at 13.

198. Appellee Erma Aldaba’s Supplemental Brief at 1, *Aldaba v. Pickens*, 844 F.3d 870 (10<sup>th</sup> Cir. 2016) (No. 13-7034).

199. *Id.* at 5.



regarding force used in car chases were hazy. In *Aldaba*, while using the *Graham* factors as the foundation for its analysis, the Tenth Circuit looked to multiple cases to untangle the complex factual and legal issues presented to it. Accepting the district court's facts, properly under the summary judgment standard, the *Aldaba* court found that the questions of whether the officers were aware and properly responded to Leija in light of his mental illness, how resistive Leija was, and whether the force was reasonable, were all facts in dispute best suited for a jury to weigh and decide.<sup>200</sup>

The case law relevant to the *Aldaba* fact pattern depended on undeveloped or undecided facts, which then *must* be taken in the light *most* favorable to the non-moving party: that the officers were fully aware of his mental illness, that due to mental illness Leija did not receive commands as others would, that off camera, Leija offered little or no resistance, and that the officers responded with unreasonable force. These several points of disputed material fact, under the existing case law, and even under the *Mullenix* case, should go to a jury for decision; after which qualified immunity may still exist depending on the facts found by the jury. Whether the Tenth Circuit stands up for itself and its analysis, or feels it necessary to backtrack from its previous positions in the face of reversal and reconsideration in light of *Mullenix*, will be a telling forecast in the future of excessive force analysis in this Circuit.

## VI. REDUCING JURY INVOLVEMENT: TWO RECENT SUPREME COURT DECISIONS

The run of reasonable, thoughtful 10<sup>th</sup> Circuit cases trending in a workable direction ran headlong into a wall with two decisions that came down within twenty days of each other in late 2016 and early 2017.

On December 20, 2016, the Tenth Circuit handed down in *Aldaba* its new decision after the stern remand from the Supreme Court. As stated above, the Supreme Court decision reversing and remanding *Aldaba* was a scant two sentences that merely referred to *Mullenix*. Tenth Circuit Judge Phillips spent nearly as much time in the *Aldaba* remand opinion talking about *Mullenix* than the actual case being reconsidered trying to tease out what the *Mullenix* case had to do with *Aldaba*, as these authors did above.<sup>201</sup> The Tenth does push-back on the Supreme Court about its first opinion:

[W]e did not just repeat [*Graham*'s] general rule and conclude that the officers' conduct had violated it. Instead, we turned to our circuit's sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity. We also relied on several cases resolving excessive-force claims.<sup>202</sup>

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200. *Aldaba*, 777 F.3d, 1161 ("significant factual issues remain which must be resolved at trial, including whether Mr. Leija was slinging blood at the officers, whether the officers knew about the extent of Mr. Leija's illness, and whether he exhibited something more than passive resistance in the moments before he was tased.")

201. *Aldaba v. Pickens*, 844 F.3d 870, 870–74 (10<sup>th</sup> Cir. 2016), *remanded from* 136 S. Ct. 479 (2015).

202. *Id.* at 876.

Left with no choice, the court then goes on to follow the Supreme Court's banal admonition to avoid "asserting the law at too high a generalization"<sup>203</sup> and search for previous cases that put the question "beyond debate."<sup>204</sup> A moment of candor comes in the first footnote, in which the court acknowledges "the Supreme Court might be emphasizing different portions of its earlier decisions" and yet "[i]n any event, the Supreme Court told us to apply *Mullenix*, so we do."<sup>205</sup> And the Tenth Circuit does just that. While it hints that under the Tenth Circuit's previously established practical approach where a series of cases would put a reasonable officer on notice that this conduct fell into the unconstitutional realm, the *Aldaba* court concludes that under the reemphasized portions of the *Mullenix* decision, there was no case directly on point to the facts before it and therefore no violation of what the Supreme Court in *Mullenix* has cabined as "clearly established law."<sup>206</sup>

On January 10, 2017, the Supreme Court reversed *Pauly v. White*'s holding that Officer White, who shot and killed a Pauly brother without identifying himself as a police officer or knowing the situation generally, was not allowed qualified immunity at summary judgment.<sup>207</sup> The Supreme Court again recited the *Mullenix* reprise that articulating what is the "established" law at too generalized a level is counter to a proper application of the qualified immunity doctrine.<sup>208</sup> The Court directly spoke against the notion that *Graham v. Connor* or *Tennessee v. Garner* created established law that put an officer on notice regarding the constitutionality of uses of force and turned instead to *Anderson v. Creighton* and *Ashcroft v. al-Kidd* as the standards requiring the existence of prior cases that were "particularized to the facts of the case" lest the rule of qualified immunity turn into a "rule of virtually unqualified liability."<sup>209</sup> Clearly the Supreme Court, averring that qualified immunity is "effectively lost" if a case goes to trial, believes it is more important to insulate officers from the crucible of trial where a jury is empowered to find facts and do justice than to allow juries to have a part in deciding an officer's actions were reasonable.<sup>210</sup>

Notable is Justice Ginsberg's concurrence in which she articulates, where the per curiam decision declines to state explicitly, that the opinion "does not foreclose the denial of summary judgment" as to the other two officers, or address the factual disputes over when Officer White arrived, what he may have seen and whether he had "adequate time" to identify himself and order Pauly to drop his weapon.<sup>211</sup> Despite the Justice Ginsberg clarification, a constitutional law scholar stated the day the decision came down that it would become more difficult to sue officers "because almost all confrontations have unique feature that could be used to block lawsuits," and that with the *White* decision, "the court is signaling that it wants

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203. *Mullenix*, 136 S. Ct., 308–09.

204. *Id.* at 877.

205. *Id.* at 874 n.1.

206. *Id.* at 876–77.

207. *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam).

208. *Id.* at 551.

209. *Id.* at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

210. *See id.* at 551.

211. *Id.* at 553 (Ginsburg, J., concurring).

fewer suits against officers in the lower courts.”<sup>212</sup> Professor Feldman’s comments underscore more than one issue: not just the reduction of suits against officers, but also a reduction in cases that actually *decide* law, that is, make “clearly established” law that then can be used for liability in future cases. The *Pauly* facts should give pause to individuals who value their rights: defendant officers admitted having no violation of the law on which to arrest the Pauly brothers, but proceeded to enter their property in a stealthy manner and engage the Paulys in a manner that led to death. The retrenchment enforced upon the Tenth Circuit by the Supreme Court’s decisions in *Aldaba* and *Pauly* suggest that law enforcement officers are to be given wide leniency as to their uses of force undertaken in the course and scope of their duties.

## VII. CONCLUSION

However applied, qualified immunity remains pivotal in the Section 1983 litigation world when it comes to excessive force and it does not appear to be going away any time soon. For three decades the circuit courts and the Supreme Court have tried to find a balance between what constitutes sufficient notice to officers for their conduct and the constitutional rights of the citizen. Decades of decisions on what constitutes excessive force have created a body of law that is now “clearly established.” Because courts retain the discretion, however, to address the “clearly established law” second prong of the qualified immunity question first, all too often defendant officers prevail on that prong alone, as *Mullenix* and now *Aldaba* and *Pauly* nicely demonstrate. When that occurs, the law remains “unclear” because the court does not proceed to address the law as to the particular set of facts in the case in order to decide the existence of a constitutional violation. In that case, individuals are denied a decision on whether they were deprived of a constitutional right, and the law fails to advance. Law enforcement officers are not put on notice as to what the law expects of them—entitling the next officer in another similar case to the defense of qualified immunity because the law is not clear.

What *is* clear under the current qualified immunity jurisprudence is that a court considering a claim of excessive force under the Fourth Amendment needs to consider the following: First, whether the conduct in question violates an existing constitutional right. This is a mixed question of fact and law. Whether a right exists that can be violated is a legal question for a judge. However, this question is often dependent on what facts are found to be true with respect to the alleged conduct in question, which is properly a jury decision. When reviewing whether the conduct violates a right, the courts must take the facts in the light most favorable to the non-moving party, and should conclude that the existence of a disputed material fact leaves the case in the purview of the jury. In the Tenth Circuit, at least prior to *Mullenix* and now *Aldaba* and *Pauly*, the requisite analysis included consideration of the *Graham* factors, and in deadly force cases the *Garner* factors along with the *Larsen* factors. Moreover, the conduct of multiple officers involved in an incident may be analyzed together or separately depending on what the circumstances of the case dictate. Second, in examining whether the law is clearly established, at least

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212. Mark Oswald, *U.S. Supreme Court Rules for Officer in Fatal 2011 Shooting at Glorieta*, ALBUQUERQUE J. (January 10, 2017), <https://www.abqjournal.com/924283/supreme-court-rules-for-officer-in-shooting.html> (quoting Harvard Law Professor Noah Feldman).

prior to *Mullenix* and now *Aldaba* and *Pauly* the right in question need not have been mirrored in the precise fact pattern of a prior case. To put a reasonable officer on notice, like in *Weigel*, the fact pattern only had to be sufficiently close to conduct that has been considered by the Tenth Circuit or Supreme Court and found to be unconstitutional.

In light of the Supreme Court's recent decisions in *Mullenix*, *Aldaba* and *Pauly* and what its reversal of the *Aldaba* and *Pauly* cases signaled to the Tenth Circuit, the courts have received their marching orders to explore the arguably related cases with as much fact specificity as possible using them as the guideposts for the determination of whether the law is clearly established. The cases reviewed here indicate that, at least prior to *Mullenix* and now *Aldaba* and *Pauly*, this conclusion could result from a more complex and nuanced discussion than just merely searching for the identical facts in a previous case, and might be determined from the discussion of conduct from more than just a single prior case.

The cases reviewed above suggest that prior to *Mullenix* and now *Aldaba* and *Pauly* there had been a small but perceptible shift in the Tenth Circuit to a more reasonable approach that better protects citizens' rights. This approach was based on a stricter expectation as to the propriety of officers' decision-making in their use of force, especially deadly force, and a greater willingness to retain the jury as the partner in the judicial system charged with reviewing those actions. That shift put in retrograde, in more instances, the question of whether the law has spoken and drew forward the question of whether officers' actions were reasonable in light of what the law requires in the circumstances the officers faced. Because the former is a question to be decided by a judge—or three or nine of them—and the latter is a question properly left for the jury, this shift, but for *Mullenix* and now *Aldaba* and *Pauly*, would likely have resulted in more of the *de facto* decision-making in use of force cases being made not by judges but by juries, which are made up, in theory, of the officers' as well as the plaintiff's peers. This construct if increasingly embraced in the Tenth Circuit, would have allowed the members of a jury to look at the stories proffered by both sides, to weigh the credibility of the officers as well as the plaintiff—and decide whether the officers in question overstepped their authority or made reasonable decisions regarding the use of force, both deadly and less than lethal, within the bounds of the law. After *Mullenix* and now *Aldaba* and *Pauly*, fewer juries, in the Tenth Circuit and across the country, are likely to have that opportunity.