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"Obvious Injustice" and Qualified Immunity: The Legacy of *Hope v. Pelzer*

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ABSTRACT

Qualified immunity has captured popular attention in the wake of multiple high-profile killings of civilians by police due to its role in shielding officers and other public officials from legal accountability for constitutional rights violations if the specific conduct at issue has not previously been held unconstitutional. Since creating the doctrine in 1982, the U.S. Supreme Court has substantially expanded its protective power through a string of decisions making the defense increasingly more difficult to overcome. This state of affairs has led many to lose hope in the legal system's ability to vindicate civil rights violations and has even prompted legislative efforts to abolish the doctrine outright. But a promising doctrinal tool with which to overcome qualified immunity in particularly egregious cases—wherein a grant of immunity poses the greatest injustice—already exists. In *Hope v. Pelzer*, a unique decision from 2002 that the Court has—until recently—largely ignored but has never overturned, the Court held that official misconduct may, in some cases, be so flagrant that no previous decision need have found it unconstitutional for a court to deny qualified immunity. Although the Court's subsequent qualified immunity decisions have been the subject of much scholarly attention, *Hope*'s lasting effect in the lower courts has received little focus. Through a review of 210 qualified immunity decisions, in this Comment I evaluate the enduring impact of the *Hope* decision in the federal courts of appeals and its varying treatment among the circuits. I conclude that although qualified immunity remains a significant obstacle in civil rights litigation, *Hope* may yet represent a powerful option for plaintiffs in holding public officials accountable for abuses.

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INTRODUCTION

42 U.S.C. § 1983—originally passed as the Ku Klux Klan Act in 1871, soon after the ratification of the postbellum amendments to the U.S. Constitution—creates a private right of action to sue state and local government actors for violations of individuals' federal civil rights. The core purpose of § 1983 is to facilitate the private vindication of civil rights violations in light of the fact that the federal government often lacks the time and resources to do so itself.[1] By enabling and incentivizing[2] private attorneys to sue government actors on behalf of their clients, the idea goes, the federal government can ensure greater accountability among local governments and better protect the people from unconstitutional conduct.

Since then, however, a formidable obstacle to the success of § 1983 claims has emerged: qualified immunity. Qualified immunity, a U.S. Supreme Court-created doctrine found nowhere in the text of the statute,[3] protects § 1983 defendants from liability by shielding them from trial altogether when certain criteria are met. As one early Supreme Court opinion described the defense, qualified immunity is "an entitlement not to stand trial under certain circumstances. . . . an *immunity from suit* rather than a mere defense to liability."[4]

1. *See* S. REP. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts."). This principle was emphasized via the passage of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b), and through the contemporaneous popularization of the term "private attorney general." *E.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968); *see also* Richard L. Gibson, *Redefining the Civil Rights Attorney's Fees Award Act:* Buckhannon Board and Care Home *and the End of the Catalyst Theory*, 52 CATH. U. L. REV. 207, 209 (2002) ("Historically, the Supreme Court supported awarding fees to a plaintiff who brings an action as a 'private attorney general' that preserves or recovers a benefit on behalf of the general public.").
2. *See* 42 U.S.C. § 1988(b) (enabling private attorneys to recover fees for successful § 1983 actions).
3. *See* 42 U.S.C. § 1983; *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (interpreting § 1983's silence regarding the applicability of common law immunities as indicative of a congressional intent that § 1983 incorporate them).
4. Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985). Qualified immunity has been justified on the grounds that it protects public officials from litigation that might otherwise chill their willingness to zealously uphold the law. *See* Scheuer v. Rhodes, 416 U.S. 232, 241–42 (1974) ("[O]ne policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and

To defeat qualified immunity, a § 1983 plaintiff must show that (1) taken in the light most favorable to the plaintiff, the facts show that the official's conduct violated a constitutional right, and (2) the right was "clearly established" at the time.[5] While showing that a constitutional violation has occurred may seldom be easy, the "clearly established" prong has particularly vexed advocates and scholars alike for decades.[6] First articulated in 1975,[7] this element of the qualified immunity analysis requires plaintiffs to show that the asserted right has already been recognized in prior decisions in order to prevail.

Soon after this standard was imposed, the Court began to grapple with the question of what precise showing was required in order to satisfy it. Early decisions evinced some degree of back and forth on this issue, with some decisions indicating that prior cases should be factually similar enough to the case at bar to make the constitutionality of the act in question quite clear[8] and others expressing a broader view of what might make a right clearly established.[9]

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possible injury from such error than not to decide or act at all."), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984); *see also* Tahir Duckett, Note, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 418 (2016) ("Recognizing that even defending a lawsuit can be an immense burden for a public servant, the Court strove to ensure that frivolous lawsuits are resolved as early as possible.").

5. Saucier v. Katz, 533 U.S. 194, 201 (2001).

6. *See generally* John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 854 (2010) (discussing the U.S. Supreme Court's development of the clearly established requirement and criticizing it as "a source of . . . much confusion and instability"); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (criticizing the inconsistencies in the Court's qualified immunity jurisprudence and arguing that "[o]ne has to work hard to find some doctrinal consistency or predictability in the case law"); *see also* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010) (arguing that the Court's qualified immunity jurisprudence "ha[s] gradually diminished § 1983 in ways that make damages recovery both costly and difficult").

7. Wood v. Strickland, 420 U.S. 308, 322 (1975).

8. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (citation omitted).

9. *See* United States v. Lanier, 520 U.S. 259, 271 (1997) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'") (quoting *Anderson*, 483 U.S. at 640).

In 2002, however, the Court decided *Hope v. Pelzer*,[10] which portended a significant shift in this landscape. In *Hope*, an Alabama prisoner had been handcuffed and brought to the prison yard after getting into an altercation with a guard.[11] There, guards made him remove his shirt and tied him to a hitching post, where they left him for seven hours as his skin burned in the sun.[12] He was given no bathroom breaks, received water only once or twice, and was taunted about his thirst.[13] In determining whether the officers were entitled to qualified immunity after Hope alleged that they had violated his Eighth Amendment rights, the Court announced that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[14] Having adopted this expansive view, the Court determined that the guards' treatment of Hope was so outrageous that their conduct would have violated clearly established law even absent precedent establishing the right at issue. As the Court stated, "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."[15]

Some saw *Hope* as a significant departure from the Court's prior qualified immunity jurisprudence, liberalizing the clearly established standard and allowing plaintiffs to more easily overcome the defense.[16] As one pair of commentators put it:

> *Hope* effectively added a new category of municipal official conduct that can be denied qualified immunity, conduct that is determined in hindsight to violate a more generalized constitutional rule, not previously identified in cases materially similar to the one at hand. . . . [Under *Hope*], notice may depend on more generalized notions of constitutional rights that are not tied to specific

10. 536 U.S. 730 (2002).
11. *Id.* at 734.
12. *Id.* at 734–35.
13. *Id.*
14. *Id.* at 741.
15. *Id.* at 745. The Court hedged somewhat, however, by observing that factually similar circuit precedent and a U.S. Department of Justice report would also have made the unconstitutionality of this conduct clear to the prison guards. *Id.* at 745–46.
16. *See, e.g.*, Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 583 (2006) ("In *Hope*, the Court eliminated any requirement that the facts of the case law precedent be 'fundamentally similar' or 'materially similar' to the conduct in question in order to provide a government official with notice that such actions would violate clearly established law. In fact, the *Hope* Court criticized the Eleventh Circuit for 'requir[ing] that the facts of previous cases be "materially similar" to Hope's situation.'") (footnotes omitted).

> circumstances but that emanate from the text of the Constitution itself.[17]

Since *Hope*, however, the Court has tightened the requirements for demonstrating that a right is clearly established, increasingly requiring plaintiffs to point to factually similar precedent in order to show that the conduct at issue had already been deemed unconstitutional.[18] At the same time, the Court has also altered the language it uses in addressing how manifest the clarity of the right at issue must be in order for the right to qualify as clearly established in a way that has likewise made the standard more restrictive.[19] Together, these trends have prompted extensive criticism arguing that this increasingly stringent standard—already part of an undemocratic, judicially created doctrine—unjustly deprives § 1983 plaintiffs of their day in court.[20] What is more, during the same period, the Court established that lower courts are not even required to evaluate whether a constitutional violation occurred if they can determine that the right in question was not clearly established,[21] reversing its requirement—announced just a few years earlier—that courts analyze the two prongs in order.[22]

17. *Id.* at 585.
18. *See infra* Part II.
19. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016) ("In a number of recent rulings, the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.").
20. *See, e.g.*, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 255–56 (2013) ("By casting [the qualified immunity] defense in a way that sends judges in search of factually similar precedent to show clearly established law, the Supreme Court has excluded from civil liability conduct that fully merits that liability. . . . [I]t does not make sense to bar liability for conduct that is both unconstitutional and unreasonable, simply because it has not specifically been declared so in a prior decision. As applied, the search for factually similar precedent extends qualified immunity beyond any defensible rationale.") (emphasis omitted); Jon O. Newman, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/ heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html [https://perma.cc/PZS6-ASVB] ("If an officer violates the Constitution, the victim should win the lawsuit, just as he or she wins when hit by an officer negligently driving his vehicle."); Joanna C. Schwartz, *Suing Police for Abuse Is Nearly Impossible. The Supreme Court Can Fix That.*, WASH. POST. (June 3, 2020, 11:17 AM), https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity [https://perma.cc/29ZW-UNWQ].
21. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
22. Saucier v. Katz, 533 U.S. 194, 201 (2001). The *Pearson* Court reversed on this point despite acknowledging that analyzing the two prongs in order "is often beneficial" for the purpose of rendering rights clearly established. *Pearson*, 555 U.S. at 236.

Overall, these post-*Hope* shifts evince a growing hostility toward plaintiffs in the Court's qualified immunity jurisprudence.[23] As scholars have observed, in recent decades the Court has not found a clearly established right in the vast majority of its qualified immunity decisions, and with one exception it has been quite some time since it did.[24] In mid-2020, the Court declined to hear a group of consolidated qualified immunity cases, leaving its stringent standard for the defense untouched.[25] This decision, together with a concurrent nationwide outcry against the police killing of George Floyd,[26] longstanding patterns of police violence against Black Americans,[27] and the criminal justice system's failure to

23. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1837–38 (2018) (speculating that a hostility toward plaintiffs among some justices may itself be a driver of the Court's continued and expanding application of qualified immunity); Parsons v. Velasquez, No. CIV 20-0074 JB/KK, 2021 WL 3269457, at *38 n.136 (D.N.M. July 30, 2021) (criticizing the Court's expansion of qualified immunity as the product of "an intent to create 'an absolute shield for law enforcement officers,' . . . . crafting its recent qualified immunity jurisprudence to effectively eliminate § 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong") (citations omitted).

24. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (noting that as of 2018, the Court had found a violation of a clearly established right in only two of the thirty qualified immunity cases it had decided since 1982); Kinports, *supra* note 19, at 63 (observing that as of 2016, the Court had not identified a violation of a clearly established right in more than a decade); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) ("The Court has . . . granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, reversing or vacating every one."); *but see* Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam) (reversing grant of qualified immunity after finding the right at issue clearly established), discussed *infra* at notes 34–35 and in accompanying text.

25. Nina Totenberg, *Supreme Court Will Not Reexamine Doctrine That Shields Police in Misconduct Suits*, NPR (June 15, 2020, 9:55 AM), https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui [https://perma.cc/R2C7-AWUG].

26. *See* John Eligon, Matt Furber & Campbell Robertson, *Appeals for Calm as Sprawling Protests Threaten to Spiral out of Control*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/05/30/us/george-floyd-protest-minneapolis.html [https://perma.cc/S62R-2DZU]; Alan Feuer & Azi Paybarah, *Thousands Protest in N.Y.C., Clashing With Police Across All 5 Boroughs*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/05/30/nyregion/protests-nyc-george-floyd.html [https://perma.cc/H5CV-AQ9F]; Catie Edmondson, *George Floyd's Brother Pleads With Congress: 'Make it Stop'*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/us/politics/george-floyd-brother-congress-philonise.html [https://perma.cc/ZRA2-G8UE]; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/F72J-U8ZR].

27. *See, e.g.*, Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (May 29, 2020), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098 [https://perma.cc/HVW5-XN6Q]; Zack Linly, *In the Past Decade, at Least 70 People Have Died in Police Custody After Saying 'I Can't Breathe': Report*, ROOT (June 29, 2020, 7:30 PM),

hold police officers accountable for civil rights violations more generally,[28] has even prompted lawmakers to attempt to abolish qualified immunity altogether.[29]

The Court has seldom acknowledged *Hope* since it was decided in 2002, and until recently has acknowledged the possibility of an "obvious" violation as raised

https://www.theroot.com/in-the-past-decade-at-least-70-people-have-died-in-pol-1844209308 [https://perma.cc/7DVJ-9F7K]; Brianna Scott, *Author: Black Women's Experiences With Police Brutality Must Be 'Invisible No More'*, NPR (July 16, 2020, 5:37 PM), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/16/892015743/author-black-womens-experiences-with-police-brutality-must-be-invisible-no-more [https://perma.cc/86D9-RVLE]; The Times Editorial Board, *Editorial: A Very Abbreviated History of Police Officers Killing Black People*, L.A. TIMES (June 4, 2020, 5:00 AM), https://www.latimes.com/opinion/story/2020-06-04/police-killings-black-victims [https://perma.cc/8TQK-R6ME].

28. John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown, New Prosecutor Says*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html [https://perma.cc/PR4T-96PL]; Dan Hinkel, Stacy St. Clair, John Keilman & Genevieve Bookwalter, *Police Officer Won't Face Charges in Jacob Blake Police Shooting, Kenosha Prosecutor Says; Rittenhouse Pleads Not Guilty*, CHI. TRIB. (Jan. 5, 2021), https://www.chicagotribune.com/news/breaking/ct-jacob-blake-kenosha-shooting-police-charges-decision-20210104-edxoyst26rbqvl44dyvuf5grvy-story.html [https://perma.cc/UWV2-L4UQ]; Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/ us/police-shooting-trial-philando-castile.html [https://perma.cc/F6D7-NB49]; *Breonna Taylor: Police Officer Charged but Not Over Death*, BBC (Sept. 23, 2020), https://www.bbc.com/news/world-us-canada-54273317 [https://perma.cc/9FNQ-R2AY].

29. *See* Nick Sibilla, *House Passes New Bill to Abolish Qualified Immunity for Police*, FORBES (Mar. 4, 2021, 10:55 AM), https://www.forbes.com/sites/nicksibilla/2021/03/04/house-passes-new-bill-to-abolish-qualified-immunity-for-police/?sh=603cc98b2daf [https://perma.cc/GZ5Q-BFQV]; Sarah D. Wire, *The Supreme Court Created Qualified Immunity. Why Is It So Tough for Congress to Get Rid of It?*, L.A. TIMES (May 25, 2021, 3:00 AM), https://www.latimes.com/politics/story/2021-05-25/qualified-immunity-congress-george-floyd-police-reform-faq [https://perma.cc/R9R4-7CHX] (detailing recent debates within Congress over changes to qualified immunity, as well as recent state-level reforms); Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2021); *Senators Markey, Sanders, and Warren Introduce Legislation to End Qualified Immunity, Hold Law Enforcement Accountable for Excessive Force, Brutality*, ED MARKEY, U.S. SENATOR MASS. (July 1, 2020), https://www.markey.senate.gov/news/press-releases/ senators-markey-sanders-and-warren-introduce-legislation-to-end-qualified-immunity-hold-law-enforcement-accountable-for-excessive-force-brutality [https://perma.cc/ 68QZ-853G]; Press Release, Justin Amash, Amash, Pressley Introduce Bipartisan Legislation to End Qualified Immunity (June 4, 2020), https://web.archive.org/web/20200607012310/https://amash.house.gov/media/press-releases/amash-pressley-introduce-bipartisan-legislation-end-qualified-immunity [https://perma.cc/TN8Q-5EH3]; *but see* Qualified Immunity Act of 2021, H.R. 288, 117th Cong. (2021) (proposing to codify qualified immunity via statute).

in *Hope* only dismissively,[30] when it has acknowledged the possibility at all.[31] In 2020, however, the Court broke from a long pattern of deciding qualified immunity questions in favor of defendants[32] and instead reversed a grant of qualified immunity, specifically relying on *Hope* and identifying an obvious constitutional violation for the first time in more than a decade.[33] Yet even there, the Court issued only a brief opinion, noting its reliance on "the particularly egregious facts of th[e] case" but offering little guidance on how lower courts should apply *Hope* or when a violation may properly be considered obvious.[34]

Time will tell whether lower courts will apply *Hope* more liberally in light of the Court's seeming endorsement, albeit one made in a decision involving truly egregious civil rights violations.[35] But because the Court has otherwise seemed to

30. *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) ("Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. But a body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.") (quotations and citation omitted).

31. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731 (2011) (omitting any reference to *Hope* or its proposition that violations may be obvious); Plumhoff v. Rickard, 572 U.S. 765 (2014) (same); Mullenix v. Luna, 577 U.S. 7 (2015) (per curiam) (same); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (same).

32. *See supra* note 24 and accompanying text; Scott Michelman, Taylor v. Barkes*: Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), https://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend/ [https://perma.cc/ALS3-PNN6] (noting the Court's tendency to decide qualified immunity questions in favor of official defendants via summary reversal).

33. Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam).

34. *See id.* at 54. Moreover, because *Taylor* addressed a challenge to prison conditions the plaintiff was made to endure for an extended period of time, the decision offers little clarity as to when other kinds of violations might be obviously unconstitutional. Notable among these are violations in Fourth Amendment cases, in which the Court has noted that officials' decisions are often the product of "split-second judgments," Graham v. Connor, 490 U.S. 386, 397 (1989), and that "specificity is especially important" to the qualified immunity analysis given the Court's view that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)). The Court did, however, appear to identify two factors to help guide lower courts in determining whether a violation is obvious in prison conditions cases. *See Taylor*, 141 S. Ct. at 54 (noting that the evidence did not indicate that "the conditions of Taylor's confinement were compelled by necessity or exigency" or that they "could not have been mitigated, either in degree or duration"). More recently, the Court summarily vacated and remanded another decision granting qualified immunity to a prison official in an Eighth Amendment case, directing the appeals court to reconsider in light of *Taylor*. McCoy v. Alamu, 141 S. Ct. 1364 (2021).

35. The plaintiff, a Texas state prisoner, alleged that over the course of six days he was confined in two cells, the first of which "was covered, nearly floor to ceiling, in massive amounts of feces: all over the floor, the ceiling, the window, the walls, and even packed inside the water faucet," prompting him to refrain from eating or drinking "for nearly four days," and the second of which was "frigidly cold [and] equipped with only a clogged drain in the floor to

disfavor *Hope*, with the exception of a few Justices who have occasionally cited it in dissent for its more lenient standard,[36] it is perhaps unsurprising that lower courts have expressed and demonstrated uncertainty regarding proper treatment of its precedent. In one opinion, for example, the Fifth Circuit discussed the "perplexity" brought about by this conflict at length, questioning "whether the Court's statements in *Hope* survive[d]" subsequent decisions.[37]

To evaluate both the extent and the impact of this uncertainty—bearing in mind that this landscape could change somewhat in light of the Court's recent decision in *Taylor v. Riojas*[38]—I have set out to review the approaches lower courts have taken in deciding qualified immunity issues following *Hope*. In particular, in this Comment I describe and analyze decisions by courts of appeals in four circuits—the Fourth, Sixth, Eighth, and Eleventh—on the basis of their treatment of qualified immunity, focusing in particular on cases where the alleged constitutional violation was arguably obvious under *Hope*.[39] After reviewing a total of 210 qualified immunity decisions across these four circuits addressing *Hope* or its "obvious" possibility, I identify trends in the courts' approaches and

dispose of bodily wastes," which led "the drain to overflow and raw sewage to spill across the floor" on which the prisoner slept. *Taylor*, 141 S. Ct. at 53 (internal quotation marks omitted). Given the severe facts of the case, courts will likely be able to distinguish *Taylor* in nearly every case that comes before them if they so choose.

36. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 205 (2004) (per curiam) (Stevens, J., dissenting) (citing *Hope* for the proposition that precedent with materially similar facts is not necessary in finding a right clearly established); Wilkie v. Robbins, 551 U.S. 537, 585 (2007) (Ginsberg, J., dissenting) (contending that under *Hope*, the egregious circumstances of the case, relevant constitutional text, and the Court's jurisprudence provided fair warning to the defendants that their actions violated a constitutional right); Kisela v. Hughes, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., dissenting) (citing *Hope* for its proposition that a right may be clearly established even in "novel factual circumstances").

37. Morgan v. Swanson, 659 F.3d 359, 373 (5th Cir. 2011) (en banc). The Fifth Circuit further observed that the *al-Kidd* Court, "in admonishing lower courts 'not to define clearly established law at a high level of generality,' did not discuss or even cite *Hope*, nor other earlier opinions reflecting a similar concern that a damages remedy be available for 'obvious' or flagrant constitutional violations." *Id.*; *see* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011). It went on to note that "[t]his silence is puzzling given that *al-Kidd* reversed a Ninth Circuit decision denying immunity in reliance on *Hope*." *Morgan*, 659 F.3d at 373. *But see* Baynes v. Cleland, 799 F.3d 600, 617 (6th Cir. 2015) ("To be sure, since its decision in *Hope*, the Supreme Court has reemphasized that a particularized review of the right at issue, as opposed to a review made at a 'high level of generality,' is necessary; but the standards set out in *Hope*—which states that an official can be on notice that his conduct violates a clearly established right even in 'novel factual circumstances'—have not been altered or overturned. *Brosseau* and *al-Kidd* merely set the outer bounds of the 'clearly established' inquiry.").

38. *See supra* notes 33–35 and accompanying text.

39. *See infra* Part III. I began my research with the Eleventh Circuit, and selected it for this review, because *Hope* originated there. I then selected the other three circuits because they appeared most frequently in my preliminary research.

discuss what they indicate about federal clearly established jurisprudence more broadly.[40]

Predictably, the "perplexity" the Fifth Circuit described has resulted in varied and divergent treatments of *Hope* and the propositions for which it stands among lower courts. Some circuits, such as the Sixth and Eleventh, have created multitrack frameworks for evaluating whether a right is clearly established for qualified immunity purposes, carving out factual circumstances in certain cases as being governed by and requiring factually similar precedent, and identifying others as ones in which the right in question may indeed be obvious despite a lack of factually similar precedent, following the analysis in *Hope*. Other circuits, such as the Fourth and Eighth, search more intensively for factually similar precedent, continuing to sometimes acknowledge the potential for "obvious" cases but often dismissing the possibility, much in the manner of recent Supreme Court decisions.[41]

What my findings suggest, however, is that even among circuits employing an approach that tracks more closely with Court decisions that came after *Hope*, the results have been more friendly to plaintiffs than the Court's current clearly established jurisprudence might seem to require. These courts frequently found clearly established rights either by looking to precedent bearing meaningful factual dissimilarities to the case before them, by applying generalized constitutional principles derived from Supreme Court or circuit precedent, or even sometimes by finding obvious violations outright. Courts that have taken more idiosyncratic, multitrack approaches have produced even more of these kinds of decisions, and decisions finding obvious violations in particular. This indicates that these circuits have to varying degrees—but all at least to some degree—blunted the effects of the Court's qualified immunity jurisprudence after *Hope* in ways that have invigorated *Hope*, cabined the relevance of the Court's subsequent decisions, or both.[42] Although the Court's approach to qualified immunity remains strict and

40. *See infra* Part IV.

41. The Court's recent reliance on *Hope* in *Taylor v. Riojas* appears unlikely to affect these basic approaches, even if it might encourage lower courts to be more open to finding obvious violations as a general matter, given the Court's lack of guidance regarding this analysis outside of the prison conditions context and its emphasis on the severe facts present in *Taylor*. *See supra* note 34.

42. These treatments reflect an interpretive approach by lower courts that Richard Re refers to broadly as "narrowing from below." *See generally* Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921 (2016). According to Re, "ambiguous Supreme Court precedent can and often should be viewed as effecting a kind of delegation to lower courts, affording them legitimate space for interpretive flexibility," which can lead courts to minimize the significance and applicability of ambiguous precedent in relevant legal areas. *See id.* at 926, 932. This, in turn, often leads to "reasonably divergent interpretations, thereby greatly

many judges appear to continue to follow the Court's lead, these findings may nonetheless be welcome news for plaintiffs seeking redress for violations of their civil rights.

This Comment proceeds in four Parts. In Part I, I survey the development of the Supreme Court's qualified immunity and clearly established jurisprudence leading up to and including *Hope*, as well as the general qualified immunity framework it has employed since. In Part II, I analyze *Hope*'s legacy in the Court and the increasingly rigid approach to identifying clearly established rights the Court has taken in subsequent years. In Part III, I review the treatment of *Hope* and the "obvious" violation in the courts of appeals, focusing on the Fourth, Sixth, Eighth, and Eleventh circuits. In Part IV, I evaluate the various approaches identified in Part III and argue that a circuit's willingness to find obvious violations under *Hope* is in substantial part a function of the analytical framework it uses in identifying whether a right is clearly established. In particular, I suggest that circuits that have developed approaches requiring courts to account for the possibility of obvious violations are more likely to deny qualified immunity on the basis of an obvious violation than those that have not. Despite the apparent lower frequency of recognized obvious violations in the latter group of circuits, I nonetheless conclude that the approaches of *all* reviewed circuits are more conducive to recognizing clearly established rights and thereby denying qualified immunity than is the approach the Supreme Court has endorsed. Finally, I argue that despite the Court's apparent rejection of *Hope*, qualified immunity decisions in lower courts demonstrate that its precedent is still very much alive in practice.

I. EVOLUTION OF THE SUPREME COURT'S CLEARLY ESTABLISHED JURISPRUDENCE

In 1871, Congress passed and President Ulysses S. Grant signed into law the Ku Klux Klan Act,[43] later codified in part as 42 U.S.C. § 1983, which allows individuals to sue for the violation of constitutional or other federally granted rights by anyone acting under color of state law.[44] The law was largely used to prosecute Klansmen at the time, but fell into disuse after the end of Reconstruction

increasing the odds of disuniformity" among lower courts, here evidenced by the reviewed circuits' disparate analytical approaches to identifying clearly established rights. *See id.* at 946.

43. Ku Klux Klan Act, Pub. L. No. 42-22, § 31, 17 Stat. 13 (1871); *Historical Highlights: The Ku Klux Klan Act of 1871*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/15032451486 [https://perma.cc/Y7BG-WKRZ] (last visited Oct. 27, 2020).

44. 42 U.S.C. § 1983.

until *Monroe v. Pape*[45] revived § 1983 as a cause of action for civil rights violations after nearly a century of dormancy. In the following years, the Supreme Court would come to substantially develop its § 1983 jurisprudence through a long series of decisions. Notable among the earlier cases was *Pierson v. Ray*,[46] in which the Court imported into the statute a common law defense protecting officials from suit if their violation of a federal right had occurred in good faith, meaning that officers' subjective belief about the legality of their actions would determine whether the plaintiff's rights could be vindicated.[47] Significantly, this defense appears nowhere in the text of the statute[48] or its legislative history.[49]

45. 365 U.S. 167 (1961). An analogous cause of action against federal officials was later created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and § 1983's reach was soon expanded to allow suit against municipalities in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978).

46. 386 U.S. 547 (1967).

47. *Id.* at 557. The Court held that because a defense of "good faith and probable cause" existed at common law as "[p]art of the background of tort liability[] in the case of police officers making an arrest" and because "[t]he legislative record g[ave] no clear indication that Congress meant to abolish wholesale all common-law immunities" in passing the Ku Klux Klan Act, this variety of "immunity" applied to § 1983 defendants as well. *Id.* at 554–57. *See also* Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner, Almighty Supreme Born Allah v. Milling, 139 S. Ct. 49 (2018) (No. 17-8654), 2018 WL 3388318, at *1–2 [hereinafter Scholars Brief] ("Although the text of § 1983 does not expressly provide for a defense of qualified immunity, th[e] Court in *Pierson v. Ray* held that, in enacting § 1983, Congress intended to provide a defense to a § 1983 action based on an official's subjective good faith. Because the common law at the time of § 1983's enactment in 1871 was understood to include that defense, the *Pierson* Court reasoned, Congress's silence concerning its application to § 1983 liability should be construed as adopting rather than rejecting the common law rule.") (citation omitted). *Pierson* also recognized a right of absolute immunity for judges. *Pierson,* 386 U.S. at 553–55. This right already existed for legislators, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), and would later be expanded to protect prosecutors as well. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

48. *See* Ku Klux Klan Act, Pub. L. No. 42-22, § 31, 17 Stat. 13 (1871).

49. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 502 (1992) ("There is not a single statement in the legislative history of section 1 of the Civil Rights Act of 1871 (from which § 1983 was derived) indicating that some classes of defendants would be immune from liability. To the contrary, opponents of the statute specifically stated that section 1 would impose liability—regardless of good faith—on officials who would be immune under state law. Despite being challenged to do so, no supporter of the Act denied that it would have that effect.") (internal citations omitted). At most, the Court has found that in passing the Act Congress did not explicitly repudiate a good faith defense for tort claims that existed at common law in 1871, and therefore did not intend to do so. *See supra* note 47. However, the Court's subsequent conception of qualified immunity lacked a common-law basis, which the Court has itself since acknowledged. Achtenberg, *supra*, at 529–30; Schwartz, *supra* note 23, at 1801–02; Anderson v. Creighton, 483 U.S. 635, 645 (1987). In large part due to this suspect basis for the creation of qualified immunity, some commentators have argued that qualified immunity is itself unlawful. *See, e.g.*, Baude, *supra* note 24, at 55–58; *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*,

The Court subsequently termed this defense "qualified immunity"[50] and would later clarify its protective power, stating that the defense constitutes "an entitlement not to stand trial or face the other burdens of litigation . . . . an *immunity from suit* rather than a mere defense to liability."[51] The Court also imposed the additional requirement that in order for a § 1983 defendant to be subject to liability, the violated right must have been "clearly established" such that the defendant's "action cannot reasonably be characterized as being in good faith" for qualified immunity purposes.[52] It explained that a right was clearly established if the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the [plaintiff's] constitutional rights."[53] Over the years, the Court has repeatedly claimed that qualified immunity is important "to society as a whole"[54] and has justified the doctrine and its requirements on the grounds that officials must be protected in exercising discretion "for the protection of the public" because "it is better to risk some error and possible injury from such error than not to decide or act at all."[55]

Several years later, in *Harlow v. Fitzgerald*, the Court overturned its previous subjective standard, instead holding that "the objective reasonableness of an official's conduct," as judged by whether or not the official violated a clearly established federal law, was determinative of § 1983 liability,[56] a standard on which the Court would continue to rely thereafter.[57] It reasoned that if at the time of the violation "the law . . . was not clearly established, an official could not . . . fairly be said to 'know' that the law forbade conduct not previously identified as

CATO INST. (Mar. 1, 2018), https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability [https://perma.cc/2723-F6YG]; *see also* Scholars Brief, *supra* note 47, at *6–7 (arguing that the purported common-law basis for qualified immunity never existed because "[i]n 1871, there was no generally available defense of good faith for constitutional claims, and probably not for common law torts either").

50. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974). The Court in *Scheuer* maintained the subjective test set out in *Pierson*, stating that "reasonable grounds for the [officer's] belief" of legality "coupled with good-faith belief . . . affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.*
51. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).
52. Wood v. Strickland, 420 U.S. 308, 322 (1975).
53. *Id.*
54. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); City & County of San Francisco v. Sheehan, 575 U.S. 600, 611 n.3 (2015); White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam).
55. *Scheuer*, 416 U.S. at 241–42.
56. *Harlow*, 457 U.S. at 816–18.
57. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 641 (1987) ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant.").

unlawful."[58] Although the Court reiterated the necessity of relying on "objective factors," it offered no clarification as to what might make a law clearly established for qualified immunity purposes.[59] It did, however, add a few years later that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law,"[60] indicating substantial lenience toward § 1983 defendants and suggesting that a considerable degree of clarity in the state of the law would be required in order to render it clearly established.

In subsequent cases the Court would further develop the standard for qualified immunity. *Saucier v. Katz* articulated the modern two-prong qualified immunity analysis, which holds that a defendant official is immune from liability unless (1) "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right," and (2) "the right was clearly established."[61] Although *Saucier* also required that courts address these two prongs in order,[62] the Court soon undid this requirement in *Pearson v. Callahan*.[63] This reversal allowed courts to dispose of cases by finding the right at issue not clearly established without deciding the constitutionality of the challenged conduct,[64] inviting courts to skip directly to the second prong

58. *Harlow*, 457 U.S. at 818. Recent scholarship, however, has demonstrated that the assumption that public officials will be familiar with case law other than major U.S. Supreme Court decisions is largely erroneous, calling into question qualified immunity's doctrinal legitimacy. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 610–11 (2021). The Court also later clarified that the qualified immunity defense is only available to individuals, not to municipalities or government agencies. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

59. *Harlow*, 457 U.S. at 819.

60. Malley v. Briggs, 475 U.S. 335, 341 (1986). The Court would come to cite this language frequently in subsequent decisions. *See, e.g.*, *Anderson*, 483 U.S. at 638; Burns v. Reed, 500 U.S. 478, 495 (1991); Saucier v. Katz, 533 U.S. 194, 202 (2001); Stanton v. Sims, 571 U.S. 3, 6 (2013) (per curiam); Carroll v. Carman, 574 U.S. 13, 17 (2014) (per curiam); Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam); White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

61. *Saucier*, 533 U.S. 194, at 201. The Court in *Saucier* also stated that "[q]ualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force'" in explaining the purpose for the defense, language that the Supreme Court and appellate courts would come to quote frequently as well. *Id.* at 206; *see, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam); *Mullenix*, 577 U.S. at 18; *Kisela*, 138 S. Ct. at 1153.

62. *See Saucier*, 533 U.S. at 201.

63. 555 U.S. 223, 236 (2009) ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

64. This has been the subject of extensive criticism among scholars. *See, e.g.*, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left*

if they believed no clearly established right existed and substantially elevating its significance.[65]

Since *Harlow*, the Court also has, to some degree, clarified what it means for a law or right to be clearly established for purposes of qualified immunity, noting in *Anderson v. Creighton* that the analysis "depends substantially upon the level of generality at which the relevant legal rule is to be identified."[66] The Court went on to state:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. . . . But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. . . . It should not

for Plaintiffs, 29 TOURO L. REV. 633, 644 (2013) (observing that subsequent decisions "bypassing the merits prong of the qualified immunity test" have left "unsettled constitutional issues raised in the context of qualified immunity"); Schwartz, *supra* note 23, at 1815–16 (arguing that by enabling courts to skip the merits question and grant qualified immunity on the basis that the law in question was not clearly established, *Pearson* has stifled the development of clearly established law required for plaintiffs to be able to overcome qualified immunity in subsequent cases); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120–21 (2009) (arguing that *Pearson* would result in a "degradation of constitutional rights" and that "[f]or rights that depend on vindication through damage actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content"); John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless Into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 80–81 (2017). Federal judges have likewise criticized this shift. *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1248–49 (2015) (arguing, as a Ninth Circuit judge, that this change has led the Court to "rely on qualified immunity as a mechanism to stunt the development of constitutional rights").

65. Granted, the Court at times has appeared to hedge somewhat and acknowledge the importance of courts addressing the merits of cases to clarify legal standards and "clearly establish[]" law. *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 707 (2011) ("[I]t remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials."). The Court has not been consistent in this area, however, and has on the other hand emphasized the importance of avoiding addressing the merits of cases, often in the name of judicial restraint and conserving resources. *See* Reichle v. Howards, 566 U.S. 658, 664 (2012) ("In *Pearson v. Callahan*, we held that courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all. This approach comports with our usual reluctance to decide constitutional questions unnecessarily.") (internal citations omitted).

66. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (internal quotation marks omitted).

> be surprising, therefore, that . . . the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[67]

In doing so, the Court set precedent relevant to this Comment in three ways. First, it answered the question *Harlow* left open of what exactly "clearly establishe[s]" a law or right, indicating that precedent controlled this analysis, though without stating which courts' precedent was relevant.[68] Second, it made

67. *Id.* at 639–40 (citation omitted).

68. The question of which sources may clearly establish laws or rights has received a considerable amount of attention from scholars and judges, and the Supreme Court, on the few occasions when it has addressed the subject, has not been consistent. In *Wilson v. Layne*, 526 U.S. 603 (1999), it indicated that "cases of controlling authority in [a plaintiff's] jurisdiction at the time of the incident" or "a consensus of cases of persuasive authority" would qualify, *id.* at 617, apparently indicating that "pertinent Supreme Court or controlling circuit court decision or a consensus of persuasive authority from other circuits" was needed. Blum, Chemerinsky & Schwartz, *supra* note 64, at 652. The Court appeared for the most part to reiterate this formulation in *Ashcroft v. al-Kidd*, stating that either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" was required and clarifying that a district judge's interpretation of a holding was never controlling. 563 U.S. 731, 741–42 (2011) (quoting *Wilson*, 526 U.S. at 617). However, the Court has since called into question whether even court of appeals decisions may clearly establish law. *See* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) ("Assuming *without deciding* that a court of appeals decision may constitute clearly established law . . . .") (emphasis added).

Given the Court's general "unwillingness to clarify this step of the analysis," lower courts have taken divergent approaches "reflect[ing] the problems inherent in modern qualified immunity doctrine for rule-of-law values." *Leading Cases: Federal Jurisdiction and Procedure* (pt. II.A), 123 HARV. L. REV. 252, 278 (2009) [hereinafter *Leading Cases*]. For example, "[w]hile most circuits will consider a consensus of persuasive authority from other circuits in the absence of controlling precedent, both the Second and Eleventh Circuits have expressed disapproval of such an approach." Blum, Chemerinsky & Schwartz, *supra* note 64, at 652–53. Indeed, a number of cases reviewed in Part III *infra* found clearly established rights by looking to other circuits' decisions. *See, e.g.*, Brown v. Battle Creek Police Dep't, 844 F.3d 556, 566–67 (6th Cir. 2016); Booker v. S.C. Dep't of Corr., 855 F.3d 533, 545 (4th Cir. 2017); Z.J. *ex rel.* Jones v. Kan. City Bd. of Police Comm'rs, 931 F.3d 672, 684 (8th Cir. 2019); *see also* Leslie v. Hancock Cnty. Bd. of Educ., 720 F.3d 1338, 1348–49 (11th Cir. 2013) (finding no clearly established right in part because other circuits were divided on the issue). The Ninth Circuit takes a particularly broad approach and has directed courts to "look to whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts." Tarabochia v. Adkins, 766 F.3d 1115, 1125 (9th Cir. 2014) (citation omitted). For a more complete chronicling of the various circuits' approaches to this question, see *Leading Cases*, *supra*, at 278–79.

Other sources of law have also appeared in courts' analyses. For example, in *Hope*, the Supreme Court looked to guidance from the U.S. Department of Justice in determining

clear that whether a right was clearly established at the time of the violation is critically dependent on how the right at issue is described. In doing so, the Court appeared to recognize that parties are likely to frame the right at issue in different ways so as to make precedent appear more or less applicable and therefore more supportive of their position.[69] Consequently, the Court required that the right be presented in a "particularized" way, suggesting that the description of a right contained in the Constitution or a statute was unlikely to suffice.[70] Finally, the Court established that although precedent was the core determinant in evaluating whether a right was clearly established, a plaintiff did not need to identify prior cases presenting an exact factual match to the case at bar in order to satisfy this requirement; something less precise would be sufficient, so long as it would have made the "unlawfulness" of the defendant's action "apparent."[71]

Subsequent decisions, however, somewhat muddied the water regarding the kind of precedent that would suffice to make unlawfulness apparent at the time of the violation. A decade after *Anderson*, in *United States v. Lanier*[72] the Court rejected the idea that "general statements of the law are . . . incapable of giving fair and clear warning" that a particular course of conduct violated federal law and stated that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,'"[73] suggesting that precedent might not need to bear particularly strong factual similarities in order to clearly establish a right. In *Wilson v. Layne*, however, decided two years later, the Court appeared to take a different approach. There, a team of U.S. Marshals and local police officers went to the plaintiff's home to execute an arrest

the right had been clearly established. Hope v. Pelzer, 536 U.S. 730, 745 (2002). Some courts have looked to statutes. *See* Collier v. Dickinson, 477 F.3d 1306, 1311–12 (11th Cir. 2007). Others have even looked to departmental trainings and policy in finding a right clearly established. *See* Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1061–62 (9th Cir. 2003) (noting that "the officers received training from their *own police department* explaining specifically that" significant harms can result from the kind of maneuvers used by the officers); *but see* City & County of San Francisco v. Sheehan, 575 U.S. 600, 616 (2015) (finding that even if police officers failed to act as they were trained and in violation of department policy, those facts were not relevant to the qualified immunity determination).

69. *See Anderson*, 483 U.S. at 639 ("[I]f the test of 'clearly established law' were to be applied at [a high] level of generality, ... [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.").
70. *Id.* at 639–40.
71. *Id.* at 640.
72. 520 U.S. 259 (1997).
73. *Id.* at 271 (quoting *Anderson*, 483 U.S. at 640).

warrant and brought a reporter with them for a media ride-along and into the home.[74] The plaintiff alleged that bringing media into his home for the arrest violated his Fourth Amendment rights, and although the Court agreed, it nonetheless found the right not clearly established because at the time "there were no judicial opinions holding that th[e] practice [of media ride-alongs] became unlawful when it entered a home."[75] On the other hand, two years later in *Saucier*, where the plaintiff alleged an officer used excessive force in arresting him, the Court simply pointed to *Graham v. Connor*'s[76] statement that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it" and on that basis determined that the officer was within his rights to use the amount of force he did under the circumstances, without looking to other precedent.[77]

It was against this backdrop of patchwork and seemingly inconsistent clearly established precedent that *Hope v. Pelzer* came before the Court in 2002. There, an Alabama prisoner got into a "wrestling match" with a guard following a verbal altercation between them, for which a group of guards brought him out to the prison yard, handcuffed him to a hitching post, and made him take off his shirt.[78] In 1995, when these events took place, Alabama was the only state in the country that made punitive use of hitching posts in prisons under such circumstances.[79] The guards left him there, shirtless, for seven hours while the sun burned his skin.[80] During this time the guards offered him water only once or twice and gave him no bathroom breaks.[81] At one point, one guard approached him, "gave water to some dogs, then brought the water cooler closer to [the prisoner], removed its lid, and kicked the cooler over, spilling the water onto the ground" to taunt him about his

74. Wilson v. Layne, 526 U.S. 603, 606–07 (1999).
75. *Id.* at 608, 614, 616. Although the Court found it well established "that police actions in execution of a warrant [must] be related to the objectives of the authorized intrusion" and clear that "the presence of reporters inside the home was not related to the objectives of the authorized intrusion," it determined that this was insufficient to adequately put the officers on notice that their conduct was illegal. *Id.* at 611, 615–17.
76. 490 U.S. 386 (1989).
77. Saucier v. Katz, 533 U.S. 194, 197, 208 (2001) (quoting *Graham*, 490 U.S. at 396).
78. Hope v. Pelzer, 536 U.S. 730, 734 (2002). The Court explained that a
> hitching post is a horizontal bar made of sturdy, nonflexible material, placed between 45 and 57 inches from the ground. Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Most inmates are shackled to the hitching post with their two hands relatively close together and at face level.

Id. at 733 n.1 (internal quotation marks omitted).
79. *Id.* at 733.
80. *Id.* at 734–35.
81. *Id.* at 735.

thirst.[82] The prisoner, Larry Hope, filed suit under § 1983 alleging that in punishing him in this manner, the guards violated his Eighth Amendment rights.[83] The district court granted qualified immunity to the guards, and the Eleventh Circuit affirmed on the grounds that for a right to be clearly established there "must be . . . cases that are 'materially similar' to the facts in the case in front of [it]" and that the facts of the cases Hope presented "'though analogous,' were not 'materially similar' to Hope's situation."[84]

The Supreme Court found that the guards had indeed violated Hope's Eighth Amendment rights and, in evaluating whether the violated rights were clearly established, began by rejecting the "rigid gloss on the qualified immunity standard" imposed by the Eleventh Circuit's requirement of "materially similar" precedent.[85] It noted that the Court's precedent established the absence of a requirement that the specific action at issue have been previously held unlawful, quoted *Lanier*'s statement that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," and determined that this precedent "ma[de] clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances."[86] Consequently, according to the Court, the operative question in this analysis "is whether the state of the law" at the time of the events alleged gave a § 1983 defendant "fair warning" that their conduct was unconstitutional.[87] In addressing this question, the Court stated that "[t]he use of the hitching post . . . unnecessarily and wantonly inflicted pain and thus was a clear violation of the Eighth Amendment" that would have been "obvious" to the defendants.[88] The Court looked to its own precedent, Eleventh Circuit precedent, a state Department of Corrections regulation, and a U.S. Department of Justice report on the unconstitutionality of Alabama's penal use of hitching posts as evidence that the defendants had "fair warning" that their actions were illegal, criticizing the appellate court's finding that a prior case involving a prisoner who was handcuffed to a fence was insufficiently similar to *Hope* to put the guards on notice that handcuffing inmates to a *hitching post* was illegal.[89] The Court went on to separately state, however:

82. *Id.*
83. *Id.*
84. *Id.* at 735–36 (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)).
85. *Id.* at 739.
86. *Id.* at 739, 741 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).
87. *Id.* at 741.
88. *Id.* (original alteration marks, internal quotation marks, and internal citation omitted).
89. *Id.* at 741–42.

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct.[90]

In twice referring to the "obvious[ness]" of the violation, the Court suggested that when evaluating whether a right was clearly established in extreme cases, precedent might not even be required.[91] Further, although the Court relied on precedent with a considerable degree of factual similarity in finding the right clearly established, it also deemphasized the importance of factually similar precedent in the clearly established analysis, even in cases that do not involve particularly egregious conduct.[92] Thus, it would seem that in the wake of *Hope*, courts would enjoy a newfound ability to take a more relaxed approach in identifying clearly established rights, finding "obvious" violations in extreme cases and in others looking to precedent that was relevant but not necessarily factually similar.[93] Consequently, one would imagine, courts would find rights clearly established more frequently and therefore deny qualified immunity more often as well, enabling a greater proportion of plaintiffs to take § 1983 claims to trial and vindicate their civil rights. Subsequent Supreme Court decisions, however, suggested that this would not be the case.

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90. *Id.* at 745.

91. Richard Golden and Joseph Hubbard, Jr., have argued that *Hope*'s "obvious" violation precedent "amounts to the equivalent of Justice Stewart's 'I know it when I see it' analysis of obscenity in *Jacobellis v. Ohio*." Golden & Hubbard, Jr., *supra* note 16, at 584.

> Without a more clearly objective test to apply, courts are left to determine whether an official's conduct is obvious enough that they should have known that such conduct would violate a person's constitutional rights, even in the absence of any factually similar precedent to indicate the unlawfulness of the conduct. In other words, a municipal official will only know such conduct is unconstitutional when the Court sees it.

Id. at 584–85. They have criticized *Hope* as making "the qualified immunity determination . . . significantly unclear" on the grounds that under *Hope*, "notice may depend on more generalized notions of constitutional rights that are not tied to specific circumstances but that emanate from the text of the Constitution itself." *Id.* at 585.

92. *See supra* notes 16–17 and accompanying text.

93. *But see* Jeffries, *supra* note 20, at 256 (arguing that *Hope*'s effort to blunt the Court's requirement of factually similar precedent "was isolated and ineffective" in part because the extremity of misconduct involved in the case enabled courts to easily distinguish it and because *Hope* discussed on-point prior decisions, meaning the decision's denial of qualified immunity would have survived a standard requiring factual similarity).

II. *HOPE*'S LEGACY IN THE SUPREME COURT

For much of the period since *Hope* was decided, the Supreme Court has appeared to retreat substantially from the decision—and certainly from the liberal approach to the recognition of clearly established rights that it embodied[94]—but has not stated disagreement with the decision or its precedent. Although members of the Court have expressed some support for and validation of *Hope* (and even then, often in dissent), the general development of the Court's clearly established jurisprudence has, with one notable recent exception, been marked by the neglect of *Hope* and by an increasingly exacting insistence on the identification of materially similar precedent by plaintiffs and lower courts.[95]

Most decisions addressing the clearly established issue in the wake of *Hope* have been characterized by an increasing insistence on framing the right at issue in a specific way, with the effect of requiring a substantial degree of factual similarity in order to find a right clearly established, despite the Court disclaiming the existence of such a requirement. The Court's first decision addressing the clearly established issue after *Hope* came two years later in *Brosseau v. Haugen*,[96] which dealt with a police shooting of a suspect during a car chase.[97] The court of appeals had determined that *Graham v. Connor*[98] and *Tennessee v. Garner*[99] provided fair warning to the officer that the shooting was unconstitutional, but the Supreme Court found the precedential value of these decisions too general to clearly establish the right, emphasizing *Saucier*'s requirement that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[100] Consequently, the Court framed the issue as whether it was clearly established that the Fourth Amendment prohibited the officer's actions in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[101] The court cited *Hope*, stating, "[o]f course, in an obvious case, these [general] standards can 'clearly establish' the answer, even without a body of relevant case law," but went on to look to more factually analogous precedent

94. *See id.* at 257 (arguing that the Court's qualified immunity decisions after *Hope* "veered back toward requiring precedential specificity").
95. Scholars have extensively criticized this trend, albeit not always in the context of *Hope*. *See, e.g.*, *supra* note 20 and accompanying text.
96. 543 U.S. 194 (2004) (per curiam).
97. *Id.* at 194.
98. 490 U.S. 386 (1989).
99. 471 U.S. 1 (1985).
100. *Brosseau*, 543 U.S. at 198–99 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).
101. *Id.* at 199–200.

specifically involving shootings that occurred in the course of car chases.[102] After noting that the three decisions it evaluated had come to differ1ent conclusions regarding qualified immunity, the Court stated: "These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the 'hazy border between excessive and acceptable force.'"[103] The Court reversed the denial of qualified immunity.[104]

Several years later, the Court decided *Ashcroft v. al-Kidd*,[105] a case that many would come to view as representing something of a sea change in the Court's strictness on this issue.[106] *al-Kidd* involved a *Bivens* claim[107] brought by a native-born U.S. citizen suspected of terrorism in connection with the attacks on September 11. He alleged that he was pretextually detained, and the district and appellate courts denied qualified and absolute immunity to then-U.S. Attorney General John Ashcroft.[108] In discussing the clearly established requirement, the

102. *Id.* at 199–201 (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002)).
103. *Id.* at 200–01 (quoting *Saucier*, 533 U.S. at 206).
104. *Id.* at 201. *See* Jeffries, *supra* note 20, at 257 (arguing that *Brosseau* "suggested that *Hope* had imposed only a gentle limitation for extreme cases"); Golden & Hubbard, Jr., *supra* note 16, at 599, 603 (arguing that *Brosseau* appeared to have been an "obvious case" and yet distinguished *Hope*, indicating that courts could do the same and thereby undermine the *Hope* precedent, and arguing that "in *Brosseau* the Supreme Court simply cited *Hope* as a footnote to *Brosseau*'s 'particularized,' materially similar notice, transforming the *Hope* Doctrine into an ambiguous obvious case category that may or may not apply, depending [on] a number of unspecified factors"); *see also* Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 788–90 (2009) (arguing that the Court, particularly through *Hope* and *Brosseau*, has been "very inconsistent" regarding the extent to which courts "need a case on point in order to say there is clearly established law" and has sent "mixed signals").
105. 563 U.S. 731 (2011).
106. *See* Reinhardt, *supra* note 64, at 1247–48 (arguing that *al-Kidd* represented "[t]he most drastic change . . . in the Court's articulation of the qualified immunity standard" with "sweeping results," "erect[ing] a shield for law enforcement [by] ensuring that individuals deprived of their constitutional rights will have no civil remedy unless *every* reasonable official would have understood the illegality of the action at issue"); Blum, Chemerinsky & Schwartz, *supra* note 64, at 656 (arguing that *al-Kidd* created a "heightened standard for proving a clearly established law"); *see* Scholars Brief, *supra* note 47, at *2–3 (arguing that *al-Kidd* embodied a shift in the Court's qualified immunity doctrine that favors defendants). The Court had decided a number of cases involving qualified immunity in the years between *Brosseau* and *al-Kidd*—notably including *Pearson v. Callahan*, 555 U.S. 223 (2009), which undid *Saucier*'s requirement that courts address the two qualified immunity prongs in order—but these did not represent significant changes to the Court's treatment of the clearly established question. *See supra* Part I for a discussion of the *Pearson* decision.
107. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971) (recognizing the availability of a claim for damages against federal officials for constitutional rights violations analogous to that created by § 1983 against state or local officials).
108. *al-Kidd*, 563 U.S. at 734.

Court made multiple changes to the prevailing standards for finding a clearly established right. First, the Court stated that a law is clearly established when "*every* 'reasonable official would [have understood] that what he is doing violates that right,'"[109] partially quoting language from *Anderson*, which had instead referred to "*a* reasonable official."[110] The *al-Kidd* Court then imposed a further requirement, stating, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[111] In addition to these changes, the Court reaffirmed its prior statement that qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[112] The Court nowhere cited *Hope* or otherwise indicate the possibility of an obvious violation.

The Court went on to reiterate the approach it took in *al-Kidd* in the following years. In *Reichle v. Howards*[113] and *Plumhoff v. Rickard*,[114] the Court reiterated that the right allegedly violated must be established, "'not as a broad general proposition,' but in a 'particularized' sense,"[115] granted qualified immunity,[116] and mentioned neither *Hope* nor the possibility of an obvious violation. Similarly, in *Mullenix v. Luna*,[117] the Court again found that the lower court had framed right at issue at too high a level of generality,[118] determined that

109. *Id.* at 741 (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
110. *Anderson*, 483 U.S. at 640 (emphasis added). This move has been criticized as underhanded. *See* Kinports, *supra* note 19, at 64–66 (discussing the shift from "a" to "every" and the use of "every" in subsequent decisions, noting that the Court did not acknowledge the change and arguing that the move is evidence that "the Court has engaged in a pattern of covertly broadening the [qualified immunity] defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own"); Blum, Chemerinsky & Schwartz, *supra* note 64, at 654–56 (arguing that by making this change without acknowledging that it was doing so, the Court "surreptitiously chang[ed] the game when nobody was looking" and speculating that Justice Scalia, who authored the majority opinion, "did not call attention to the shift and the other Justices simply did not notice the change in the law").
111. *al-Kidd*, 563 U.S. at 741.
112. *Id.* at 743 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Again reemphasizing previous language, the Court cited *Brosseau* in further stating that it "ha[d] repeatedly told courts . . . not to define clearly established law at a high level of generality," admonishing the court of appeals for having done so. *Id.* at 742 (citing Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (per curiam)) (internal citation omitted).
113. 566 U.S. 658 (2012).
114. 572 U.S. 765 (2014).
115. *Howards*, 566 U.S. at 665 (quoting *Brosseau*, 543 U.S. at 198; *Anderson*, 483 U.S. at 640); *see Rickard*, 572 U.S. at 778–79.
116. *Howards*, 566 U.S. at 664–65; *Rickard*, 572 U.S. at 780–81.
117. 577 U.S. 7 (2015) (per curiam).
118. The court of appeals had "held that Mullenix violated the clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of

the case occupied the "hazy border between excessive and acceptable force," and granted qualified immunity[119] without mentioning obvious violations.[120] In *White v. Pauly*, where a police officer shot and killed a man after being called to a scene as backup,[121] the Court focused even more overtly on factual similarities in precedent, admonishing the lower court for "rel[ying] on *Graham*, *Garner*, and their Court of Appeals progeny" and distinguishing the case on the basis of "White's late arrival on the scene."[122] Although the Court briefly acknowledged the possibility of an obvious violation, it immediately determined that this was not one, with little explanation,[123] and granted qualified immunity.[124]

Although in recent decisions the Court has more frequently mentioned the possibility of an obvious violation, for the most part it does not appear to have taken the prospect particularly seriously. In *District of Columbia v. Wesby*,[125] for example, the Court acknowledged the possibility of a "rare 'obvious case' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances," but immediately largely dismissed the possibility, stating that "a body of relevant case law is usually necessary to clearly establish the answer."[126] The Court reiterated this notion in *Kisela v. Hughes*,[127] which the lower court had determined was indeed an "obvious" case, stating that in police excessive force cases "officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" and reversing.[128]

harm to the officer or others.'" *Id.* at 12–13 (quoting Luna v. Mullenix, 773 F.3d 712, 725 (5th Cir. 2014), *rev'd*, 577 U.S. 7 (2015)).

119. *Id.* at 14–19 (internal quotation marks omitted) (quoting *Brosseau*, 543 U.S. at 201). *See also* Marcus R. Nemeth, *How Was* That *Reasonable? The Misguided Development of Qualified Immunity and Excessive Force By Law Enforcement Officers*, 60 B.C. L. REV. 989, 1005 (2019) (arguing that the Court's approach to the clearly established analysis in *Mullenix* was so lenient toward the officer as to effectively render him "unconditionally immune").

120. Though not taken up in this Comment, the Court also made other notable omissions. *See, e.g.*, Kinports, *supra* note 19, at 68 (noting that the Court's traditional balancing of the governmental interest in apprehending a suspect against "the countervailing interests in vindicating constitutional rights and compensating victims of constitutional injury," recognized in the Court's initial creation of qualified immunity, is nowhere referenced in *Mullenix*).

121. 137 S. Ct. 548, 549–50 (2017) (per curiam).

122. *Id.* at 552 (quoting Pauly v. White, 814 F.3d 1060, 1077 (10th Cir. 2016), *rev'd*, 137 S. Ct. 548 (2017) (per curiam)).

123. *Id.* (quoting *Brosseau*, 543 U.S. at 199).

124. *Id.* at 552–53.

125. 138 S. Ct. 577 (2018).

126. *Id.* at 590 (quoting *Brosseau*, 543 U.S. at 199) (internal quotation marks omitted).

127. 138 S. Ct. 1148 (2018) (per curiam).

128. *Id.* at 1151, 1153–55 (quoting *Mullenix*, 577 U.S. at 13). In a subsequent case, *City of Escondido v. Emmons*, the Court reiterated the notion that "police officers are entitled to qualified

Each decision from this period found no clearly established right, and none mentioned *Hope*.[129] Together, they demonstrated a steady and consistent departure from the principles *Hope* had put forward. Whereas the Court in *Hope* saw a case with extreme circumstances and addressed them in a way that enabled lower courts to identify clearly established rights—and, crucially, overcome qualified immunity—with no or reduced reliance on factually similar precedent, the Court has with almost every subsequent decision departed from this approach by demanding ever-increasing reliance on analogous precedent and minimizing the circumstances in which an obvious violation may be found, even as it perfunctorily acknowledges the possibility. In *Hope*, the Court stated that to be clearly established a right's "contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,"[130] explicitly rejected a "require[ment] that the facts of previous cases be 'materially similar to [the] situation'" at bar,[131] and specifically disclaimed the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."[132] Since then, as critics have observed, the Court has changed the standard from "*a* reasonable official" to "*every* reasonable official,"[133] added the requirement that "existing precedent . . . place[] the statutory

immunity unless existing precedent squarely governs the specific facts at issue" in excessive force cases, nowhere mentioning the possibility of obvious violations. 139 S. Ct. 500, 503 (2019) (per curiam) (quoting *Kisela*, 138 S. Ct. at 1153). The Court was particularly exacting in this assessment, indicating that precedent establishing "a right to be 'free from the application of non-trivial force for engaging in mere passive resistance'" did not apply, given that the plaintiff had attempted to *walk past* the defendant officers, determining that this rose beyond "*passive* resistance." *Id.* at 503 (quoting Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013)).

129. For additional discussion of the development of the Court's qualified immunity jurisprudence in both the periods before and after *Hope*, see Duckett, *supra* note 4, at 412–21.

130. Hope v. Pelzer, 536 U.S. 730, 739 (2002) (internal quotations omitted).

131. *Id.* (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, Hope v. Pelzer, 536 U.S. 730 (2002)).

132. *Id.*

133. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (emphasis added) (internal quotation marks omitted). *See also* Blum, Chemerinsky & Schwartz, *supra* note 64, at 656 ("The heightened standard is facially apparent in the test's phrasing. The *Harlow* standard for thirty years focused on whether it was clearly established law that 'a' reasonable officer should know; now it must be law that 'every' reasonable officer should know."); Gross, *supra* note 64, at 81 (describing this change as "extend[ing] even greater protection to government officials"). Gross aptly explained how this shift created a more exacting standard for finding clearly established rights:

> The wording "a reasonable official" suggests a single standard of reasonableness, one that uses an objectively reasonable official as a guide. The wording "every reasonable official" suggests that there is a range of reasonableness and what is reasonable will vary from one official to another.

or constitutional question beyond debate,"[134] required lower courts to "identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the [Constitution],"[135] and, at least in the Fourth Amendment context, required that "existing precedent squarely govern[] the specific facts at issue."[136] Few of the Court's qualified immunity decisions after *Hope* have acknowledged the case.[137] Commentators have criticized these changes as heightening the requirements plaintiffs must meet[138]—at least in the Court's treatment[139]—in theory reducing plaintiffs' likelihood of overcoming summary judgment[140] and possibly even leading to a reduction in civil rights claims being

> This change interjects a greater degree of subjectivity to the qualified immunity analysis.
>
> *Id.*

134. *al-Kidd*, 563 U.S. at 741. *See also* Kinports, *supra* note 19, at 66 (noting that, as of 2016, "[t]he phrase 'beyond debate,' which appeared for the first time in *al-Kidd*, has been used in eight of the eleven subsequent Supreme Court opinions that have concluded government officials did not act in violation of clearly established law"); Nemeth, *supra* note 119, at 1011 (arguing that *al-Kidd*'s "beyond debate" requirement "has further limited the ability of civilians to bring successful excessive force claims because the fact-specific nature of § 1983 cases makes the development of 'clearly established' law extremely difficult").
135. White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam).
136. City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam).
137. *See, e.g.*, *al-Kidd*, 563 U.S. 731 (nowhere mentioning *Hope* or the possibility of an obvious violation); Reichle v. Howards, 566 U.S. 658 (2012) (same); Plumhoff v Rickard, 572 U.S. 765 (2014) (same); Mullenix v. Luna, 577 U.S. 7 (2015) (same); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (same); *White*, 137 S. Ct. 548, 552 (nowhere mentioning *Hope* but acknowledging the possibility of an "obvious case"); District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (nowhere mentioning *Hope* but acknowledging that a "rare obvious case" may exist while emphasizing that this is seldom the case) (internal quotation marks omitted); *Emmons*, 139 S. Ct. at 504 (same). *But see* Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope* and acknowledging the possibility that "an obvious case" can "clearly establish the answer") (internal quotation marks omitted); Wilkie v. Robbins, 551 U.S. 537, 585 (2007) (Ginsburg, J., dissenting) (citing *Hope* for the proposition that the egregious circumstances of a case and relevant constitutional text may contribute to giving officers fair warning that their conduct violated the U.S. Constitution); Pearson v. Callahan, 555 U.S. 223, 237, 244 (2009) (acknowledging the possibility of an obvious violation and citing *Hope* for a separate proposition).
138. *See* Blum, Chemerinsky & Schwartz, *supra* note 64, at 656 ("[C]ourts are able to grant qualified immunity and dismiss Section 1983 claims by requiring an exact case on point from a high level court and [by applying] the recently implemented heightened standard for proving a clearly established law.").
139. *See infra* Part IV for a discussion of how lower court treatments of the clearly established prong may operate to somewhat undermine the exacting nature of the Court's standard.
140. The increased burden and consequent difficulty of prevailing in § 1983 litigation resulting from the Court's increasingly restrictive qualified immunity has been the subject of extensive criticism by scholars. *See, e.g.*, Jeffries, *supra* note 20, at 258, 261 ("[Q]ualified immunity as currently defined and administered goes well beyond shielding reasonable error. . . . [and] protects much error that is plainly unreasonable, simply because of the vagaries of prior adjudication. The consequence is to send exactly the wrong deterrent message: not only that

brought.[141] The Supreme Court has put forward many of these increasingly demanding requirements in unsigned opinions,[142] and nowhere has it acknowledged that the standard has changed at all since *Hope*.[143]

To be sure, it would be inaccurate to say that the Court has entirely walked away from *Hope*, and other decisions have validated it or supported its reasoning to some degree. In *Groh v. Ramirez*,[144] for example, the Court found that an officer's search of a ranch was unreasonable where the warrant listed the items to be seized as "a 'single dwelling residence . . . blue in color,'" such that "the warrant did not describe the items to be seized *at all*," leading the Court to find the warrant "so obviously deficient" that it "regard[ed] the search as 'warrantless.'"[145] In determining whether the law the officer violated was clearly established, the Court pointed to the text of the Fourth Amendment, stating, "[g]iven that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."[146] Although the Court did not cite *Hope*, it nonetheless found that the text of the Constitution itself was sufficiently clear to put reasonable officers on notice that this search was illegal even without a prior decision on point, and accordingly found the law clearly established.[147]

officers should not be inhibited by the threat of liability for reasonable error, but that officers should not be inhibited at all, absent specific prior adjudication."); Schwartz, *supra* note 23, at 1818–19 (arguing that the Court's highly protective qualified immunity jurisprudence "may discourage people from bringing cases when their constitutional rights are violated" because it signals to plaintiffs' attorneys that § 1983 claims with egregious facts may be dismissed and encourages defense counsel to raise and appeal qualified immunity whenever possible, "increas[ing] the cost, complexity, and delay associated with litigating Section 1983 cases"); *see also Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting) (arguing that the Court's strict approach to identifying a law as clearly established is overly protective of police in excessive force cases, "render[ing] the protections of the Fourth Amendment hollow").

141. *See* Gross, *supra* note 64, at 79 ("There is very little incentive to litigate when the state of the law is arguably unclear. . . . There is very little incentive to spend the time and money associated with a lawsuit when the end result will be a benefit, not to the actual litigant, but to future litigants.").

142. *See Brosseau*, 543 U.S. 194 (per curiam); *Mullenix*, 577 U.S. 7 (per curiam); *White*, 137 S. Ct. 548 (per curiam); Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); *Emmons*, 139 S. Ct. 500 (per curiam).

143. *See* Kinports, *supra* note 19, at 65 ("[T]he Court has—without offering any explanation, and without even acknowledging it is doing so—broadened the protection qualified immunity offers government officials in § 1983 litigation.").

144. 540 U.S. 551 (2004).

145. *Id.* at 558.

146. *Id.* at 563 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

147. *Id.* at 563–65. *See* Hope v. Pelzer, 536 U.S. 730, 745 (2002) (suggesting that the Eighth Amendment itself provided at least some clarity that the officers' use of the hitching post was illegal, stating that "[t]he obvious cruelty inherent in this practice should have

Safford Unified School District No. 1 v. Redding[148] also included some discussion reflective of principles put forward in *Hope*, stating, "[t]o be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.' The unconstitutionality of outrageous conduct obviously will be unconstitutional . . . ."[149] The Court went on to state that "even as to action less than an outrage, 'officials can still be on notice that their conduct violates established law . . . in novel factual circumstances,'" quoting *Hope*.[150] Yet, the Court went on to find the right at issue not clearly established because of divergent approaches to the issue among the circuit courts.[151] *Redding*, published in 2009, represents the Court's most recent citation of *Hope* for its "novel factual circumstances" proposition.[152]

Most recently, however, the Court explicitly indicated its approval of *Hope*, relying on it in *Taylor v. Riojas*[153] to find a constitutional violation "obvious" and reverse a grant of qualified immunity.[154] There, after a state prisoner was housed in appallingly unsanitary conditions for six days, the Court held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[155] In doing so, the Court cited *Hope* for its propositions that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" and that, in the Eighth Amendment context, "'[t]he obvious cruelty inherent' in putting inmates in certain wantonly 'degrading and dangerous' situations provides officers 'with some notice'" that their conduct is unconstitutional.[156]

provided respondents with some notice that their alleged conduct violated Hope's *constitutional protection against cruel and unusual punishment*") (emphasis added). *See also* Golden & Hubbard, Jr., *supra* note 16, at 585 (arguing that under *Hope*, "notice may depend on more generalized notions of constitutional rights that are not tied to specific circumstances but that emanate from the text of the Constitution itself").

148. 557 U.S. 364 (2009).

149. *Id.* at 377 (alteration in original) (citation omitted) (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)).

150. *Id.* at 377–78 (omission in original) (quoting *Hope*, 536 U.S. at 741).

151. *Id.* at 378–79.

152. The Court subsequently cited *Hope* twice in *Tolan v. Cotton*, vacating the lower court's finding that the defendant's actions did not violate clearly established law; however, it cited *Hope* only for propositions related to the two-prong nature of the qualified immunity analysis. Tolan v. Cotton, 572 U.S. 650, 656, 660 (2014).

153. 141 S. Ct. 52 (2020).

154. *Id.* at 53–54.

155. *Id.* at 53.

156. *Id.* at 53–54 (alteration in original) (quoting Hope v. Pelzer, 536 U.S. 730, 741, 745 (2002)).

Taylor undoubtedly marks a shift in the Court's treatment of qualified immunity in that it is the first time in years that the Court has overturned a grant of qualified immunity, let alone on the grounds that the violation was obvious per *Hope*.[157] That shift, however, may be a somewhat limited one. While the Court clearly answered the question of whether *Hope* remains good law, it provided little insight regarding when courts should apply it outside of the prison conditions context,[158] particularly given the Court's prior admonitions that a violation will be obvious only in rare circumstances[159] and its reiteration of "obvious cruelty," language from *Hope* referring to the Eighth Amendment's Cruel and Unusual Punishment Clause.[160] Further, it may be that the Court will go on to use *Taylor* as a benchmark for identifying obvious violations in the future, reversing denials of qualified immunity resulting from seemingly obvious violations on the grounds that the conduct at issue is not as egregious as the defendants' was in *Taylor*—an exceptionally high bar to meet.[161] Accordingly, it is unclear whether lower courts will change their approaches to deciding qualified immunity, more frequently consider whether a particular violation might be obvious, or recognize more obvious violations.

Looking to the Court's decisions following *Hope* more broadly, however, it remains clear overall that the Court's clearly established jurisprudence has become far more restrictive and has been characterized by an emphasis on requiring

157. To be sure, multiple justices have expressed dissatisfaction with the Court's stringent approach to qualified immunity in the years since *Hope* and have indicated that they would have overturned a grant of qualified immunity, frequently in dissent. *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 205 (2004) (Stevens, J., dissenting) (first quoting United States v. Lanier, 520 U.S. 259, 271 (1997); and then citing *Hope*, 536 U.S. at 741) (acknowledging that "general statements of the law are not inherently incapable of giving fair and clear warning" and decrying the Court's "search for relevant case law applying the *Garner* standard to materially similar facts" as "both unnecessary and ill advised"); Kisela v. Hughes, 138 S. Ct. 1148, 1158, 1161 (2018) (Sotomayor, J., dissenting) (with Justice Ginsburg, citing *Hope* for its proposition that factually identical precedent is not required to clearly establish a right and arguing that the violations at issue accordingly were clearly established). One sitting justice has even indicated a willingness to revisit the doctrine entirely. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–71 (2017) (Thomas, J., concurring in part) (expressing a "growing concern with [the Court's] qualified immunity jurisprudence" and criticizing the Court's expansion of qualified immunity's applicability as "precisely the sort of 'freewheeling policy choices' that we have previously disclaimed the power to make") (original alteration omitted) (citation omitted).

158. *See supra* notes 34, 41.

159. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018); City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (per curiam).

160. U.S. CONST. amend. VIII.

161. The Court has, however, since vacated and remanded at least one other case granting qualified immunity, citing *Taylor*, suggesting that the Court may have believed that case involved an obvious violation as well. *See* McCoy v. Alamu, 141 S. Ct. 1364 (2021).

particularity and factually similar precedent, seldom recognizing that clearly established rights may indeed be obvious under appropriate circumstances. Notwithstanding any shifts that might result from *Taylor*, this would seem to mean that in adjudicating § 1983 claims, courts are more likely to protect defendants and limit plaintiffs' ability to prevail than they would with clearer guidance on how and when to apply *Hope*. Yet, given that the Court accepts so few cases for review, in far more cases plaintiffs' success will turn on how the lower courts have interpreted the Court's clearly established decisions, a subject I address in Parts III and IV.

III. *HOPE*'S LEGACY IN THE CIRCUIT COURTS

The mixed signals that the Supreme Court has sent about the precedential value of *Hope* and under what circumstances courts may find obvious violations of clearly established rights has, unsurprisingly, led to varying approaches to the clearly established analysis among the circuits.[162] To evaluate the approaches the circuit courts have taken in addressing whether a right is clearly established for qualified immunity purposes since *Hope*, I reviewed just under 250 court of appeals decisions, focusing in particular on the Fourth Circuit (Subpart 1), Sixth Circuit (Subpart 2), Eighth Circuit (Subpart 3), and Eleventh Circuit (Subpart 4).[163] I present my findings below. They reveal that in the years since *Hope*, circuit courts have indeed still been willing to find violations of constitutional rights obvious even without factually similar precedent identifying a violation,[164] and have not always cited *Hope* when doing so.

A. Methodology

In reviewing decisional law from these circuits, my goal was to assess whether the circuit courts took a clear analytical approach to resolving questions of whether a particular right was clearly established; what that approach was, if reasonably clear; and the extent to which they were willing to find obvious

162. Time will tell whether *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), will prompt appellate courts to more frequently recognize obvious violations and whether it will magnify previous trends among circuit courts, discussed *infra* Part IV. Both possibilities create ample room for future research.

163. 210 of these decisions came from these four circuits and form the basis of the findings I have detailed below.

164. *See, e.g.*, Kane v. Barger, 902 F.3d 185, 195 (3d Cir. 2018) (quoting *Hope*) (finding the right to be free from sexual assault by a police officer "so 'obvious' that it could be deemed clearly established even without materially similar cases").

violations of the kind recognized in *Hope*, whether or not *Hope* was explicitly cited.[165] I used Westlaw searches within the four circuits I evaluated to define a universe of cases to draw from in this analysis. Specifically, I reviewed published decisions from these circuits that either (1) cited *Hope* and contained the term "qualified immunity" or (2) postdated *Hope* and contained the terms "qualified immunity," "clearly established," and either "novel" or "obvious."[166] The first search yielded 45, 63, 63, and 117 cases for the Fourth, Sixth, Eighth, and Eleventh Circuits, respectively. The second search yielded 75, 158, 154, and 160 cases for each circuit, respectively. After accounting for duplicates (that is, cases returned in both searches), I was left with a total of 75, 158, 154, and 160 cases for each circuit, respectively. Overall, then, my searches yielded a grand total of 547 cases across the four circuits reviewed.

Of these cases, I reviewed 33 Fourth Circuit decisions, 76 Sixth Circuit decisions, 35 Eighth Circuit decisions, and 66 Eleventh Circuit decisions, for a total of 210 cases across the four circuits.[167] For practical reasons, I did not review every case from the universe of cases obtained from my searches.[168] I also did not randomize the cases I selected from the larger universe of cases for review;[169] however, I introduced no conscious preferences in selecting cases for review aside from giving a slight precedence to decisions that had been published more recently. I favored recent decisions so as to better account for any potential impact that stricter standards for identifying clearly established rights put forward in recent Supreme Court decisions like *al-Kidd* and *Mullenix* might have on circuit courts' analyses. A sample comprised mainly of pre-2011 decisions, for example, likely would poorly reflect the current state of the law.[170]

165. For example, a number of decisions cited *Brosseau* for the proposition that a violation may be obvious, which itself had cited *Hope* for the same. Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam). *See, e.g.*, Caudill v. Hollan, 431 F.3d 900, 912 (6th Cir. 2005); Capps v. Olson, 780 F.3d 879, 886 (8th Cir. 2015); Harris v. Coweta County, 433 F.3d 807, 819 n.15 (11th Cir. 2005). *See also, e.g.*, Moore-Jones v. Quick, 909 F.3d 983, 985 (8th Cir. 2018) (citing instead *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam), which had cited *Brosseau*).

166. I performed the bulk of this research between February and April 2020, so my findings do not reflect subsequent decisions from these circuits.

167. I also reviewed an additional 25 cases from other circuits. Although I mention some of these in this Comment for illustrative purposes, I have not included them in my study.

168. For an impressive example of scholarship evaluating qualified immunity decisions and reviewing every decision in a universe of 844 cases, see Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 30–33 (2015).

169. For an example of scholarship selecting randomized samples of qualified immunity decisions from a larger universe of decisions, see Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 684–86 (2009).

170. In conducting this study, I recognize the limitations of my methodology on my ability to present empirically robust results. Accordingly, rather than purporting to concretely establish the exact contours of circuits' approaches—even assuming that such a demonstration is

My review of these decisions included both a qualitative and quantitative approach. In the qualitative approach, I studied the methods the circuit courts used in evaluating whether the right of which the plaintiff had alleged a violation was clearly established at the time of the events at issue. In doing so, I aimed to discern whether or not each circuit employed a well-defined mode of analysis in addressing this question with a reasonable degree of consistency and, where circuits did, to identify that mode of analysis. I also aimed to determine the extent to which *Hope*'s fairly liberal precedent retained salience in the circuit's overall treatment of the clearly established issue, whether or not courts' recognition of *Hope* rose to the level of finding obvious violations outright. Because this approach is qualitative, a significant amount of interpretation was required, which naturally made the analysis somewhat subjective. Further, because I reviewed decisions spanning roughly eighteen years (from when the *Hope* decision came down until 2020) and because each circuit court is comprised of many judges, many of whom have retired and been replaced during this eighteen-year period, there was some degree of variance in approaches within individual circuits between different judges, even in decisions that were close in time to each other. As such, this analysis does not aim to put forward definitive, ironclad conclusions about the approaches taken by the reviewed circuits, but rather aims to offer a general impression of how courts are treating the clearly established analysis and the extent to which there is consistency between circuits in their approaches. Even with this caveat, I believe my findings offer valuable insight into the contours of the circuit courts' treatments of this analysis in a post-*Hope* landscape.

In the quantitative approach, I analyzed the reviewed cases to determine whether individual decisions found obvious violations in the manner of *Hope* and, where they did, what the frequency of obvious violations was within the sample of reviewed cases for each circuit. I pursued this line of inquiry to identify both whether there were notable differences in the frequency of decisions finding obvious violations between circuits and also, if there were, the extent to which different modes of analyzing the clearly established question between circuits might offer some explanation for that variance. It is important to note that, although I have termed this a quantitative analysis, this evaluation nonetheless necessitated judgment calls in some instances, as when decisions appeared to find a violation obvious but used other language to so indicate or used "obvious" or similar terms in a seemingly qualified manner. As a general matter, for the

possible, which is unlikely given the number of judges on each appellate court and the differences in their jurisprudence—I instead aim to offer an impression of how these circuits treat the clearly established issue and of the extent to which their treatments track with the Court's in the years following *Hope*.

purposes of this analysis, when referring to an "obvious" violation I mean that the court in a particular case found the right in question clearly established either based primarily on the egregiousness of the conduct at issue, or without relying on precedent, or both. Like with the qualitative approach, then, this assessment necessarily cannot be perfectly exact, and it is possible that some readers of the reviewed cases that found a clearly established right might believe that the court found an obvious violation where I did not, or that violations I have deemed obvious were not so. For example, a number of reviewed decisions appeared to find obvious violations, including somewhat similar precedent seemingly as an afterthought, and thereby appearing not to *rely* on that precedent. Again, however, the aim is not to provide a perfect accounting of the precise number of obvious violations found in each circuit, but rather an impression of the extent to which the reviewed circuits are willing to do so in general.

B. Findings

1. Fourth Circuit

Overall, reviewed decisions indicate that the Fourth Circuit typically employs what I term a "traditional" approach to determining whether an allegedly violated right was clearly established in a particular case. By traditional, I mean that in analyzing the clearly established issue, the appellate court frames the right at issue in a fairly specific way—at a low "level of generality," to use the Supreme Court's language[171]—and proceeds by assessing whether prior decisions with a fair degree of factual similarity to the case at bar found that the conduct at issue indeed violated a plaintiff's federally protected right such that officials could subsequently be said to have been put "on notice" that such conduct was illegal.

For example, in *Fields v. Prater*,[172] a candidate for the directorship of a county-level social services department brought suit alleging that the county board passed her over on the basis of her political affiliation in violation of the First Amendment.[173] In arguing that the right to not be excluded from such a position was clearly established, the plaintiff identified a prior Fourth Circuit decision holding that a state electoral board violated the First Amendment when it considered political affiliation in making employment decisions regarding county registrars.[174] The *Fields* court found the prior decision to be "the closest analogue

171. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).
172. 566 F.3d 381 (4th Cir. 2009).
173. *Id.* at 383–84.
174. *Id.* at 389–90 (citing McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987)).

in our precedent to the case at hand" and agreed that in both cases, the defendant board's consideration of the plaintiff's political affiliation was impermissible given significant evidence showing that political affiliation was irrelevant to the effective performance of the position.[175] Despite finding a constitutional violation, however, the court nonetheless found that because local directors and registrars had somewhat different levels of involvement in policymaking, the prior decision was insufficient to "*clearly* put defendants on notice that their conduct was unconstitutional."[176] Consequently, the court granted qualified immunity, finding the right not clearly established on the basis of this factual difference.[177]

Similarly, in *Brown v. Elliott*,[178] a sheriff's deputy conducted a traffic stop of a truck following a tip that a passenger was transporting cocaine.[179] When the deputy approached the passenger side of the truck, the suspect leaned toward the driver, placed his own foot on the accelerator, and shifted the truck into drive.[180] As the suspect leaned over, the deputy reached in to grab the suspect, and as the truck began to move the deputy unholstered his gun and shot the suspect in the back, killing him.[181] The decedent's estate sued, arguing that his right to be free from excessive force under the circumstances had been clearly established by Fourth Circuit precedent holding that officers violate the Fourth Amendment by firing at drivers after the driver's car had passed the officer.[182] The court, however, distinguished the precedent by observing that the deputy in *Brown* shot the decedent as the truck began moving away, not after it had already done so, and consequently found the right not clearly established and granted qualified immunity.[183]

Some decisions, while not explicit in requiring factually similar precedent, nonetheless relied principally on it in finding rights clearly established. For example, in *Harris v. Pittman*,[184] a police officer chased down the plaintiff, whom he suspected was responsible for the theft of a car, leading to a hand-to-hand struggle.[185] According to the plaintiff's account, the officer shot him once during the struggle, stood up, and shot him twice more as he lay on the ground, already

175. *Id.* at 390.
176. *Id.*
177. *Id.*
178. 876 F.3d 637 (4th Cir. 2017).
179. *Id.* at 640.
180. *Id.*
181. *Id.*
182. *Id.* at 639–40, 643–44.
183. *Id.* at 644–45.
184. 927 F.3d 266 (4th Cir. 2019).
185. *Id.* at 269.

wounded.[186] Although the court disclaimed the need for "an exact factual match" in order to find a right clearly established, it nonetheless denied qualified immunity on the basis of a prior decision "clearly establish[ing] the right of a suspect, once shot by an officer and lying wounded on the ground, not to be shot again."[187]

Many other Fourth Circuit decisions took a similar approach and looked for a high degree of factual similarity[188] or, in some cases, insisting on a highly particularized framing of the right.[189] As mentioned, however, no circuit's approach was perfectly consistent, and other Fourth Circuit decisions were less strict in their treatment of the clearly established question. One such group of cases relied on precedent that was only somewhat similar to the case at bar in finding a right clearly established, often while acknowledging meaningful factual dissimilarities.[190] Others took a similar approach but went further in rejecting

186. *Id.* at 269–70.

187. *Id.* at 281 (internal quotation marks omitted) (citation omitted).

188. *See, e.g.*, Waterman v. Batton, 393 F.3d 471, 483 (4th Cir. 2004) (granting qualified immunity on the basis that the Fourth Circuit had not previously recognized that "a passing risk to an officer does not authorize him to employ deadly force moments after he should have recognized passing of the risk"); Braun v. Maynard, 652 F.3d 557, 561–65 (4th Cir. 2011) (granting qualified immunity because sparse on-point precedent had not established that the use of an ion scanner to search for drugs in prisons could not give rise to reasonable suspicion); Feminist Majority Found. v. Hurley, 911 F.3d 674, 704–05 (4th Cir. 2018) (granting qualified immunity on the basis that "controlling authority did not clearly establish the right to be free from a university administrator's deliberate indifference to student-on-student sexual harassment," even though it did for *school-official*-on-student sexual harassment).

189. *See, e.g.*, Safar v. Tingle, 859 F.3d 241, 247 (4th Cir. 2017) (granting qualified immunity after discrediting the plaintiffs' framing of the right as being "at the highest level of generality, asserting that centuries of 'Anglo-American law' forbid a state official from 'knowingly caus[ing] or permit[ting] the arrest of an innocent citizen'" and finding that the plaintiffs had failed to identify a prior case that found a violation under similar circumstances) (alterations in original); Wilson v. Prince George's County, 893 F.3d 213, 222 (4th Cir. 2018) (granting qualified immunity after framing the issue as "whether it was clearly established law in October 2012 that shooting an individual was an unconstitutional use of excessive force when: (1) the officer had probable cause to believe that the person had committed certain misdemeanors, one of which involved the use of force against another person; (2) the individual was standing about 20 feet from the officer holding a knife and using it to hurt himself, but was not threatening anyone or making any sudden movements; and (3) the individual had ignored the officer's repeated commands to drop the knife").

190. *See* Ray v. Roane, 948 F.3d 222, 230 (4th Cir. 2020) (denying qualified immunity after finding that "the unlawfulness of [the defendant's] alleged actions was established by the general principles" of prior Fourth Circuit and by sister circuit decisions); *see also* Bellotte v. Edwards, 629 F.3d 415, 424 (4th Cir. 2011) ("The absence of a prior case directly on all fours here speaks not to the unsettledness of the law, but to the brashness of the conduct.") (internal quotation marks omitted); Meyers v. Baltimore County, 713 F.3d 723, 734 (4th Cir. 2013); Cooper v. Sheehan, 735 F.3d 153, 159–60 (4th Cir. 2013); Booker v. S.C. Dep't of Corr., 855 F.3d 533, 544 (4th Cir. 2017).

outright a requirement of factual similarity.[191] Others still found rights clearly established based on general principles articulated in Supreme Court precedent, without citing factually similar precedent from the Court or the Fourth Circuit.[192]

In many of the cases discussed and cited above, the Fourth Circuit appeared to regard *Hope* as relevant precedent—albeit to somewhat varying degrees—regardless of the category into which the case fell. In *Booker v. South Carolina Department of Corrections*, for example, the court cited *Hope*'s proposition that "a general constitutional rule . . . [may] appl[y] with obvious clarity to the specific conduct in question" in determining that the Supreme Court's decision in *Turner v. Safley* supported its finding of a clearly established right and denied qualified immunity.[193] In *Harris*, the court denied qualified immunity, citing *Hope* as its basis for rejecting the need for "an exact factual

191. *See* Thompson v. Virginia, 878 F.3d 89, 102 (4th Cir. 2017) ("To be sure, *McMillian* and *Wilkins* involved direct punches and kicks, rather than a 'rough ride,' but it makes no difference to the constitutional analysis whether Mr. Thompson was slammed against the side of the van by the officer's hands or by the momentum maliciously created by the officer's driving. . . . The intentionally erratic driving was simply a different means of effectuating the same constitutional violation. To draw a line between these acts would encourage bad actors to invent creative and novel means of using unjustified force on prisoners."). *See also* Scinto v. Stansberry, 841 F.3d 219, 235–36 (4th Cir. 2016) (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)) (rejecting defendant's highly fact-specific framing of the right, "whether a reasonable official would have known it violated a clearly established constitutional right to follow protocol by placing an inmate in administrative detention after he receives an incident report," in favor of the far more general "right of prisoners to receive adequate medical care and to be free from officials' deliberate indifference to their known medical needs," citing *Hope*'s rejection of a requirement of highly similar precedent).

192. *See* Henry v. Purnell, 652 F.3d 524, 534 (4th Cir. 2011) (en banc) (denying qualified immunity on the basis that "it would have been clear to a reasonable officer that shooting a fleeing, nonthreatening misdemeanant with a firearm was unlawful" because "[t]his basic legal principle had been established by the Supreme Court years earlier in [*Tennessee v.*] *Garner*"). *See also* Turmon v. Jordan, 405 F.3d 202, 206, 208 (4th Cir. 2005) (denying qualified immunity despite acknowledging the absence of a case "exactly like this one," framing the clearly established right broadly under Graham v. Connor, 490 U.S. 386 (1989) as the generalized "right to be free from seizures carried out by excessive force"); *Booker*, 855 F.3d at 543, 543 n.7 (indicating that *Turner v. Safley*, 482 U.S. 78, 84 (1987), which held that prisoners "retain the constitutional right to petition the government for the redress of grievances," together with Fourth Circuit precedent establishing that "prison officials cannot retaliate against inmates for exercising a constitutional right," clearly established the plaintiff prisoner's right to be free from retaliation for "fil[ing] an administrative grievance seeking redress for . . . the improper handling of his legal mail").

193. *Booker*, 855 F.3d at 543 (quoting *Hope*, 536 U.S. at 741). *See also* Graves v. Lioi, 930 F.3d 307, 349 (4th Cir. 2019) (Gregory, C.J., dissenting) (arguing that the right to be free from state-created danger recognized by the Court was enough to put police on notice that their conduct was unconstitutional even absent precedent addressing the doctrine in similar circumstances, citing *Hope*'s proposition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

match."[194] And in *Brown*, the court cited *Hope* for its proposition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," but immediately followed this with language from *al-Kidd* and *Pauly* emphasizing the Supreme Court's more recent insistence on factually analogous precedent in determining whether a right is clearly established.[195] It ultimately relied on factual distinctions from precedent in finding the right not clearly established, granting qualified immunity.[196]

The Fourth Circuit's recognition of *Hope*'s precedential value in some cases also included a recognition that a constitutional violation may be so obvious as to put the defendant on notice that their conduct was illegal even absent any relevant precedent whatsoever. In some of these cases, the court raised the "obvious" possibility but summarily rejected its applicability in the case at bar.[197] In another, however, the court appeared to find an "obvious" case. In *Brockington v. Boykins*,[198] the defendant police officer confronted the plaintiff, who was suspected of kidnapping, robbery, and other crimes, and who was unarmed, in the backyard of a vacant house.[199] During the confrontation, the officer shot the plaintiff twice, including in the chest, causing him to fall off of the stairs on which he stood.[200] As the plaintiff lay on the ground, "unable to get up or otherwise defend himself," the officer shot him six or seven more times, requiring the

194. Harris v. Pittman, 927 F.3d 266, 281 (4th Cir. 2019) (citing *Hope*, 536 U.S. at 741).
195. Brown v. Elliott, 876 F.3d 637, 642 (4th Cir. 2017) (quoting *Hope*, 536 U.S. at 741).
196. *Id.* *See also* Safar v. Tingle, 859 F.3d 241, 246 (4th Cir. 2017) (likewise citing *Hope* and immediately thereafter citing *al-Kidd* and *Pauly* for propositions emphasizing the Court's strict approach, ultimately finding no clearly established right and granting qualified immunity); Feminist Majority Found. v. Hurley, 911 F.3d 674, 704–05 (4th Cir. 2018) (citing *Hope*'s "novel factual circumstances" proposition but finding no clearly established right after distinguishing precedent on the facts); Santos v. Frederick Cnty. Bd. of Comm'rs, 725 F.3d 451, 468–69 (4th Cir. 2013). *Cf.* Wilson v. Prince George's County, 893 F.3d 213, 221 (4th Cir. 2018) (citing *Hope* for the lack of a requirement of factually identical precedent but finding no clearly established right after adopting a highly specific framing of the right at issue). *But see* Owens v. Balt. City State's Att'ys Off., 767 F.3d 379, 398–401 (4th Cir. 2014) (citing *Hope* and ultimately finding a clearly established right). Some decisions cited *Hope* but nonetheless granted qualified immunity on the basis that prior decisions had established that the conduct at issue was *legal*. *See* Bland v. Roberts, 730 F.3d 368, 391–94 (4th Cir. 2013).
197. *See* Altman v. City of High Point, 330 F.3d 194, 211–12 (4th Cir. 2003) (citing *Lanier* rather than *Hope* for the "obvious" proposition, but finding it "far from obvious, even to a court of law, that dogs are 'effects' protected by the Fourth Amendment, that the officer on the beat could not reasonably be expected to know that his seizure of a dog might violate the Fourth Amendment"); *see also* Hensley v. Price, 876 F.3d 573, 595 (4th Cir. 2017) (Shedd, J., dissenting) (arguing that this was "not an 'obvious' case," contrary to the district court opinion that the majority affirmed; the majority, however, did not discuss the "obvious" possibility).
198. 637 F.3d 503 (4th Cir. 2011).
199. *Id.* at 505.
200. *Id.*

plaintiff to spend three weeks on life support and rendering him paralyzed and paraplegic.[201] Although the court offered an extensive discussion of Fourth Circuit precedent relevant to the issue before it, it stated separately that "it is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances," citing *Hope* for the proposition that "it is not required that the exact conduct has been found unconstitutional in a previous case."[202] Given the court's emphasis on "common sense," it is evident that the Court here found an obvious violation in the manner of *Hope*, despite not using the same language.[203] Thus, although two other reviewed decisions used the term "obvious" in finding a clearly established right, *Brockington* represented the only reviewed Fourth Circuit decision in which the court appeared to recognize an obvious constitutional violation.[204]

201. *Id.*

202. *Id.* at 508. The court, however, went on to state that *Tennessee v. Garner* and Fourth Circuit precedent clearly established the right at issue as well. *Id.*

203. *See id.* Although the court did review precedent, it nonetheless clearly indicated that precedent was unnecessary to its "common sense" finding. It could be argued, however, that the court's statement about "common sense" is best read as dicta and that *Brockington* thus does not represent a true example of the court recognizing an obvious violation in the manner of *Hope*.

204. It is worth reiterating here that this inquiry is inherently subjective, and that others may identify obvious violations where I have not. For example, in *E.W. v. Dolgos*, the Fourth Circuit itself identified *Turmon v. Jordan*, 405 F.3d 202 (4th Cir. 2005), as an "obvious" case. E.W. v. Dolgos, 884 F.3d 172, 186 (4th Cir. 2018). Yet in *Turmon*, which involved a Fourth Amendment excessive force claim, the Fourth Circuit cited to other decisions that had found that the use of comparable levels of force required reasonable suspicion of ongoing criminal activity, meaning *Turmon* was not in fact decided on the basis of an obvious violation. *Turmon*, 405 F.3d 202. Similarly, *Betton v. Belue*, 942 F.3d 184 (4th Cir. 2019), appeared to hold itself out as an "obvious" case. There, a team of police officers in plain clothes used a battering ram to enter the plaintiff's home to execute a warrant to search for marijuana, equipped with "assault style rifles," without identifying themselves. *Id.* at 187. The plaintiff, hearing the commotion from the other end of the house but no verbal indication of what was happening, removed a gun from his waistband and held it at his hip. *Id.* Upon seeing the plaintiff with the gun, three officers fired at him twenty-nine times, striking him nine times and causing him permanent paralysis. *Id.* The court defined the right at issue at a high level of specificity and found that the circumstances in a prior Fourth Circuit decision were present in the case before it, thereby clearly establishing the right. *Id.* at 194. It immediately went on to state, however: "Thus, we conclude that Officer Belue's use of deadly force presents an 'obvious case' exhibiting a violation of a core Fourth Amendment right." *Id.* (citing Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018)). Yet, because it is clear that the court relied on prior, factually similar circuit precedent in concluding that the right was clearly established, its "obvious" statement here is misleading, and *Betton* found no true obvious violation in the manner of *Hope*. *Id. Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018), likewise presents an example using the word "obvious" and thus appearing to find an obvious violation at first blush. There, a detective investigating Sims, the plaintiff and a minor who had been accused of sending sexually explicit photographs, obtained a search warrant "authorizing photographs of Sims' naked body, including his erect penis." *Id.* at 257–58. When executing the warrant, the detective "demanded that Sims manipulate his penis to achieve an erection,"

2. Sixth Circuit

In 2005, the Sixth Circuit adopted a more concrete approach to determining whether a right was clearly established at the time of the alleged violation. In *Lyons v. City of Xenia*,[205] the plaintiff brought claims against two city police officers, the police chief, and the city for false arrest and excessive force. After the Sixth Circuit reversed the district court's denials of qualified immunity for the officers, the decision was appealed to the Supreme Court, which remanded the case back to the Sixth Circuit for reconsideration in light of its recent decision[206] in *Brosseau v. Haugen*.[207] On remand, the court of appeals reevaluated both prongs of its qualified immunity decision while endeavoring to square *Brosseau*'s approach to the clearly established prong with *Hope*'s.[208] In doing so, the court announced: "*Brosseau* leaves open two paths for showing that officers were on notice that they were violating a 'clearly established' constitutional right—where the violation was sufficiently 'obvious' under the general standards of constitutional care that the plaintiff need not show 'a body' of 'materially similar' case law, and where the violation is shown by the failure to adhere to a 'particularized' body of precedent that 'squarely govern[s] the case here.'"[209]

As my study shows, the *Lyons* "two paths" approach would come to appear frequently in the Sixth Circuit's analyses of the clearly established issue. Indeed,

prompting Sims to challenge the search under the Fourth Amendment. *Id.* at 258. The court of appeals observed that although officers are typically entitled to assume that conduct prescribed by warrant is constitutional, its decision in *Graham v. Gagnon* established that officers are not so entitled when it would be objectively unreasonable to rely on the particular warrant. *Id.* at 264 (citing Graham v. Gagnon, 831 F.3d 176, 183 (4th Cir. 2016)). The court then vacated the district court's grant of qualified immunity after stating: "Here, the *obvious*, unconstitutional invasion of Sims' right of privacy that was required to carry out the warrant rendered reliance on that warrant objectively unreasonable, thereby eliminating the protection that a search warrant typically would have afforded an executing officer." *Id.* at 264–65 (emphasis added). Even so, because the court explicitly relied on *Graham* to demonstrate that unreasonably relying on improper warrants had been clearly established as unconstitutional, it did not find a true obvious violation here. *Id.*

205. 417 F.3d 565 (6th Cir. 2005).

206. *Id.* at 569–71.

207. 543 U.S. 194 (2004) (per curiam). *See supra* Part II for a discussion of the *Brosseau* decision.

208. *Lyons*, 417 F.3d at 571–80.

209. *Id.* at 579 (alteration in original) (internal citation omitted) (quoting *Brosseau*, 543 U.S. at 199, 201). *See* Golden & Hubbard, Jr., *supra* note 16, at 602 ("The [Sixth] circuit's two-path approach to establishing fair notice within the qualified immunity analysis attempts to reconcile *Hope*'s rejection of the materially similar standard and *Brosseau*'s implementation of the materially similar standard."). The *Lyons* court ultimately granted qualified immunity after finding the right at issue not clearly established under either of the "two paths," noting specifically that the case did not present an obvious violation under *Hope*. *Lyons*, 417 F.3d at 578–80.

most of the decisions I reviewed explicitly or impliedly sorted the case before them into one of the two categories. As a result, my review of the Sixth Circuit's approach to the clearly established analysis focuses primarily on cases decided in 2005 and later, after *Lyons* was decided. Not all post-*Lyons* decisions alluded to the framework, however, and some (whether deliberately or not) quite clearly did not apply it at all. Some of these appear to have taken what I term a middle path, applying an approach seemingly lying somewhere between the two articulated in *Lyons*.[210]

Of the seventy-five post-*Lyons* cases I reviewed, a substantial portion were decided using *Lyons*'s second "path," which requires plaintiffs to show that defendants "fail[ed] to adhere to a particularized body of precedent that squarely governs the case."[211] For example, in *Campbell v. City of Springboro*,[212] the two plaintiffs had each been attacked in separate incidents by the same police dog, part of the city police department's canine unit, and brought various claims against the dog's handler, the police chief, and the city, including an excessive force claim.[213] On appeal, the Sixth Circuit looked to, and factually distinguished, two decisions that had granted summary judgment after finding the use of a police dog against the plaintiffs permissible on the basis that the officers were in dangerous environments and pursuing individuals who were exhibiting irrational behavior.[214] The court then looked to a third case, which had denied summary judgment, and found it factually similar to the case at bar given that in both cases an officer "allowed a 'bite and hold' dog, whose training was questionable, to attack . . . suspects who were not actively fleeing and who, because of proximity, showed no ability to evade police custody."[215] Given these factual similarities, the court determined that the third case clearly established the plaintiffs' right to not be attacked by a police dog under the circumstances, and accordingly upheld the district court's denial of qualified immunity.[216] Many other reviewed decisions took a similar approach.[217]

210. *See infra* Subpart III.B.4 and Part IV for findings and discussion relating to a similar approach taken by the Eleventh Circuit.
211. *Lyons*, 417 F.3d at 579 (internal citations, quotations, and alteration marks omitted).
212. 700 F.3d 779 (6th Cir. 2012).
213. *Id.* at 782.
214. *Id.* at 788–89.
215. *Id.* at 789 (citing White v. Harmon, 65 F.3d 169, 1995 WL 51886, at *3 (6th Cir. 1995)).
216. *Id.*
217. *See, e.g.*, Myers v. Potter, 422 F.3d 347, 356–57 (6th Cir. 2005); Evans-Marshall v. Bd. of Educ. of Tipp City, 428 F.3d 223, 232 (6th Cir. 2005); Armstrong v. City of Melvindale, 432 F.3d 695, 700–02 (6th Cir. 2006); Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807, 824–25, 830–31 (6th Cir. 2007); Waeschle v. Dragovic, 576 F.3d 539, 545–50 (6th Cir. 2009); Occupy Nashville v. Haslam, 769 F.3d 434, 444–46 (6th Cir. 2014); Gradisher v. City of Akron,

Other reviewed Sixth Circuit decisions took *Lyons*'s first "path" and indeed found obvious violations as described in *Hope*. Even within this category, however, decisions varied in the extent to which the court appeared to rely on the obviousness of the violation in recognizing a right as clearly established. Some, while explicitly finding obvious violations, nonetheless seemed to rely heavily on factually similar precedent in performing the analysis. In *Schreiber v. Moe*,[218] for example, a police officer responded to a 911 call reporting potential domestic violence and encountered the plaintiff in a loud argument with his daughter.[219] After entering without a warrant to address the dispute and determine whether the daughter had been harmed, the officer and the plaintiff got into an altercation during which the plaintiff broke a glass door, at which point the officer tackled the plaintiff to the ground and began punching him repeatedly.[220] In analyzing whether the plaintiff's right to be free from excessive force under the circumstances was clearly established, the court stated that it was because "examples of factually similar cases decided before the incident in question where [the court] found an officer's alleged use of force to be excessive" would have made clear to a reasonable officer that the defendant's conduct was unlawful.[221] The court, however, immediately followed with the statement: "Similarly, even if this case presented a novel factual situation, we still conclude that Schreiber's right to not be punched in the face twenty times as he lay on the floor was sufficiently 'obvious' to put [the officer] on notice."[222] In decisions like *Schreiber*, then, the court appeared to lean less heavily on its finding of an obvious violation than it did on its precedent-based determination.[223]

794 F.3d 574, 584 (6th Cir. 2015); Barber v. Miller, 809 F.3d 840, 845–47 (6th Cir. 2015); Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 993–94 (6th Cir. 2017); Mitchell v. Schlabach, 864 F.3d 416, 424–26 (6th Cir. 2017); Sumpter v. Wayne County, 868 F.3d 473, 485–88 (6th Cir. 2017); Latits v. Phillips, 878 F.3d 541, 552–53 (6th Cir. 2017); Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 422–23 (6th Cir. 2019); Novak v. City of Parma, 932 F.3d 421, 430 (6th Cir. 2019); Barton v. Martin, 949 F.3d 938, 951–52, 954 (6th Cir. 2020); J.H. v. Williamson County, 951 F.3d 709, 720 (6th Cir. 2020); Siefert v. Hamilton County, 951 F.3d 753, 764–65 (6th Cir. 2020); Ashford v. Raby, 951 F.3d 798, 803 (6th Cir. 2020); Howse v. Hodous, 953 F.3d 402, 406–07 (6th Cir. 2020).

218. 596 F.3d 323 (6th Cir. 2010).

219. *Id.* at 326.

220. *Id.* at 326–28.

221. *Id.* at 333.

222. *Id.* (internal quotation marks omitted).

223. *See* Barker v. Goodrich, 649 F.3d 428, 435 (6th Cir. 2011) ("Case law from the Supreme Court, this Court, and other circuits established at that time that each condition seen here—restraining an inmate in an uncomfortable position, denying access to water, and denying access to the toilet—could rise to an Eighth Amendment violation if allowed to persist for an extended period. These cases, taken together with the notice given by normal prison practice and the *obvious cruelty* inherent in the conduct, clearly established that Defendants'

On the other end of the spectrum, however, lay cases that took a more forceful approach in finding a right clearly established on the basis of an obvious violation. *Guertin v. Michigan*[224] represents perhaps the strongest example among reviewed Sixth Circuit opinions. There, residents of Flint, Michigan brought substantive due process claims against the state, city, and other government officials alleging that the plaintiffs suffered significant injuries as a result of their use of improperly treated river water that the government had provided to them and that was known to be corrosive.[225] In particularly strong terms, the court found that the grievousness of the defendants' alleged conduct alone, without regard to precedent, made clear that the conduct violated a clearly established right:

> [T]aking affirmative steps to systematically contaminate a community through its public water supply with deliberate indifference is a government invasion of the highest magnitude. Any reasonable official should have known that doing so constitutes conscience-shocking conduct prohibited by the substantive due process clause. These "actions violate the heartland of the constitutional guarantee" to the right of bodily integrity, and "the obvious cruelty

alleged conduct—subjecting Barker to all of these conditions at once for a period in excess of twelve hours—violated Barker's Eighth Amendment rights.") (emphasis added); *see also* Griffith v. Coburn, 473 F.3d 650, 659–60 (6th Cir. 2007) (citing *Shreve v. Jessamine County Fiscal Court*, 453 F.3d 681, 688 (6th Cir. 2006), for the proposition that Sixth Circuit precedent "clearly establish[ed] the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest" (internal quotation marks omitted), and subsequently stating that because the plaintiff posed no threat, "[i]t follows that the use of the neck restraint in such circumstances violates a clearly established constitutional right to be free from gratuitous violence during arrest and is obviously inconsistent with a general prohibition on excessive force"). Similarly, in *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), the court found the punishing of the plaintiff for using a profanity in a public forum unconstitutional on the basis of "First Amendment jurisprudence that is decades old. . . . . and of the *prominent position that free political speech has in . . . our society*." *Id.* at 361 (emphasis added). Although the court did not use the term "obvious," its statement about the fundamental nature of free speech in society echoes language in *Hope*, and a subsequent Sixth Circuit decision posited that *Leonard* was an example of a decision recognizing an obvious violation. United Pet Supply, Inc. v. City of Chattanooga, 768 F.3d 464, 488–89 (6th Cir. 2014). This latter point again highlights the subjectivity inherent in this study. The *Leonard* court went on to cite Eleventh Circuit and Supreme Court decisions for the proposition that "no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly." *Leonard*, 477 F.3d at 361.

224. 912 F.3d 907 (6th Cir. 2019).

225. *Id.* at 915.

> inherent" in defendants' conduct should have been enough to forewarn defendants.[226]

Other such decisions, while somewhat less stern in their language, nonetheless also made clear that the egregiousness of the defendants' conduct demonstrated that a clearly established right had obviously been violated. In *Grawey v. Drury*,[227] for example, the court stated outright that "discharging enough pepper spray in a detainee's face to cause him to lose consciousness is an obvious constitutional violation that does not require a specific body of caselaw to be clearly established."[228] Similarly, in *Jackson v. City of Cleveland*,[229] the court stated: "It is difficult to countenance any argument that a law-enforcement officer in 1975 would not be on notice his conduct was unlawful when coercing a witness into perjuring himself in a capital trial. The obvious injustice inherent in fabricating evidence to convict three innocent men of a capital offense put [the officer] on notice that his conduct was unlawful."[230] Of the Sixth Circuit decisions I reviewed, I found a total of nine clear obvious violations.[231]

As mentioned above, some decisions did not appear to fall into either category described in *Lyons*, but rather took an approach that can be said to lie somewhere between *Lyons*'s "two paths." These cases tended to approach the clearly established issue by looking to Supreme Court precedent and Sixth Circuit

226. *Id.* at 933 (quoting Hope v. Pelzer, 536 U.S. 730, 745 (2002); other citations omitted).

227. 567 F.3d 302 (6th Cir. 2009).

228. *Id.* at 314. The court elaborated by stating:

> What makes this a clearly established constitutional violation is the use of an inherently hazardous type of force, one that any reasonable person would know is likely to cause serious injury to an ankle, knee, or leg, without any justification for doing so. In the absence of exigent circumstances or other legitimate law-enforcement consideration, a reasonable officer would have known that turning over a limp and unconscious detainee's body using leverage from the twisting of his foot is a use of excessive force that is sufficiently obvious under general standards of constitutional care.

Id. at 315.

229. 925 F.3d 793 (6th Cir. 2019).

230. *Id.* at 825 (citing *Hope*, 536 U.S. at 739) (other citations, internal quotation marks, and original alteration marks omitted).

231. *See, e.g.*, Knott v. Sullivan, 418 F.3d 561, 571 (6th Cir. 2005) (involving officers executing a search warrant and searching a car completely different from the one described in the warrant, in which the court stated, "[t]he Fourth Amendment *obviously* forbids relying on a warrant to search one vehicle when all of the vehicle-specific descriptors refer to another vehicle, and thus we conclude that the constitutional invalidity of the search warrant at issue in this case was clearly established at the time Knott's vehicle was searched") (emphasis added); United Pet Supply, Inc. v. City of Chattanooga, 768 F.3d 464, 488 (6th Cir. 2014) ("No reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy was constitutional. . . . This is one of the rare situations where the unconstitutionality of the application of a statute to a situation is *plainly obvious*.") (emphasis added).

case law to glean constitutional principles, which themselves demonstrated that the conduct at issue violated clearly established law, without conducting a more fact-intensive inquiry into precedent in the manner prescribed by *Lyons*'s second "path." Many of the clearly established analyses in these opinions used *Hope*'s language (quoting *Lanier*) in stating that the case at bar presented an example of a case where "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."[232] In *Smith v. Cupp*,[233] for example, a man who had been handcuffed and placed in the back seat of a police cruiser climbed into the front seat while the officer was outside speaking to a tow truck driver, put the car into gear, and began to drive away.[234] In the plaintiff's version of events,[235] the man turned past the officer, and as the car was passing by the officer fired three or four shots, the last of which passed through the passenger window, killing the man.[236] In analyzing whether the officer violated a clearly established right, the court looked to *Tennessee v. Garner*,[237] which established that officers may use deadly force when doing so reasonably appears necessary to apprehend a suspect whom the officer has reason to believe poses a risk of subsequent death or serious bodily harm to others.[238] With this principle in mind, the court determined that "Smith's case is an obvious case where *Tennessee v. Garner* clearly establishes the law" and "where a general constitutional rule applies with 'obvious clarity.'"[239] A fair number of other reviewed decisions likewise took this approach.[240]

232. *Hope*, 536 U.S. at 741 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)) (internal quotation marks omitted). See Subpart III.B.4 (Eleventh Circuit), *infra*, and related discussion in Part IV, *infra*, for more on why I have categorized these cases separately despite their frequent use of the word "obvious" in finding rights clearly established.

233. 430 F.3d 766 (6th Cir. 2005).

234. *Id.* at 769–70.

235. For purposes of summary judgment decisions, courts construe the facts in the manner most favorable to the nonmoving party. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

236. *Smith*, 430 F.3d at 770.

237. 471 U.S. 1 (1985).

238. *Smith*, 430 F.3d at 775–76.

239. *Id.* at 776–77 (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

240. *See* Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394, 408 (6th Cir. 2009) ("In this Circuit, the law is clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized. [The officer] was on notice that his conduct was a violation of Amanda's constitutional rights to be free from excessive use of force because it was 'obvious under the general standards of constitutional care' existing as of . . . the date of the relevant events [] that such conduct violated her Fourth Amendment rights. Specifically, it was 'obvious' that [the officer] could not push a handcuffed detainee's face into the ground when there lacked a genuine threat to the safety of the officers or others.") (quoting Lyons v. City of Xenia, 417 F.3d 565, 579 (6th Cir. 2005)) (original alteration marks and some internal quotation marks omitted) (citations omitted); Walker v. Davis, 649 F.3d 502, 503–04 (6th Cir.

3. Eighth Circuit[241]

Like the Fourth Circuit, the Eighth Circuit generally took a traditional approach to the clearly established analysis and employed no discernible framework like that used in the Sixth Circuit. Accordingly, some decisions directly or indirectly stated that a high degree of factual similarity was required in order to find a right clearly established.[242] Many more, however, did not state such a requirement but nonetheless relied principally on factually similar precedent in determining whether the right at issue was clearly established. In *Sisney v. Reisch*,[243] for example, a prisoner brought a First Amendment claim against prison officials for denying his requests to erect and eat his meals in a succah during the Jewish holiday of Sukkot.[244] In determining whether the plaintiff's right to eat his meals in a succah was clearly established, the court reviewed its prior free exercise decisions addressing the rights of prisoners to eat meals in accordance with religious traditions.[245] In doing so, the court observed that the only prior decisions finding that such a right had been violated pertained to inmates' rights to eat or not eat particular foods or a particular diet, rather than their right to take meals in a particular location.[246] On the basis of this distinction, the court found that the right the prisoner had asserted was not clearly established and affirmed the district

2011) (quoting *Garner*'s statement that "[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so," 471 U.S. at 11, and going on to state: "It is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force. This case is thus governed by the rule that general statements of the law are capable of giving clear and fair warning to officers even where the very action in question has not previously been held unlawful") (internal quotation marks omitted); Quigley v. Tuong Vinh Thai, 707 F.3d 675, 685 (6th Cir. 2013) ("[The defendant] violated a clearly established right. That there is no federal case directly on point does not undermine this conclusion. The principle at issue . . . is enshrined in our caselaw."); Bletz v. Gribble, 641 F.3d 743, 755–56 (6th Cir. 2011); Brown v. Battle Creek Police Dep't, 844 F.3d 556, 567 (6th Cir. 2016); Moody v. Mich. Gaming Control Bd., 871 F.3d 420, 427–28 (6th Cir. 2017); Cahoo v. SAS Analytics Inc., 912 F.3d 887, 903–04 (6th Cir. 2019); Ermold v. Davis, 936 F.3d 429, 435–36 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 3 (2020).

241. These findings are based on a review of roughly forty Eighth Circuit opinions issued since *Hope* was decided.

242. *See, e.g.*, Swearingen v. Judd, 930 F.3d 983, 988 (8th Cir. 2019); Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019) ("Decisions concerning the use of force against suspects who were compliant or engaged in passive resistance are insufficient to constitute clearly established law that governs an officer's use of force against a suspect who ignores a command and walks away."); Hamner v. Burls, 937 F.3d 1171, 1177–78 (8th Cir. 2019).

243. 674 F.3d 839 (8th Cir. 2012).

244. *Id.* at 841. A succah is "a small three-sided tent or booth that is used as a residence or eating place during observance of Sukkot." *Id.*

245. *Id.* at 846–47.

246. *Id.* at 847.

court's grant of qualified immunity.[247] A significant portion of reviewed decisions were decided in this manner,[248] some of which even disclaimed outright the existence of a requirement that precedent bear a high level of factual similarity, despite ultimately deciding the clearly established issue by looking to factually similar precedent themselves.[249]

Other cases analogized to or otherwise relied on precedent that bore some similarities to the case at bar but also had notable differences. In *Nelson v. Correctional Medical Services*, a prisoner alleged that she was made to go through the final stages of labor with her legs shackled to her bed in violation of the Eighth Amendment.[250] After noting relevant, generalized Supreme Court precedent, the court asserted that prior Eighth Circuit decisions had established that official action taken despite knowledge of a substantial risk of harm constituted deliberate indifference under the Eighth Amendment.[251] Yet these decisions contained facts fairly different from those in *Nelson*; one, for example, involved a prisoner who suffered and died from a heart attack while in prison, whereas the plaintiff in *Nelson* was giving birth during the alleged violation and lived.[252] This particular approach appeared in several reviewed decisions.[253]

A fair number of decisions took an even more generalized approach, relying on precedent establishing general principles and applying them to the case at bar. For example, in *Lindsey v. City of Orrick*,[254] a city public works director alleged that

247. *Id.*

248. *See* Parks v. Pomeroy, 387 F.3d 949, 957–58 (8th Cir. 2004); Craighead v. Lee, 399 F.3d 954, 962–63 (8th Cir. 2005); Nelson v. Corr. Med. Servs., 583 F.3d 522, 533 (8th Cir. 2009) (en banc); El-Ghazzawy v. Berthiaume, 636 F.3d 452, 459–60 (8th Cir. 2011); Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir. 2012); Hess v. Ables, 714 F.3d 1048, 1052–53 (8th Cir. 2013); Reeves v. King, 774 F.3d 430, 432–33 (8th Cir. 2014).

249. *See, e.g.*, Bonner v. Outlaw, 552 F.3d 673, 679–80 (8th Cir. 2009) (rejecting defendant's argument that precedent requiring that prisons give notice to prisoners when their mail is rejected does not apply to packages as "strain[ing] credulity"); Howard v. Kan. City Police Dep't, 570 F.3d 984, 991–92 (8th Cir. 2009) (rejecting dissent's argument that right was not clearly established because prior cases failed to specify a time limit beyond which officers could not ignore a seized person's pain complaints); Nance v. Sammis, 586 F.3d 604, 611 (8th Cir. 2009) (rejecting defendant's contention that case law needed to demonstrate a clearly established "right to be free from the use of deadly force 'where the suspect has in his possession a toy weapon that appears to be real and the suspect does not comply with the officers' commands'").

250. *Nelson*, 583 F.3d at 524.

251. *Id.* at 531–32.

252. *Id.* at 528, 532 (citing Tlamka v. Serrell, 244 F.3d 628, 633 (8th Cir. 2001)).

253. *See* Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009); Nord v. Walsh County, 757 F.3d 734, 744 (8th Cir. 2014); Gerlich v. Leath, 861 F.3d 697, 711 (8th Cir. 2017) (Kelly, J., concurring); Rokusek v. Jansen, 899 F.3d 544, 548 (8th Cir. 2018); Jackson v. Stair, 944 F.3d 704, 711–13 (8th Cir. 2019).

254. 491 F.3d 892 (8th Cir. 2007).

he was fired after drawing attention to the City Council's failure to adhere to open meeting laws.[255] The court began its clearly established analysis by stating that prior to this case, the "court ha[d] taken a broad view of what constitutes 'clearly established law' for the purposes of a qualified immunity inquiry."[256] It went on to determine that Eighth Circuit precedent had "clearly established [that] a public employer may not discharge an employee for disclosing the potential illegal conduct of public officials" and, applying this standard to the case before it, found that the plaintiff's right not to be fired for expressing concern about open meetings violations was clearly established, denying qualified immunity.[257] Several other reviewed decisions took a similar approach.[258]

Many reviewed Eighth Circuit decisions cited *Hope*, though they tended most frequently to do so either for its statement that a right may be clearly established in "novel factual circumstances" (or an analogous proposition)[259] or for its description of the clearly established requirement as one requiring "fair warning."[260] Few cited *Hope* for its propositions that a violation may be obvious even absent case law or that an established constitutional principle may apply to a particular case with "obvious clarity."[261] Regardless, a number of reviewed decisions nonetheless recognized the possibility of obvious violations, although in most of these the court found that none was present in the case before it.[262]

Yet, some reviewed decisions did find that an obvious violation had occurred under *Hope*. In *Morris v. Zefferi*, a sheriff's department bailiff was assigned to

255. *Id.* at 895–97.
256. *Id.* at 902 (quoting Sexton v. Martin, 210 F.3d 905, 909 (8th Cir. 2000)).
257. *Id.* at 902–03.
258. *See* Brown v. Fortner, 518 F.3d 552, 561–62 (8th Cir. 2008); Chambers v. Pennycook, 641 F.3d 898, 908–09 (8th Cir. 2011) (finding no clearly established right due to lack of precedent establishing a minimum level of injury required for excessive force claims, making it unclear whether force resulting in de minimis injury was unconstitutional); Peterson v. Kopp, 754 F.3d 594, 600–01 (8th Cir. 2014) (same); White v. Smith, 696 F.3d 740, 759 (8th Cir. 2012); Capps v. Olson, 780 F.3d 879, 886 (8th Cir. 2015); Ellison v. Lesher, 796 F.3d 910, 917 (8th Cir. 2015); Neal v. Ficcadenti, 895 F.3d 576, 582 (8th Cir. 2018).
259. Howard v. Kan. City Police Dep't, 570 F.3d 984, 991 (8th Cir. 2009); Nelson v. Corr. Med. Servs., 583 F.3d 522, 531 (8th Cir. 2009) (en banc); *White*, 696 F.3d at 758; Hess v. Ables, 714 F.3d 1048, 1053 (8th Cir. 2013); *Ellison*, 796 F.3d at 914; Gerlich v. Leath, 861 F.3d 697, 711 (8th Cir. 2017) (Kelly, J., concurring).
260. El-Ghazzawy v. Berthiaume, 636 F.3d 452, 459 (8th Cir. 2011); *Chambers*, 641 F.3d at 908; *Hess*, 714 F.3d at 1053; Reeves v. King, 774 F.3d 430, 433 (8th Cir. 2014); *Neal*, 895 F.3d at 582.
261. Morris v. Zefferi, 601 F.3d 805, 812 (8th Cir. 2010); Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir. 2012); Rokusek v. Jansen, 899 F.3d 544, 548 (8th Cir. 2018); Z.J. *ex rel.* Jones v. Kan. City Bd. of Police Comm'rs, 931 F.3d 672, 685 (8th Cir. 2019).
262. *See* Smith v. City of Minneapolis, 754 F.3d 541, 547 (8th Cir. 2014); Brossart v. Janke, 859 F.3d 616, 625 (8th Cir. 2017); Moore-Jones v. Quick, 909 F.3d 983, 985–86 (8th Cir. 2018); K.W.P. v. Kan. City Pub. Schs., 931 F.3d 813, 828–29 (8th Cir. 2019); Lunon v. Botsford, 946 F.3d 425, 432 (8th Cir. 2019) (Colloton, J., concurring).

transport the plaintiff, a pretrial detainee, from jail to the courthouse for an appearance.[263] Because the plaintiff had escaped from a moving law enforcement vehicle six years prior, the bailiff sought to transport him in a cage car; however, finding none available, the bailiff opted to transport the plaintiff, who was 5'9", in a dog cage measuring three and a half feet wide, three feet tall, and three feet deep.[264] According to the plaintiff, he was made to lie in a restricted position in the cage, which was littered with animal hair and dried dog urine and feces, for the entirety of the ninety-minute drive.[265] In deciding whether the plaintiff's right not to be transported in this manner was clearly established, the court cited a prior en banc decision denying qualified immunity to a prison guard for mistreatment of a prisoner "without any Supreme Court or circuit precedent factually on point" based on the "obvious cruelty inherent in th[e] practice."[266] The court went on to state that the reasoning of the prior case "controlled" its decision in *Morris* and found that "the unconstitutionality of Zefferi's alleged conduct should have been obvious to Zefferi based both on common sense and prior general case law."[267] As this statement makes evident, the court qualified its finding that the obviousness of the violation clearly established the right at issue by noting that precedent supported the same result. The two other reviewed Eighth Circuit decisions that found obvious violations took the same approach, supplementing their "obvious" findings with precedent demonstrating the existence of a clearly established right,[268] for a total of three cases.

263. *Morris*, 601 F.3d at 807.
264. *Id.* at 807–08.
265. *Id.* at 808.
266. *Id.* at 812 (quoting Nelson v. Corr. Med. Servs., 583 F.3d 522, 534 (8th Cir. 2009) (en banc)).
267. *Id. Nelson* itself took a similar approach, both analogizing to precedent and implying that the violation was obvious. *Nelson*, 583 F.3d at 534. However, the *Nelson* court based the latter statement on "[e]xisting constitutional protections, as developed by the Supreme Court and the lower federal courts," and thus did in fact consider precedent in coming to the conclusion that the "obvious cruelty" inherent in the challenged practice "should have provided [the defendant] with some notice" of unconstitutionality. *Id.*
268. *See* Dean v. Searcey, 893 F.3d 504, 518–19 (8th Cir. 2018) (citing Eighth Circuit precedent finding that severely reckless police investigations violated the Constitution for the proposition that the right not to be framed by police was clearly established, and citing the Magna Carta and materials discussing it as demonstrating the fundamentality of this right such that the violation thereof in this case was obvious); Z.J. *ex rel.* Jones v. Kan. City Bd. of Police Comm'rs, 931 F.3d 672, 683 (8th Cir. 2019) ("First, the use of the flash-bang grenade was unreasonable under all of the relevant case law. Second, it would have been obvious to any reasonable officer that the use of the flash-bang grenade under th[e] circumstances was unreasonable.").

4. Eleventh Circuit

Before *Hope* went to the Supreme Court, the Eleventh Circuit decided the case in favor of the defendant prison guards, finding that they had violated no clearly established right in their treatment of Larry Hope in spite of Eleventh Circuit precedent with substantial factual similarity to *Hope*.[269] In reversing the Eleventh Circuit's decision, the Court admonished the court of appeals for focusing too greatly on minor distinctions between the precedent it examined and Hope's case, an approach that the Court deemed "a rigid, overreliance on factual similarity."[270] Likely in response to this criticism, just a few months after the Court decided *Hope* the Eleventh Circuit articulated a new method for determining whether a right is clearly established in *Vinyard v. Wilson*.[271] In *Vinyard*, the court described a three-track framework for the clearly established analysis. It explained the first track, stating:

> First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*. This kind of case is one kind of "obvious clarity" case. For example, the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful.[272]

The court proceeded:

> Second, if the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then *turn to case law*. When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts. For example, if some authoritative judicial decision decides a case by determining that "X Conduct" is unconstitutional *without tying* that determination to a particularized set of facts, the decision on "X Conduct" can be read as having clearly established a constitutional principle: put differently, the precise facts surrounding "X Conduct" are immaterial to the violation. These judicial decisions can control "with obvious clarity" a wide variety of later factual circumstances. . . . [I]f a broad principle in case law is to establish clearly the law applicable to a specific set of facts facing

269. Hope v. Pelzer, 240 F.3d 975, 981–82 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).
270. Hope v. Pelzer, 536 U.S. 730, 742 (2002).
271. 311 F.3d 1340 (11th Cir. 2002).
272. *Id.* at 1350.

> a governmental official, it must do so "with obvious clarity" to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.[273]

Finally, the court stated:

> Third, if we have no case law with a broad holding of "X" that is not tied to particularized facts, we then look at precedent *that is tied to the facts.* That is, we look for cases in which the Supreme Court or we, or the pertinent state supreme court has said that "Y Conduct" is unconstitutional in "Z Circumstances." We believe that most judicial precedents are tied to particularized facts and fall into this category.[274]

To summarize, the court determined that rights could be clearly established by (1) the Constitution or other federal law directly, wholly without regard to case law; (2) general constitutional principles articulated in prior decisions that apply "with obvious clarity" to a particular case at bar, with no need for factually analogous precedent; and (3) factually similar prior decisions that found the conduct at issue or sufficiently analogous conduct unconstitutional.[275] It is worth noting that, as articulated in *Vinyard*, the analysis begins by asking first whether the violation is so obvious that no precedent is needed to clearly establish the right, and, if not, then proceeds through the remaining tracks in sequence.[276] The Eleventh Circuit would come to use *Vinyard*'s approach frequently in subsequent qualified immunity decisions. Because this framework has in large part characterized the court's clearly established analysis ever since, my review of the Eleventh Circuit's approach focuses primarily on cases decided in November 2002 and later, after *Vinyard* had been decided.[277]

The court's analyses using the third-track approach in many respects resembled the mode of analysis generally employed by the Fourth and Eighth Circuits,[278] focusing on the existence or absence of factually similar precedent that found the challenged conduct unconstitutional. For example, in *Bowen v. Warden, Baldwin State Prison*,[279] a prisoner was moved into a cell in "the lock-down segregation unit for disciplinary, protected custody and mental health

273. *Id.* at 1351 (internal citation omitted).
274. *Id.* at 1351–52.
275. *Id.* at 1350–52.
276. *See infra* Part IV for further discussion of this approach and its significance.
277. For additional discussion of *Vinyard*'s three-track approach, see Chemerinsky & Blum, *supra* note 104, at 791–92.
278. *See supra* Subparts III.B.1 and III.B.3. For further discussion of these approaches, see *infra* Part IV.
279. 826 F.3d 1312 (11th Cir. 2016).

individuals" with a prisoner who was taller and one hundred pounds heavier than him, who the warden and guards knew to suffer from schizophrenia and other mental illness, who they likewise knew was in prison for murder and had been moved to that cell after beating another prisoner, and who according to prison policy should have been housed alone.[280] After the warden denied the transferred prisoner's request to be moved, prison guards found him beaten to death in his cell, with the larger prisoner's hands around his neck.[281] The court found that the warden and an officer violated the decedent's Eighth Amendment rights by demonstrating deliberate indifference to his safety.[282] In determining whether the right at issue was clearly established, the court identified a prior Eleventh Circuit failure-to-protect decision holding "that the total failure to monitor or supervise a visibly violent, mentally unstable, schizophrenic inmate who was housed in a separate unit for mentally ill inmates and who posed a substantial risk of serious harm to other inmates in that housing unit constituted deliberate indifference," and determined that the facts of the two cases were sufficiently similar to demonstrate that the decedent's right in *Bowen* was clearly established.[283] The Eleventh Circuit took this approach in a fair number of reviewed decisions.[284]

In other cases, the court found clearly established rights using *Vinyard*'s second track, determining that prior decisions had established general constitutional principles that plainly applied to the case at bar. In *Stephens v. DeGiovanni*,[285] for example, a sheriff's deputy approached the plaintiff and another man as they sat in the plaintiff's car, asked them what they were doing there, and demanded identification.[286] After providing his identification card, the plaintiff answered a call using a Bluetooth device on his ear, which the deputy

280. *Id.* at 1316–17.
281. *Id.* at 1317–18.
282. *Id.* at 1324–25.
283. *Id.* at 1325 (citing Caldwell v. Warden, FCI Talladega, 748 F.3d 1090, 1102 (11th Cir. 2014)).
284. *See* Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1269–73 (11th Cir. 2003); Coffin v. Brandau, 642 F.3d 999, 1016 (11th Cir. 2011) (en banc); Edwards v. Shanley, 666 F.3d 1289, 1297–98 (11th Cir. 2012); Morton v. Kirkwood, 707 F.3d 1276, 1283 (11th Cir. 2013); Jones v. Fransen, 857 F.3d 843, 854 (11th Cir. 2017) (finding no clearly established right after stating that the "case is not directly on all fours with" cited precedent); Washington v. Rivera, 939 F.3d 1239, 1245–49 (11th Cir. 2019). Notably, the Eleventh Circuit decided even some fairly egregious cases using this approach, even though other judges might well have done so under the first- or second-track approaches instead. *See, e.g.*, *Edwards*, 666 F.3d at 1297–98 (looking to a prior decision finding an extended dog bite against a compliant and nonresistant plaintiff unconstitutional in determining that the plaintiff's right to not be subject to a five- to seven-minute dog bite while compliant and "pleading for surrender" was clearly established).
285. 852 F.3d 1298 (11th Cir. 2017).
286. *Id.* at 1307.

slapped away, asking "Who told you to answer the phone?" and prompting the plaintiff to ask for the deputy's supervisor.[287] In response and without warning, the deputy began repeatedly punching the plaintiff over the plaintiff's objections as onlookers watched, grabbed him by the neck, slammed his head into the car door, bent his fingers backward, and handcuffed him tightly.[288] Although the plaintiff objected, he at no point raised his voice, threatened the officer, made aggressive gestures, or resisted being handcuffed.[289] In its clearly established analysis, the court cited Eleventh Circuit precedent observing that it "ha[d] repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands."[290] The court went on to state that "[o]n these obvious-clarity facts, no particularized preexisting case law was necessary for it to be clearly established that what Deputy DeGiovanni did violated Stephens's constitutional right to be free from the excessive use of force in his arrest" and denied qualified immunity.[291] The Eleventh Circuit found clearly established rights using this second-track mode of analysis in a substantial number of reviewed decisions.[292]

Finally, in many decisions in the study, the Eleventh Circuit decided that in the case before it the defendant's conduct so obviously ran counter to the Constitution that the court found no need to consider precedent in determining that the right at issue was clearly established. In *Gray ex rel. Alexander v. Bostic*,[293] for example, an elementary school physical education coach observed that a nine-year-old student was not doing jumping jacks with the rest of the class as instructed and told her to go stand against a nearby gym wall.[294] The girl responded by threatening to hit the coach—who later stated he was not afraid nor did he believe she could actually physically do so—prompting him to send her to go speak to another nearby coach about the issue.[295] As the girl walked over, a

287. *Id.* at 1307–08.
288. *Id.* at 1308.
289. *Id.*
290. *Id.* at 1328 (quoting Saunders v. Duke, 766 F.3d 1262, 1265 (11th Cir. 2014) (internal quotation marks omitted)).
291. *Id.* (internal quotation marks and original alteration marks omitted).
292. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1268–69 (11th Cir. 2004); O'Rourke v. Hayes, 378 F.3d 1201, 1208 (11th Cir. 2004); Bennett v. Hendrix, 423 F.3d 1247, 1256 (11th Cir. 2005); Goebert v. Lee County, 510 F.3d 1312, 1330 (11th Cir. 2007); Keating v. City of Miami, 598 F.3d 753, 766–67 (11th Cir. 2010); Gennusa v. Canova, 748 F.3d 1103, 1113 (11th Cir. 2014); Salvato v. Miley, 790 F.3d 1286, 1294 (11th Cir. 2015); Carollo v. Boria, 833 F.3d 1322, 1334–35 (11th Cir. 2016); Crocker v. Beatty, 886 F.3d 1132, 1138 (11th Cir. 2018).
293. 458 F.3d 1295 (11th Cir. 2006).
294. *Id.* at 1300.
295. *Id.* at 1300–02.

nearby sheriff's deputy serving as a school resource officer who had observed the encounter intercepted her and, over the second coach's objections, led her away to the lobby area of the gym.[296] There, the deputy pulled her hands behind her back, put her in handcuffs, and tightened them until they began to hurt.[297] The deputy told her "this is how it feels when you break the law" and "how it feels to be in jail," and kept the handcuffs on her for at least five minutes while she cried.[298] During discovery, he stated that he did so "to impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration," "to help persuade her to rid herself of her disrespectful attitude," and to "show[] her what would happen if a less generous officer . . . were to arrest her for her actions."[299] In addressing the deputy's qualified immunity claim, the court stated:

> We . . . conclude that Deputy Bostic's conduct in handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights. . . . Deputy Bostic's purpose in handcuffing Gray was not to pursue an investigation to confirm or dispel his suspicions that Gray had committed a misdemeanor. Rather, Deputy Bostic's purpose in handcuffing Gray was simply to punish her and teach her a lesson. Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable.[300]

In *Brooks v. Warden*,[301] the court took the same approach. There, during a prison riot a sixty-four-year-old prisoner was attacked by another prisoner who choked him, punched him in the face, "beat him over the head with a ten-pound food tray," and sexually assaulted him.[302] The victim was taken to the hospital for treatment for serious injuries, where he remained for three days with his hands and legs shackled and was constantly guarded by four prison officers.[303] On the second day, the guards refused to allow him to use the toilet, "forc[ing him] to soil his jumpsuit for the remainder of his stay" as the guards laughed at and mocked him.[304] Analyzing the clearly established issue, the court found that the circumstances presented a "rare case of obvious clarity, in which conduct is so

296. *Id.* at 1301.
297. *Id.*
298. *Id.* (original alterations omitted).
299. *Id.* at 1301–02.
300. *Id.* at 1307.
301. 800 F.3d 1295 (11th Cir. 2015).
302. *Id.* at 1298–99.
303. *Id.* at 1299.
304. *Id.*

egregious that no prior case law is needed to put a reasonable officer on notice of its unconstitutionality."[305] The court continued, stating:

> Forcing a prisoner to soil himself over a two-day period while chained in a hospital bed creates an obvious health risk and is an affront to human dignity. Laughing at and ridiculing an inmate who is forced to sit in his own feces for an extended period of time is not merely unreasonable, but an act of "obvious cruelty." . . . Any reasonable officer should have known that such conduct was at war with the command of the Eighth Amendment.[306]

A number of other opinions employed similar reasoning, and in total, twelve reviewed Eleventh Circuit decisions found obvious violations of this kind.[307]

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305. *Id.* at 1307 (internal quotation marks, citations, and original alteration marks omitted).

306. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 745 (2002)).

307. *See Vinyard v. Wilson*, 311 F.3d 1340, 1343, 1355 (11th Cir. 2002), where the court addressed allegations that an officer had pulled the plaintiff by her hair and repeatedly sprayed her with pepper spray while she was restrained in the back of his patrol car:

> Considering Vinyard's version of the events, no factually particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer facing Stanfield's situation that Stanfield's conduct during the jail ride violated Vinyard's constitutional right to be free of the excessive use of force. . . . The peculiar facts of this case are "so far beyond the hazy border between excessive and acceptable force [that every objectively reasonable officer] had to know he was violating the Constitution even without caselaw on point."

Id. at 1355 (citation omitted) (alterations in original). *See also* Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005); Evans v. Stephens, 407 F.3d 1272, 1283 (11th Cir. 2005) (en banc). In *Evans*, the court addressed allegations that a police officer had performed an invasive strip search of the plaintiffs, sexually assaulting them while using racial slurs and threatening to imprison them:

> No preexisting case law established this violation or made it obviously clear. . . . But the text of the Fourth Amendment prohibits "unreasonable" searches. Seldom does a general standard such as "to act reasonably" put officers on notice that certain conduct will violate federal law given the precise circumstances before them: Fourth Amendment law is intensely fact specific. But we conclude the supposed facts of this case take the manner of the searches well beyond the "hazy border" that sometimes separates lawful conduct from unlawful conduct. The violation was obvious.

Id. at 1276–77, 1283 (citation omitted). *See also* Oliver v. Fiorino, 586 F.3d 898 (11th Cir. 2009). There, the court addressed a claim of severe excessive force:

> Tasering the plaintiff at least eight and as many as eleven or twelve times over a two-minute span without attempting to arrest or otherwise subdue the plaintiff—including tasering Oliver while he was writhing in pain on the hot pavement and after he had gone limp and immobilized—was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances. When measured against these facts, the officers violated a clearly established right.

Id. at 908. *See also* Fils v. City of Aventura, 647 F.3d 1272 (11th Cir. 2011), where the court addressed another excessive force claim:

Some decisions also found a right clearly established under more than one track. In *Mercado v. City of Orlando*, a team of officers responded to an attempted suicide and found the plaintiff on his kitchen floor, crying, with a telephone cord around his neck and a knife in his hands, pointed toward his chest.[308] The officers twice ordered the plaintiff to drop the knife, which he refused, and without warning the defendant fired a powerful and highly accurate "less lethal" launcher-type weapon at the plaintiff's head from only six feet away, fracturing the plaintiff's skull and causing permanent brain damage.[309] In deciding whether the right at issue was clearly established, the court first cited *Tennessee v. Garner*[310] for the "principle that deadly force cannot be employed in a situation that requires less-than-lethal force" and, after an analysis of Florida law defining

> [Plaintiff] showed no hostility to the Defendants, did not disobey any orders, and did not make any menacing gestures. Assuming these facts, no reasonable officer could ever believe that it was appropriate to shoot his taser probes into [the plaintiff] and shock him. This line is not hazy, and [the officers'] actions were clearly wrong.

Id. at 1292. *See also* Perez v. Suszczynski, 809 F.3d 1213 (11th Cir. 2016). In *Perez*, the court offered a similar explanation:

> [T]he facts alleged reflect behavior so inherently violative of the Fourth Amendment that it should be obvious to any reasonable officer that this conduct was unlawful. The unprovoked shooting of a compliant individual is "conduct [that] lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [should have been] readily apparent to the official." Indeed, this conduct lies "so far beyond the hazy border between excessive and acceptable force that [Suszczynski] had to know he was violating the Constitution."

Id. at 1222–23 (citation omitted) (alterations in original). *See also* Bailey v. Wheeler, 843 F.3d 473, 477, 485 (11th Cir. 2016), in which a police officer alleged that his department retaliated against him for complaining about racial profiling practices, advising officers in the county that he posed a danger to them and to "act accordingly":

> Law-enforcement officers are sworn to protect and defend the lives of others. It is completely antithetical to those sworn duties for a law-enforcement officer to use his position to harness the power of an entire county's law-enforcement force to teach a lesson to—and potentially very seriously endanger—someone who had the temerity to speak up about alleged abuses.

Id. at 485. *See also* May v. City of Nahunta, 846 F.3d 1320, 1332 (11th Cir. 2017); Sebastian v. Ortiz, 918 F.3d 1301, 1311–12 (11th Cir. 2019); Hunter v. City of Leeds, 941 F.3d 1265, 1281 (11th Cir. 2019) ("The use of deadly force against a suspect who, though initially dangerous, has been disarmed or otherwise become non-dangerous, is conduct that lies 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [is] readily apparent.'" (alteration in original)).

308. *Mercado*, 407 F.3d at 1154.

309. *Id.* at 1154–55. The court described the weapon as a "'less lethal' munition that fires a polyurethane baton that is 1.5 inches wide, travels approximately 240 feet per second, and delivers a force of 154 foot/pounds of energy[—]approximately the energy of a professionally-thrown baseball." *Id.* at 1155.

310. 471 U.S. 1 (1985).

deadly and less-than-lethal force, found that the defendant "violated the clearly established principle that deadly force cannot be used in non-deadly situations."[311] The court went on, however, to state that the case was also "one of the cases that lie so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law," and that the defendant "should not have needed case law to know that by intentionally shooting Mercado in the head, he was violating Mercado's Fourth Amendment rights."[312] A small number of reviewed decisions explicitly or apparently found a clearly established right using more than one track.[313]

While most reviewed decisions followed *Vinyard*'s three-track framework, a line of Eleventh Circuit decisions appears to have collapsed the first two tracks together, resulting in a modified two-track framework. In setting out the standard for the clearly established analysis, the court in *Fils v. City of Aventura* began by stating:

> Our circuit uses *two methods* to determine whether a reasonable officer would know that his conduct is unconstitutional. The first method looks at the relevant case law at the time of the violation; the right is clearly established if a concrete factual context [exists] so as to make it obvious to a reasonable government actor that his actions violate federal law.[314]

The court went on to state:

> The second method looks not at case law, but at the officer's conduct, and inquires whether that conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law." This method—termed "obvious clarity"—is a "narrow exception" to the normal rule that only case law and specific factual scenarios can clearly establish a violation.[315]

311. *Mercado*, 407 F.3d at 1159–60.
312. *Id.* at 1160.
313. *See* Brooks v. Warden, 800 F.3d 1295, 1306–07 (11th Cir. 2015) (finding a clearly established right under *Vinyard*'s first and second tracks); Hunter v. City of Leeds, 941 F.3d 1265, 1280–81 (11th Cir. 2019) (same).
314. Fils v. City of Aventura, 647 F.3d 1272, 1291 (11th Cir. 2011) (alteration in original) (emphasis added) (quotation and citation omitted). Neither the decision cited here nor others cited in *Fils*'s clearly established analysis articulated a two-track framework, despite the *Fils* court's assertion that "[o]ur circuit uses two methods." *See id.* at 1291–92 and opinions cited therein.
315. *Id.* at 1291 (citations omitted) (quoting Vinyard v. Wilson, 311 F.3d 1340, 1355 (11th Cir. 2002).

As is evident in the latter excerpt, the court appeared to combine *Vinyard*'s track requiring no precedent and its "obvious clarity" track into one. Although many reviewed Eleventh Circuit decisions did not specify whether they were using *Vinyard*'s or *Fils*'s framework, some clearly indicated that they were applying the two-track approach, citing *Fils*.[316]

IV. TREATMENTS OF *HOPE* AMONG THE CIRCUITS

On the whole, upon evaluating the circuit court decisions reviewed in Part III, it first becomes clear that the Supreme Court's treatment of the *Hope v. Pelzer*[317] precedent after handing down the decision is a fairly poor indicator of its lasting value among the lower courts. In particular, while the Court itself had not purported to find any obvious violations prior to *Taylor v. Riojas*,[318] each of the reviewed circuits found at least one, suggesting that even circuits taking a somewhat stricter approach to the clearly established analysis have recognized *Hope*'s precedential value, whether or not they attribute it to *Hope*.

Further, as Part III indicates, a review of the four circuits' decisions makes it apparent that lower courts—at least in the reviewed circuits—can be placed into two categories with regard to their approach to the clearly established analysis: circuits that default to a search for reasonably similar precedent and treat the possibility of obvious violations as something of an outlier, an approach I here term "traditional;" and circuits that have developed multitrack frameworks for identifying clearly established rights, which consider both the "obvious" possibility and the potential for precedent—often precedent involving fairly similar circumstances to the case at bar—to clearly establish the right. As discussed in Part III, my study indicates that the Fourth and Eighth Circuits fall into the first category, whereas the Sixth and Eleventh Circuits (as demonstrated in *Lyons v. City of Xenia*[319] and *Vinyard v. Wilson*,[320] respectively) fall into the second.

Many reviewed decisions in first-category, or "traditional," circuits took an approach that appears to comport fairly well with the Supreme Court's usual approach following *Hope*, perhaps in response to the Court's treatment of the

316. *See, e.g.*, Edwards v. Shanley, 666 F.3d 1289, 1295 (11th Cir. 2012); May v. City of Nahunta, 846 F.3d 1320, 1331 (11th Cir. 2017); Baas v. Fewless, 886 F.3d 1088, 1093 (11th Cir. 2018).
317. 536 U.S. 730 (2002).
318. 141 S. Ct. 52 (2020) (per curiam).
319. 417 F.3d 565 (6th Cir. 2005).
320. 311 F.3d 1340 (11th Cir. 2002).

clearly established issue in the bulk of its subsequent decisions.[321] These lower court decisions focused heavily on framing the right at issue in a specific way, consciously avoiding highly generalized framings. Likewise, a substantial number of courts employing traditional approaches sought prior decisions that were similar in relevant respects to the cases before them such that they could be said to clearly establish the identified right, finding the test not met when no sufficiently similar precedent could be found. Finally, these decisions tended to only acknowledge the possibility of obvious violations in a passing manner—if at all—and when they did, suggested that obvious violations would be apparent only occasionally and in extreme cases.

Yet, even these comparatively restrictive circuits appeared to take a somewhat more flexible view to finding clearly established rights than has the Supreme Court, consequently demonstrating greater stratification in their approaches.[322] As Subparts III.B.1 and III.B.3 show, although a considerable number of reviewed cases in the Fourth and Eighth Circuits determined whether or not a right was clearly established on the basis of the presence or absence of factually similar precedent, many others found clearly established rights by looking to prior decisions that bore looser factual connections to the case at bar, by applying generalized Constitutional principles derived from circuit or Supreme Court precedent, or even sometimes by finding obvious violations outright. Because decisions in these circuits typically did not recite the "obvious" possibility as a matter of course in setting out the legal standard, the cases that did find obvious violations appear all the more conspicuous.

In second-category, or "multitrack," circuits, however, the possibility of obvious violations was baked into the prevailing approaches to the clearly established analysis passed down through prior decisions. These approaches, in the many cases in these circuits that adhered to them, obligated judges at minimum to acknowledge the possibility that any given case that came before them could present an obvious violation. It should perhaps come as no surprise that courts that are made to acknowledge that an option exists are more likely to reach for it than those that are not; indeed, surveyed cases in these circuits more frequently determined that a constitutional violation was obvious, requiring no analogous precedent to determine that the law had been clearly established.

321. *See* Duckett, *supra* note 4, at 423 (arguing that the Court's qualified immunity jurisprudence is overly protective of police officers and has led circuit courts to take unduly conservative approaches to the clearly established analysis).

322. *Cf.* Chemerinsky & Blum, *supra* note 104, at 788 (arguing that like the Supreme Court, "the lower courts are very inconsistent" in requiring "cases in order to say there is clearly established law").

Perhaps even more significant than the requirement that courts acknowledge the "obvious" possibility, however, is the order in which these circuits' frameworks presented the methods by which clearly established rights may be identified. In both second-category circuits, the possibility of an obvious violation was the first track in the typical analytical framework, and the Eleventh Circuit's standard even specified that courts determining whether a right was clearly established were to proceed through the circuit's three tracks in order.[323] The consequence of this is that these courts at minimum acknowledged the possibility of an obvious violation in each case, and in many cases actually evaluated whether an obvious violation occurred; indeed, by requiring judges to move through the three tracks in sequence, the Eleventh Circuit compels judges to make this determination before they may ask whether relevant precedent clearly established the right at issue. Again, it appears intuitive that if a court is made to consider whether a violation was obvious, it will in fact find obvious violations more frequently than will courts that are given license to ignore the possibility. In contrast, circuits that employ a single-track, precedent-dependent approach and that are free to raise or ignore the possibility of obvious violations as they see fit naturally seem less likely to find obvious violations; under such a system, an obvious violation is a true aberration rather than an uncommon but nonetheless expected occurrence. Consequently, although I make no claim as to the statistical significance of data generated from the samples in my study, it seems no surprise that obvious violations were found more frequently in second-category circuits than in first-category circuits.

Additionally, as decisions in the Sixth and Eleventh Circuits show, the multitrack approaches also provide a means of cabining the effects of the Supreme Court's tightening of the clearly established standard, discussed in Part II,[324] whether or not these courts have resisted the Court's preferences deliberately.[325]

323. *See* Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002) ("Second, if the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then *turn to case law*. . . . Third, if we have no case law with a [relevant] broad holding . . . that is not tied to particularized facts, we then look at precedent *that is tied to the facts*.").

324. *See generally* Re, *supra* note 42 (discussing the ability and tendency of lower courts to interpret Supreme Court precedent in a manner that narrows its applicability, granting lower courts greater latitude to resolve issues in ways that appear appropriate or desirable). Some commentators have found the apparently progressive approach taken by the Eleventh Circuit surprising given that the Eleventh Circuit is "generally known to disfavor plaintiffs in Section 1983 qualified immunity cases." *See* Chemerinsky & Blum, *supra* note 104, at 784.

325. *See* Re, *supra* note 42, at 927 ("[L]ower courts have a substantial interpretive gray zone available to them—and, in taking advantage of that discretion, lower courts sometimes engage in a precedential dialogue with the Supreme Court."). Re has observed that lower courts may in some cases intentionally narrow Court precedent as a means of "resist[ing] the disruptive effect of broadly written Supreme Court decisions," but has also argued that these efforts "will likely

Using these frameworks, these circuits appear to have interpreted the Court's admonition against framing the right at issue at a high level of generality and its requirement that "every reasonable official" be aware of the right such that it is "beyond debate"[326] as applying only to the most precedent-dependent track.[327] While their precedent-oriented approaches thus cast a fairly strict eye in determining whether precedent is sufficiently similar to a case at bar to clearly establish the right at issue, through their frameworks they are free to disregard these strictures when identifying a clearly established right using other, more abstract approaches.

By contrast, because the "obvious" analysis functions as more of an addendum to the core, precedent-based approach in single-track circuits than as a distinct path for evaluating the clarity of a constitutional violation, these directives by the Court appear to apply with equal force to both the precedent-based and precedent-free approaches in these circuits.[328] In light of the relative scarcity of

remain limited to only a small, if important, subset of . . . cases" including situations in which "the Court . . . [has] afforded lower courts limited guidance as to how . . . principles ought to apply to specific factual circumstances." *Id.* at 960, 965. Given the Court's failure to clarify how lower courts should apply *Hope* outside of prison conditions cases, lower courts' efforts to reconcile *Hope* with subsequent precedent would certainly seem to qualify as situations in which these courts are working with "limited guidance" as to the applicability of principles stated by the Court.

326. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (internal quotation marks omitted).

327. *See, e.g.*, Carollo v. Boria, 833 F.3d 1322 (11th Cir. 2016). In *Carollo*, the court delineated two methods of identifying clearly established rights, the second of which identified obvious violations, before stating:

> Under the first method, we determine whether existing law provides fair warning and notice "in light of the specific context of the case, not as a broad general proposition." Fair warning and notice do not require "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate," that is to say, there must exist a "robust 'consensus of cases of persuasive authority.'"

Id. at 1333 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001); *al-Kidd*, 563 U.S. at 741–42) (citations omitted). The court concluded the case presented no obvious violation, without attaching any of these requirements to that method of analysis. *Id.* Yet, this pattern has not been consistent, as two commentators have observed:

> Some judges on the Eleventh Circuit believe that the *Hope* Doctrine should be applied as its own autonomous standard for determining qualified immunity, separate from *Anderson* [*v. Creighton*]'s objective legal reasonableness standard. Other judges on the Eleventh Circuit are quick to point out that the *Hope* Doctrine merely applied the same standard as previous qualified immunity determinations and was incorporated in those determinations. This divergence of opinion in the Eleventh Circuit represents the variety of interpretations of how the *Hope* Doctrine affects the qualified immunity analysis.

Golden & Hubbard, Jr., *supra* note 16, at 586.

328. *See, e.g.*, Wilson v. Prince George's County, 893 F.3d 213 (4th Cir. 2018). The court in *Wilson* noted that exact factual similarity is not required and that in "obvious cases" general rules may

obvious violations among reviewed cases in these circuits, this treatment of Supreme Court precedent may have the effect of skewing the "obvious" analysis in these circuits such that their judges are more likely to hesitate before finding an obvious violation.

Although it is too soon to tell, these differences may offer some insight as to how the Supreme Court's decision in *Taylor* will affect qualified immunity decisions in lower courts. In particular, it seems reasonably likely that circuits that were already routinely considering the possibility of obvious violations might be more receptive to the decision than others, and accordingly might renew their willingness to deny qualified immunity on the basis of obvious violations. To the extent that these circuits were more inclined to do so to begin with, *Taylor* may signal that they can continue or do so more frequently. The same may also be true for other circuits, since the Court recognizing an obvious violation after declining to do so for so long may also encourage more hesitant circuits to do the same.

At the same time, it is apparent that the Court's lack of guidance has led to diverging interpretations of how precedent should apply, leading circuits to vary in their willingness to recognize obvious violations and in their insistence on factually similar precedent.[329] The result is differing treatment of—and quite likely unequal access to justice for—§ 1983 plaintiffs depending on their jurisdiction.[330] In light of the findings presented in Part III, it may well be the case that a § 1983 plaintiff who is the victim of egregious conduct by a state actor might overcome qualified immunity in the Eleventh Circuit but lose in the Fourth. Not only is such a disparity unjust, but the Supreme Court has repeatedly demonstrated a concern

clearly establish a right, but went on to define the right at issue in such a specific way as to render it impossible to find it clearly established absent factually similar precedent, stating:

> Defined at the level of specificity required by the Supreme Court, we ask here whether it was clearly established law in October 2012 that shooting an individual was an unconstitutional use of excessive force when: (1) the officer had probable cause to believe that the person had committed certain misdemeanors, one of which involved the use of force against another person; (2) the individual was standing about 20 feet from the officer holding a knife and using it to hurt himself, but was not threatening anyone or making any sudden movements; and (3) the individual had ignored the officer's repeated commands to drop the knife.

Id. at 222.

329. *See* Blum, Chemerinsky & Schwartz, *supra* note 64, at 657–58 ("One thing is certainly clearly established. Whether you represent plaintiffs or defendants in these cases, you have a tough job, and staying on top of the law, as murky as it may be, is essential.").

330. This is more problematic outside of the Fourth Amendment context, as in Fourth Amendment cases the Court has been somewhat clearer by specifically emphasizing the importance of factual similarity, making § 1983 plaintiffs more likely to need factually analogous precedent in order to overcome qualified immunity.

for resolving disparate treatments of important legal issues among circuits,[331] suggesting that this issue represents a strong candidate for review. This concern seems particularly salient given that a core policy goal of qualified immunity is to reduce the time, energy, and resources that government officials expend in defending § 1983 claims,[332] as it is quite likely that the Court's lack of clarity leads defendants to unnecessarily appeal proper denials of qualified immunity and plaintiffs to unnecessarily appeal proper grants.[333] With the state of the law so murky, municipal defendants that face little scrutiny for costs expended in civil suits[334] may see little reason not to appeal, delaying relief to plaintiffs, based on a

331. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 106 (1990) ("Notwithstanding the narrowness of this issue, we granted certiorari to resolve a divergence of opinion among the Courts of Appeals."); *see also* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (denying review on the basis that only one circuit had addressed the issue in question, thus presenting no circuit split).

332. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (identifying a primary goal of qualified immunity as avoiding the "excessive disruption of government" that would result from "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" by allowing for the early resolution of claims); *Saucier*, 533 U.S. at 200 (indicating that the value of qualified immunity is its avoidance of "the costs and expenses of trial").

333. For a more comprehensive examination of qualified immunity's failure to achieve its stated goal of conserving government resources, see generally Schwartz, *supra* note 58.

334. Previous scholarship has suggested that in the vast majority of § 1983 cases involving police, officers are represented by taxpayer-funded city or county attorneys or by union-hired counsel. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 915–16 (2014); *see also* David Brancaccio, Candace Manriquez Wrenn & Alex Schroeder, *Understanding "the Hidden Costs of Police Misconduct" for Cities Nationwide*, MARKETPLACE (June 1, 2020), https://www.marketplace.org/2020/06/01/george-floyd-protests-police-misconduct-cases-settlements-judgments/ [https://perma.cc/2LTN-PQJA] (quoting Marc Morial, president of a national civil rights organization and former New Orleans Mayor: "[T]his is what I call one of the hidden costs of police misconduct: that cities pay out millions and millions of dollars in civil judgments. The public knows nothing about it. Many times it's hidden behind confidentiality agreements, attorney-client privilege. It's not discussed."); Newman, *supra* note 20 (calling, as a Second Circuit judge, for legislative expansion of § 1983 to better spotlight officer misconduct and increase public scrutiny); *but see, e.g.*, Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020, 7:00 AM), https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers [https://perma.cc/BJX2-AQCR] (reporting on substantial money judgments and settlements resulting from police misconduct and satisfied with taxpayer funds, but noting increased public focus on this issue in recent years); Christina Carrega, *Millions in Lawsuit Settlements Are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS (June 14, 2020, 7:12 AM), https://abcnews.go.com/US/ millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540 [https://perma.cc/LKW8-Q7ZR] (reporting that New York City paid $175.9 million in the 2019 fiscal year for police-related lawsuits, and noting public and institutional criticism of these costs). Existing scholarship has likewise demonstrated that in many cases, government agencies either lack the information-gathering capacity necessary to scrutinize their § 1983 litigation expenditures or have

hope that the appellate panel they draw will look to the Court's statements suggesting the need for a close factual match and reverse a qualified immunity denial. Plaintiffs who have already invested so much into a case may hold out for an appeals court to reach for a rare obvious violation that would allow their case to go forward. In either circumstance, the uncertain ground upon which both parties tread will have led to precisely the inefficiencies and waste the Court has stated a desire to avoid—even justifying its creation of qualified immunity on the basis of such avoidance—and that could in fact be avoided with a clearer legal standard. As such, in an appropriate case the Court would do well to revisit this issue and offer more precise guidance to lower courts.[335]

Yet, these findings also suggest that although greater clarity from the Court would certainly benefit litigants in § 1983 actions, the landscape of § 1983 litigation in lower courts may not be quite so grim as many scholars have forecasted the Court's confounding jurisprudence would cause it to be. Much of the criticism evaluating the Court's post-*Hope* decisions has offered a fairly gloomy forecast of what it would mean for the prospects of plaintiffs bringing § 1983 claims,[336] though existing scholarship has not taken a comprehensive look at the impact of these decisions on lower courts or the extent to which overcoming qualified immunity via a finding of an obvious violation remains viable. While it has undoubtedly been reasonable for scholars to predict that the Court's decisions after *Hope* would significantly diminish the likelihood of courts recognizing obvious violations and would in a substantial number of cases turn qualified immunity into an insurmountable hurdle, my study suggests that these predictions have not entirely been borne out on the ground. For example, some scholars have pointed to the proportion of the Court's qualified immunity decisions in which the Court has

determined, at least in the policing context, that such expenditures are worthwhile in light of the perceived benefits of aggressive law enforcement. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1033, 1047 (2010).

335. Although some Justices appear amenable to clarifying or otherwise revisiting the standard, *see* Mullenix v. Luna, 577 U.S. 7, 25 (2015) (Sotomayor, J., dissenting) (criticizing the majority for affirming a grant of qualified immunity on the grounds that it failed to "ask[] the appropriate legal question"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–71 (2017) (Thomas, J., concurring in part) (critiquing the Court's approach to and expansion of qualified immunity), the Court's refusal in the summer of 2020 to take up any of a group of consolidated qualified immunity cases makes it apparent that there were not then four sitting Justices who held this position. *See* Josh Gerstein, *Supreme Court Turns Down Cases on 'Qualified Immunity' for Police*, POLITICO (June 15, 2020, 3:08 PM), https://www.politico.com/news/2020/06/15/supreme-court-qualified-immunity-police-cases-320187 [https://perma.cc/SLE8-V8PP]; Baxter v. Bracey, 140 S. Ct. 1862 (2020) (denying review).

336. *See supra* notes 6, 19, 20.

found no clearly established right as indicative of the uphill battle plaintiffs would face in lower courts,[337] yet the number of decisions in my study finding that a right was clearly established by identifying an obvious violation or by looking to factually dissimilar precedent indicates that the Court's treatment of this issue has been a less-than-accurate barometer of plaintiffs' prospects. While this may in part be due to the fact that "[t]he easiest cases don't even arise,"[338] thereby limiting the number of particularly egregious cases for which the Court grants review, it seems likely that it is also partly a function of the relative lenity some lower courts have demonstrated in addressing qualified immunity's clearly established prong. Accordingly, while it may be true that little prevents appellate courts from taking a particularly exacting approach to this analysis[339]—and indeed, courts sometimes take this to an extent that is plainly unreasonable[340]—it is also far from true that this will reliably be the case.[341]

This likelihood merits further inquiry, and the extent to which the Court's qualified immunity jurisprudence has impacted § 1983 plaintiffs' odds of success could be further elucidated in a number of ways. Scholarship would benefit from further research evaluating the frequency with which courts identify obvious violations following *Taylor*,[342] in circuits not reviewed in this Comment, and at the district level. Additionally, research examining whether the variations by circuit that I have identified have had a discernible effect on the rates and nature of filings, qualified immunity rulings, ultimate dispositions in § 1983 actions, and other relevant metrics would likely prove illuminating.[343] For the time being, however,

337. *See supra* note 24.

338. United States v. Lanier, 520 U.S. 259, 271 (1997); K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

339. *See* Blum, Chemerinsky & Schwartz, *supra* note 64, at 656 ("[C]ourts are able to grant qualified immunity and dismiss Section 1983 claims by requiring an exact case on point from a high level court and the recently implemented heightened standard for proving a clearly established law.").

340. *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019) (granting qualified immunity after police officer mistakenly shot a prone ten-year-old child while attempting to shoot a pet dog that likewise posed no apparent threat).

341. To be sure, this is not to suggest that any surveyed courts found obvious violations frequently or that requiring precedent with some degree of factual similarity is not the norm among these circuit courts. However, in light of the Court's recent decision in *Taylor*, see *supra* notes 153–156 and accompanying text, one might expect that courts may be more open to recognizing obvious violations than before.

342. Taylor v. Riojas, 141 S. Ct. 52 (2020).

343. The latter mode of research would likely dovetail well with other recent scholarship addressing the contemporary landscape of § 1983 litigation and regional variations in outcomes. *See generally* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020) (arguing that institutional knowledge and experience as to § 1983 litigation within given jurisdictions has a reinforcing effect, promoting vibrant "ecosystems" of civil rights litigation in which plaintiffs frequently prevail and obtain high damage awards and other

it may suffice to say that civil rights plaintiffs may be more likely to have their day in court than the Supreme Court's qualified immunity jurisprudence might suggest and that there may yet be some "*Hope* left for plaintiffs."[344]

CONCLUSION

Qualified immunity, in particular its requirement that violated law be clearly established for the defense to be overcome, has been heavily criticized by individuals and organizations across the political spectrum.[345] Among the most frequent and prominent critiques is that the requirement "bars even those plaintiffs who can prove their case from remedying a wrong[,] . . . . enabl[ing] public officials who violate federal law to sidestep their legal obligations to the victims of their misconduct."[346] Indeed, by precluding findings of liability against

relief in some parts of the country, while creating civil rights "deserts" in others, where few practitioners are successful in this field and where courts are markedly less sympathetic to § 1983 plaintiffs).

344. Blum, Chemerinsky & Schwartz, *supra* note 64, at 633.

345. *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Almighty Supreme Born Allah v. Milling, 139 S. Ct. 49 (2018) (No. 17-8654), 2018 WL 3388317 [hereinafter Cross-Ideological Brief] (arguing, on behalf an array of ideologically disparate groups including the ACLU, Alliance Defending Freedom, Freedom Partners Chamber of Commerce, Institute for Justice, and Second Amendment Foundation, for the Court's reconsideration of qualified immunity doctrine); *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, *supra* note 49; *Project on Immunity and Accountability*, INST. FOR JUST., https://ij.org/issues/private-property/project-on-immunity-and-accountability [https://perma.cc/4RYR-FERG] (last visited June 14, 2021); Emma Andersson, *The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later'*, ACLU (Apr. 9, 2018 5:00 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-gives-police-green-light-shoot-first-and [https://perma.cc/2G7H-U27W]; Hon. Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, AM. CONST. SOC'Y: EXPERT F. (Jan. 12, 2018), https://www.acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights [https://perma.cc/436T-E869]; Amash, *supra* note 29.

346. Cross-Ideological Brief, *supra* note 345, at *8. *See also* Jeffries, *supra* note 20, at 255, 261 (arguing that through its qualified immunity jurisprudence "the Supreme Court has excluded from civil liability conduct that fully merits that liability," which "send[s] exactly the wrong deterrent message: not only that officers should not be inhibited by the threat of liability for reasonable error, but that officers should not be inhibited at all, absent specific prior adjudication"); Duckett, *supra* note 4, at 435 (arguing that the prevalence of decisions granting qualified immunity has "eroded public trust in the judiciary and cultivated doubt among commentators that courts are capable of holding police officers accountable for unconstitutionally violent behavior"); Gross, *supra* note 64, at 77 (arguing that the Court's qualified immunity jurisprudence "creates a powerful disincentive to litigate" in many cases); @TheKaranMenon, TWITTER (June 8, 2020, 7:47 AM), https://twitter.com/thekaranmenon/status/1270004558933221377 [https://perma.cc/29FX-

officials who commit civil rights violations, qualified immunity unjustly undermines § 1983's clear purpose of remedying these wrongs, shielding culpable officials from accountability to both the individuals they have harmed and the public at large.

Perhaps some of the decisions finding obvious violations discussed in this Comment are indicative of judges recognizing the untenability of requiring relevant precedent in circumstances when the injustice present in a case is palpable, a recognition that was central to the *Hope* decision and that the Court has recently acknowledged once again in *Taylor*. Although decisions finding obvious violations have been fairly rare—even in circuits that are more amenable to the possibility—they overwhelmingly have been decided that way for good reason, and a grant of qualified immunity in these cases would truly be unjust. A look at the factual circumstances presented in these cases (which I have taken care to preserve in presenting them in this Comment) makes it clear that not only did "elemental justice"[347] require the availability of liability—clearly established requirement or no—but also that a deep social harm would be done by the dismissal of these § 1983 actions on the basis of a technicality.[348]

UCZ9] (deriding qualified immunity in a comedic sketch on the grounds that it unjustly shields police officers who perpetrate brutality).

347. United States v. Swayne, 700 F.2d 467, 470 (8th Cir. 1983).

348. Indeed, there is no doubt that extensive social harm has already been done by dismissals of many other egregious cases through grants of qualified immunity in the years since the doctrine was first created. As one district court powerfully put it:

> This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted.
>
> But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.

Jamison v. McClendon, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020). The Fourth Circuit offered a similar statement on qualified immunity's effect of ratifying killings by police:

> [W]e are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of [B]lack lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a [B]lack man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept. The district court's grant of summary judgment on qualified immunity grounds is reversed, and the dismissal of that claim is hereby vacated.

Accordingly, given the unfortunate prevalence of constitutional violations that occur in the United States each year, the willingness of circuit courts to find obvious violations despite the Supreme Court's aversion to doing so, along with courts' relative amenability to finding clearly established rights when something less than materially similar precedent is available, represent somewhat positive signs about the condition of the *Hope* precedent and federal qualified immunity jurisprudence more generally.

Qualified immunity frequently works injustice, lacks valid historical justification, and fails to accomplish its purported policy goals.[349] Even so, barring successful legislation[350] or a surprise reversal by the Court,[351] the defense in some form is here to stay. Consequently, the willingness of lower courts to overcome the defense in cases where its requirements are plainly unreasonable is laudable, but courts should not have to engage in "narrowing" of the Court's precedent—deliberate or otherwise—in order to effectuate justice.[352] Civil rights plaintiffs and defendants alike should be able to make well informed decisions in litigating § 1983 claims rather than rolling the dice and hoping the judge or panel they land on will prove amenable to their positions, and they likewise should not be made to estimate whether and how far to pursue claims on the basis of the circuit in which they happen to be located. To that end, in light of the Supreme Court's evident and unfortunate unwillingness to meaningfully clarify the doctrine, Congress can and should abolish it, or at the very least limit it and more clearly delineate its boundaries. Until that happens, it is more critical than ever for practitioners, scholars, and lower court judges to reexamine the defense and identify ways in which it can be more readily overcome. In egregious cases, *Hope v. Pelzer*[353]—largely neglected by the Court—may provide a powerful solution.

Estate of Jones *ex rel.* Jones v. City of Martinsburg, 961 F.3d 661, 673 (4th Cir. 2020). *See also Jamison*, 476 F. Supp. 3d at 390–91 (offering an extensive list of Black Americans killed by police and strongly criticizing qualified immunity's effect of immunizing offending officers).

349. *See* Schwartz, *supra* note 23, at 1803–14; *see also generally* Schwartz, *supra* note 24 (undertaking an empirical review of § 1983 cases and the frequency with which qualified immunity defenses were raised and decided before discovery and trial, finding that only rarely did the defense effectively spare government defendants the costs and burdens of litigation that the Court has stated qualified immunity is intended to avoid).

350. *See supra* note 29.

351. With the Court's 2020 denial of review to a group of qualified immunity cases, this seems increasingly unlikely. *See supra* notes 25, 335.

352. *See supra* notes 42, 324, and accompanying text.

353. 536 U.S. 730 (2002).