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Mark D. Standridge

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REQUIEM FOR THE SLIDING SCALE: THE QUIET ASCENT—AND SLOW DEATH— OF THE TENTH CIRCUIT'S PECULIAR APPROACH TO QUALIFIED IMMUNITY

*Mark D. Standridge**

I. INTRODUCTION

Many practitioners and scholars view qualified immunity as the most important doctrine in the law of constitutional torts because it shields a government official from a civil suit for monetary damages under federal civil rights laws

* Mark D. Standridge is an attorney practicing with Jarmie & Rogers, P.C. in Las Cruces, New Mexico, focusing on civil rights, personal injury defense, and appellate practice. My thanks to the editorial staff of the *Wyoming Law Review* for their insightful comments and suggestions for this Article, and to Cody Rogers and Mark Jarmie for their support in the drafting of this Article.

unless the official violates "clearly established" constitutional rights.[1] The doctrine protects a public official who has purportedly violated the Constitution from individual liability, unless the official had fair notice that his alleged conduct would violate "the Supreme Law of the Land."[2] "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."[3] Much of the power of the qualified immunity doctrine arises from the fact that a defendant must simply raise it as a defense, and the plaintiffs have the burden of establishing the proof and arguments necessary to overcome it.[4]

Under "the traditional two-part qualified immunity framework," a court considers "first the existence of a constitutional violation and next whether the law as to that violation was clearly established."[5] By 2007, the United States Court of Appeals for the Tenth Circuit adopted a "sliding scale" method to determine when law is clearly established for purposes of qualified immunity, such that "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."[6] For nearly a decade, the United States Court of Appeals for the Tenth Circuit employed this unique method for determining whether a plaintiff can show that a constitutional right was clearly established.[7] However, based

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[1] *See* Imbler v. Pachtman, 424 U.S. 409, 419 (1976); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 851–52 (2010); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting qualified immunity's importance "to society as a whole").

[2] Echols v. Lawton, 913 F.3d 1313, 1326 (11th Cir. 2019) (quoting U.S. CONST. art. VI), *cert. denied*, 139 S. Ct. 2678 (2019).

[3] *Harlow*, 457 U.S. at 815 (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

[4] Strickland v. City of Crenshaw, 114 F. Supp. 3d 400, 412 (N.D. Miss. 2015) (citing Pierce v. Smith, 117 F.3d 866, 871–72 (5th Cir. 1997) ("[N]oting that the plaintiff bears the burden of demonstrating that an individual defendant is *not* entitled to qualified immunity.")).

[5] Manzanares v. Higdon, 575 F.3d 1135, 1142 (10th Cir. 2009) (citing Weigel v. Broad, 544 F.3d 1143, 1151 (10th Cir. 2008)).

[6] Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004)).

[7] *See, e.g.*, Sanchez v. Hartley, 810 F.3d 750, 759–60 (10th Cir. 2016); Ornelas v. Lovewell, 613 F. App'x 718, 721–22 (10th Cir. 2015); Waters v. Coleman, 632 F. App'x 431, 435 (10th Cir. 2015); Estate of Booker v. Gomez, 745 F.3d 405, 427 (10th Cir. 2014); Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008). One commentator has suggested that "*several* circuits use a 'sliding scale'" approach to qualified immunity—however, the commentator cited only Tenth Circuit opinions in support of this assertion. *See* Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA's Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in §1983 and Bivens Cases to Expand and Strengthen Sources of "Clearly Established" Law in Civil Rights Actions*, 29 GEO. MASON U. CIV. RTS. L.J. 43, 59 n.86 (2018) (emphasis added) (citing *Casey*, 509 F.3d at 1284; *Pierce*, 359 F.3d at 1279). From approximately 2007 to 2016, the Tenth Circuit was the only circuit to employ the "sliding scale" approach to clearly established law—the Tenth Circuit's various cases employing this method are discussed *infra*. *But see* Guertin v. Michigan, 924 F.3d 309, 314 (6th Cir. 2019) (Sutton, J., concurring in the denial of rehearing en banc) (suggesting that, "in the context of a clearly established conscience-shocking

upon more recent qualified immunity decisions handed down by the United States Supreme Court, the Tenth Circuit has seemingly retreated from its sliding scale approach.[8] However, a handful of district courts within the Tenth Circuit continue to apply the sliding scale analysis to the question of whether clearly established law exists in a given case.[9]

Part II of this Article provides a brief overview of the qualified immunity defense.[10] Part III explores the origins of the Tenth Circuit's sliding scale approach to analyzing the defense.[11] Part IV addresses the Supreme Court's strengthening of the qualified immunity defense, particularly in the last ten years.[12] Parts V and VI discuss the Supreme Court's decisions in *Aldaba v. Pickens* and *White v. Pauly*—in each of these cases, the Supreme Court reversed the Tenth Circuit, leading courts within the circuit to question the sliding scale approach as discussed in Part VII of this Article.[13] Finally, Part VIII of this Article argues that the Tenth Circuit should abolish or replace the sliding scale, as the Tenth Circuit's novel approach to qualified immunity conflicts with United States Supreme Court precedent, particularly the more recent qualified immunity opinions from the High Court.[14] As discussed in Part VIII, to the extent that it has not already

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standard of care," for purposes of the Fourteenth Amendment, "the case law seems to present a sliding scale—the more evidence of unforgiveable intent, the less necessity to identify a case just like this one.").

[8] *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017) (per curiam); Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam); Pickens v. Aldaba, 136 S. Ct. 479 (2015); Nosewicz v. Janosko, 754 F. App'x 725, 733 n.8 (10th Cir. 2018); Lowe v. Raemisch, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) ("[O]ur sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity. The possibility of a conflict arises because the sliding-scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable." (citations omitted)), *cert denied*, 139 S. Ct. 5 (2018); Aldaba v. Pickens, 844 F.3d 870, 877 (10th Cir. 2016).

[9] *See, e.g.*, Youngblood v. Qualls, 308 F. Supp. 3d 1184, 1201 (D. Kan. 2018) (citations omitted); Hayenga v. Garth, No. 18-cv-02038-KLM, 2019 WL 2471086, at *7 (D. Colo. June 13, 2019); Jager v. Mulheron, No. 18-743 GBW/CG, 2018 WL 6436913, at *6 (D.N.M. Dec. 7, 2018); Boateng v. Metz, No. 18-cv-2694-WJM-SKC, 2019 WL 4751748, at *3 (D. Colo. Sep. 30, 2019); *see also* Myers v. Brewer, No. 17-2682, 2018 WL 3145401, at *8 (D. Kan. June 27, 2018) (the "sliding scale test has been called into question recently . . . but the Tenth Circuit has not yet decided that it conflicts with Supreme Court authority." (citing McCoy v. Meyers, 887 F.3d 1034, 1053 n.22 (10th Cir. 2018)), *aff'd*, 773 F. App'x 1032 (10th Cir. 2019); Arnold v. City of Olathe, Kansas, No. 18-2703-CM-JPO, 2019 WL 4305132, at *10 (D. Kan. Sep. 11, 2019).

[10] *See infra* notes 16–30 and accompanying text.

[11] *See infra* notes 31–49 and accompanying text.

[12] *See infra* notes 50–105 and accompanying text.

[13] *See infra* notes 106–59 and accompanying text.

[14] *See infra* notes 165–70 and accompanying text; *see also, e.g.*, Quintana v. Santa Fe County Bd. of Comm'rs, No. CIV 18-0043 JB/LF, 2019 WL 452755, at *37 (D.N.M. Feb. 5, 2019); Petition for Writ of Certiorari at 14, Hartley v. Sanchez, 137 S. Ct. 1372 (Apr. 8, 2016) (No. 15-1281), 2016 WL 1554724, at *14 n.10.

done so, the Tenth Circuit should formally do away with the sliding scale in its qualified immunity jurisprudence.[15]

II. A (BRIEF) SUMMARY OF QUALIFIED IMMUNITY

The defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[16] Qualified immunity shields government officials and employees "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[17] This doctrine balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[18] Qualified immunity provides government officials and employees the "breathing room to make reasonable but mistaken judgments."[19]

Qualified immunity protects federal and state officials from liability for discretionary functions, and from the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."[20] The qualified immunity privilege is "an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial" rather than disposing of it by way of a motion to dismiss or motion for summary judgment.[21] In simple terms, qualified immunity allows public employees to do their jobs without the persistent threat of lawsuits.[22]

"When a defendant asserts qualified immunity . . . the burden shifts to the plaintiff, who must clear two hurdles."[23] The plaintiff must show both that a defendant's actions "violated a constitutional or statutory right" and that the right the defendant allegedly violated was "clearly established at the time of the

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[15] *See infra* notes 165–70 and accompanying text.

[16] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[17] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[18] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[19] Stanton v. Sims, 571 U.S. 3, 5 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

[20] Siegert v. Gilley, 500 U.S. 226, 232 (1991).

[21] *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)), *overruled in part by Pearson*, 555 U.S. at 236; *see also* Peterson v. Jensen, 371 F.3d 1199, 1201 (10th Cir. 2004) ("Although summary judgment provides the typical vehicle for asserting a qualified immunity defense, we will also review this defense on a motion to dismiss." (citing *Mitchell*, 472 U.S. at 526)).

[22] *See* Kerns v. Bader, 663 F.3d 1173, 1180 (10th Cir. 2011) (quoting Lewis v. Tripp, 604 F.3d 1221, 1230 (10th Cir. 2010)).

[23] Riggins v. Goodman, 572 F.3d 1101, 1107 (10th Cir. 2009).

conduct at issue."[24] To meet this heavy burden, the plaintiff must "do more than simply allege the violation of a general legal precept."[25] Rather, the plaintiff is required to demonstrate: (1) a substantial correspondence between the conduct in question; and (2) prior case law establishing that the defendant's actions were clearly prohibited.[26]

For decades, the Supreme Court has repeatedly warned the lower courts not to analyze clearly established law at too high a level of generality.[27] In all Section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition."[28] That said, the Supreme Court must often "slosh [its] way through the fact-bound morass of reasonableness" to resolve a qualified immunity case.[29] The Supreme Court has not shied away from reviewing—and reversing—fact-intensive qualified immunity cases, particularly where the lower courts have egregiously misapplied settled law.[30]

III. THE ORIGIN OF THE SLIDING SCALE IN THE TENTH CIRCUIT: *CASEY* AND *PIERCE*

The first Tenth Circuit case to identify the court's approach to analyzing clearly established law as utilizing a sliding scale was the court's 2007 decision in *Casey v. City of Federal Heights*.[31] In *Casey*, the Tenth Circuit reversed a district court's grant of qualified immunity where officers accosted a man on his way back to a courthouse.[32] Plaintiff Casey was under investigation for a misdemeanor

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[24] Nelson v. McMullen, 207 F.3d 1202, 1206 (10th Cir. 2000) (internal quotation marks omitted).

[25] Jantz v. Muci, 976 F.2d 623, 627 (10th Cir. 1992).

[26] *See id.*; *see also* Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1184 (10th Cir. 2010).

[27] *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 615–16 (1999); Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982))).

[28] Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) (citations omitted); *see also* Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993) ("To show [that a right] is clearly established, a plaintiff cannot rely on general, conclusory allegations or broad legal truisms." (quotations and citations omitted)).

[29] *See* Scott v. Harris, 550 U.S. 372, 383 (2007) (internal quotations omitted).

[30] *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam); Stanton v. Sims, 571 U.S. 3 (2013); Ryburn v. Huff, 565 U.S. 469 (2012) (per curiam); *see also* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015); Plumhoff v. Rickard, 572 U.S. 765 (2014); Reichle v. Howards, 566 U.S. 658 (2012).

[31] Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007).

[32] *Id.* at 1287.

and, while walking towards the courthouse in a non-violent, non-hostile manner, officers confronted Casey.[33] The Tenth Circuit examined the excessiveness of the force used against Casey and considered "first whether each officer's conduct violated the Constitution; then, if so, whether it also violated clearly established law."[34] In analyzing whether the defendant officers violated Casey's clearly established Fourth Amendment right against an unreasonable seizure, the court noted that, "'[o]rdinarily,' . . . for a rule to be clearly established 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'"[35] The Tenth Circuit looked to the Supreme Court's decision in *Hope v. Pelzer*, in which the Court posited that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[36] In *Hope*, the Supreme Court suggested that the "salient question" in qualified immunity cases is whether the state of the law at the time of the challenged conduct gave defendants fair warning that their actions were unconstitutional.[37] Consequently, the Tenth Circuit formulated the "relevant inquiry" as being "whether the law put officials on fair notice that the described conduct was unconstitutional."[38] In *Casey*, the Tenth Circuit pronounced—for the first time, but without significant explanation—that the court had "adopted a sliding scale to determine when law is clearly established."[39]

The Tenth Circuit's 2004 decision in *Pierce v. Gilchrist*, cited by the Tenth Circuit in *Casey*, was an important precursor case that supplied language for the court's adoption of the sliding scale. In *Pierce*, the plaintiff brought a

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[33] *Id.* at 1281–82. Eyewitnesses confirmed the plaintiff was non-violent, and rather than resisting arrest, the plaintiff was merely walking toward the courthouse. *Id.*

[34] *See id.* at 1282.

[35] *Id.* at 1284 (quoting Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

[36] Hope v. Pelzer, 536 U.S. 730, 741 (2002). In *Hope*, prison guards handcuffed the plaintiff, a prison inmate, to a "hitching post" on two separate occasions. *Hope*, 536 U.S. at 733–74. During the second such instance, the prison guards made Hope take off his shirt; he remained shirtless all day while the sun burned his skin. *Id.* at 734–35. Hope remained attached to the post for approximately seven hours, during which "he was given water only once or twice and was given no bathroom breaks." *Id.* at 735. The Supreme Court found that Hope had alleged an "obvious" Eighth Amendment violation. *Id.* at 738. Citing its prior opinion in *United States v. Lanier*, 520 U.S. 259 (1997), the Court found that government "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 754. The Court ultimately concluded that the defendants violated clearly established law: "[t]he obvious cruelty inherent in [the hitching post] practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 744–45.

[37] *Id.*

[38] Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (internal quotations and citation omitted).

[39] *Id.*; *see also* Smith v. City & County of Denver, No. 07-cv-00154-WDM-BNB, 2008 WL 724629, at *5 (D. Colo. Mar. 18, 2008).

malicious prosecution claim based upon the allegation that a forensic chemist fabricated inculpatory evidence and disregarded exculpatory evidence, causing the plaintiff to suffer imprisonment for fifteen years for a rape he did not commit.[40] In determining the chemist violated the plaintiff's clearly established Fourth and Fourteenth Amendment rights to be free from unreasonable seizures and a deprivation of liberty, respectively, the Tenth Circuit looked to its pre-*Hope* cases and found that "qualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'"[41] Without saying as much explicitly, the Tenth Circuit essentially defined the sliding scale by opining that "[t]he degree of specificity required from prior case law depends in part on the character of the challenged conduct," where "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."[42] Three years later, the Tenth Circuit relied on the "obviously egregious" language from *Pierce* in announcing the adoption of the sliding scale in qualified immunity cases.[43]

Four months after the Tenth Circuit decided *Casey*, the court applied its sliding scale approach in *Fogarty v. Gallegos*.[44] In *Fogarty*, the plaintiff claimed the defendants' use of pepper balls and tear gas against him, combined with the use of force to tear plaintiff's tendon, constituted excessive force.[45] Applying the sliding scale, the Tenth Circuit noted that, while its prior opinions had not directly addressed the Fourth Amendment implications of "less lethal" munitions, a reasonable officer would have been on notice that the use of pepper balls and tear gas could constitute excessive force.[46] The court likewise concluded "that it would be apparent to a reasonable officer that the use of force adequate to tear a tendon is unreasonable against a fully restrained arrestee."[47] Building upon *Pierce*, *Casey*, and *Fogarty*, the district courts within the Tenth Circuit began applying the sliding scale method to various federal civil rights claims.[48] Additionally, the

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[40] Pierce v. Gilchrist, 359 F.3d 1279, 1281 (10th Cir. 2004).

[41] *Id.* at 1298–1300 (quoting Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001)).

[42] *Id.* at 1298 (citing Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002) (noting that the "constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that this conduct cannot be lawful."); Austin v. Hamilton, 945 F.2d 1155, 1158 (10th Cir. 1991) ("It is only by ignoring the particularized allegations of deplorable violence and humiliation advanced by plaintiffs that defendants are able to argue for qualified immunity.").

[43] *Casey*, 509 F.3d at 1284.

[44] Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008).

[45] *See id.* at 1161–62.

[46] *See id.* at 1161.

[47] *Id.* at 1162.

[48] *See, e.g.*, Davis v. City of Aurora, 705 F. Supp. 2d 1243, 1256–57 (D. Colo. 2010); Cavanaugh v. Woods Cross City, No. 1:08-CV-32-TC-BCW, 2009 WL 4981591, at *3–4 (D. Utah. Dec. 14, 2009), *aff'd*, 625 F.3d 661 (10th Cir. 2010); Asten v. City of Boulder, 652 F.

Tenth Circuit itself later applied the sliding scale in 2010 in *Shroff v. Spellman*, affirming a district court's ruling that the defendant police officer arrested the plaintiff without probable cause.[49]

IV. *HOPE* BEGINS TO FADE: THE SUPREME COURT STRENGTHENS THE QUALIFIED IMMUNITY DEFENSE

Beginning in the early twenty-first century, the Supreme Court began to strengthen the qualified immunity doctrine in a number of ways, starting with its 2004 opinion in *Brosseau v. Haugen*.[50] In *Brosseau*, the defendant police officer shot plaintiff Haugen in the back as he attempted to flee from law enforcement authorities in his vehicle.[51] The Ninth Circuit found that the officer had violated the plaintiff's Fourth Amendment right to freedom from excessive force, and that the officer violated a clearly established right such that the officer was not entitled to qualified immunity.[52] The Supreme Court granted review only on the "clearly established" question, and reversed.[53] While acknowledging its prior ruling in *Hope* that, in an obvious case, general statements regarding constitutional rights can clearly establish the law "even without a body of relevant case law," the Supreme Court found that *Brosseau* was "far from [an] obvious" case such that the Court needed to determine whether the plaintiff's claimed Fourth Amendment right was clearly established in a more "particularized" sense.[54] Between the two of them, the plaintiff and the defendant cited only three relevant circuit opinions to

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Supp. 2d 1188, 1205 (D. Colo. 2009) ("[U]nder the Tenth Circuit's 'sliding scale' regarding clearly established law, although identical facts cannot be found in the case law, general constitutional doctrine combined with the nature of the facts—the unforewarned tasing of a mentally unstable woman in her own home—lead the Court to conclude that the law at issue was clearly established at the time Officer Frenzen used his taser to seize Ms. Asten."); Cordova v. Aragon, 560 F. Supp. 2d 1041, 1061–62 (D. Colo. 2008) (finding that neither of the two cases cited by plaintiff illustrated that defendants violated clearly established law in an excessive force case), *aff'd*, 569 F.3d 1181 (10th Cir. 2009), *cert. denied*, 558 U.S. 1152 (2010).

[49] Shroff v. Spellman, 604 F.3d 1179, 1189–90 (10th Cir. 2010).

[50] Brosseau v. Haugen, 543 U.S. 194 (2004).

[51] *Id.* at 194.

[52] *Id.* at 195 (citing Haugen v. Brosseau, 339 F.3d 857 (9th Cir. 2003)).

[53] *See Brosseau*, 543 U.S. at 195.

[54] *Id.* at 199 (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002); then citing Saucier v. Katz, 533 U.S. 194, 202 (2001)). In *Brosseau*, the general statements of law regarding the Fourth Amendment came from *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), two prior Supreme Court cases involving excessive force claims. However, in *Brosseau* and in subsequent cases, the Supreme Court clarified that *Graham* and *Garner* cannot suffice as clearly established law outside of an "obvious" case. *Brosseau*, 543 U.S. at 199; *see also* White v. Pauly, 137 S. Ct. 548, 552 (2017); Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (emphasizing that *Graham* and *Garner* "are 'cast at a high level of generality.'").

the Supreme Court, none of which the Court found to govern the case before it.[55] While *Brosseau* did not explicitly overrule *Hope*, it also did not apply *Hope*'s "fair warning" standard.[56] Instead, the Court looked to its previous equation of "clarity" with "factual similarity" as set forth in *Anderson v. Creighton* in 1987.[57] "Indeed, *Brosseau* is an especially potent illustration of the way the stricter *Anderson* inquiry favors defendants."[58]

Over the last decade, the United States Supreme Court has further expanded the qualified immunity defense. Traditionally, in assessing qualified immunity, courts first needed to determine whether the defendant's actions violated a constitutional right, and *then* determine whether or not that right was clearly established at the time of the action.[59] However, in 2009, the Supreme Court ruled that courts retain discretion to consider those two separate questions in the order they see fit, such that courts can now conserve judicial resources by moving directly to the question of whether a right is clearly established.[60] Two years later, in *Ashcroft v. al-Kidd*, the Court reformulated the qualified immunity standard to require "*every* 'reasonable official'. . . [to understand] that what he is doing violates that right."[61] Under *Ashcroft*, the correct inquiry is now "whether the violative nature of *particular conduct* is clearly established."[62] To support a clearly established constitutional right, "existing precedent must have placed the statutory or constitutional question *beyond debate*."[63] *Ashcroft* thus raised the bar

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[55] *Brosseau*, 543 U.S. at 200–01 (first citing Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993); then citing Smith v. Freland, 954 F.2d 343 (6th Cir. 1992); and then citing Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993)).

[56] *Brosseau*, 543 U.S at 199.

[57] John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1308–09 (2012); *see also supra* note 27 and accompanying text.

[58] Williams, *supra* note 57, at 1309.

[59] *See, e.g.*, *Saucier*, 533 U.S. at 200–01 ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)).

[60] Pearson v. Callahan, 555 U.S. 223, 236 (2009); *see also, e.g.*, Kerns v. Bader, 663 F.3d 1173, 1181 (10th Cir. 2011); Weise v. Casper, 593 F.3d 1163, 1167 (10th Cir. 2010) ("[S]kipping the constitutional violation question may conserve judicial resources in 'cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'" (quoting *Pearson*, 555 U.S. at 237)).

[61] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

[62] *Id.* at 742 (emphasis added) (first citing *Saucier*, 533 U.S. at 201–02; then citing Wilson v. Layne, 526 U.S. 603, 615 (1999)).

[63] *Id.* at 741 (emphasis added) (citations omitted); *see also* Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Stanton v. Sims, 571 U.S. 3, 10–11 (2013) ("[W]hether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'").

for overcoming qualified immunity. Indeed, the Supreme Court's subsequent, repeated, and often unanimous awards of qualified immunity emphasize the narrow circumstances in which courts may hold government officials personally liable for their actions in suits for money damages.[64]

In 2015, the Supreme Court issued another seminal qualified immunity opinion, *Mullenix v. Luna*, in which the Court reversed the Fifth Circuit and ruled that the defendant state trooper was entitled to qualified immunity for the shooting death of a criminal suspect.[65] The Supreme Court found, *inter alia*, that the trooper confronted a fleeing fugitive who had twice threatened to shoot police officers and who was moments away from encountering another officer on the roadway.[66] The Supreme Court also found that the cases cited in the Fifth Circuit's opinion were "simply too factually distinct to speak clearly to the specific circumstances here."[67] Notably, the majority opinion in *Mullenix* did not cite *Hope* which, as noted above, was the foundational case for the Tenth Circuit's adoption of the sliding scale.[68] Because qualified immunity protects actions in the hazy border between excessive and acceptable force, and because existing precedent did not place the conclusion that the trooper acted unreasonably "beyond debate," the Court found that the trooper was entitled to qualified immunity.[69] Following *Mullenix*, the Supreme Court refrained from "any reference to the plaintiff's countervailing interests in vindicating constitutional rights and compensation for constitutional injury, which the Supreme Court recognized in *Harlow v. Fitzgerald*."[70]

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[64] *See, e.g.*, Ryburn v. Huff, 565 U.S. 469, 474 (2012) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction."); *see also id.* at 477 ("[R]easonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent."); Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015); Carroll v. Carman, 574 U.S. 13, 16-20 (2014) (per curiam); Lane v. Franks, 573 U.S. 228, 246 (2014); Plumhoff v. Rickard, 572 U.S. 765, 779–81 (2014); *Stanton*, 571 U.S. at 10–11; Wood v. Moss, 572 U.S. 744, 763–64 (2014).

[65] *Mullenix*, 136 S. Ct. at 312 (2015); Luna v. Mullenix, 773 F.3d 712 (5th Cir. 2014), *rev'd per curiam*, 136 S. Ct. 305 (2015).

[66] *See Mullenix*, 136 S. Ct. at 312.

[67] *Id.*

[68] *See* Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007); *see also Mullenix*, 136 S. Ct. at 306–12.

[69] *Mullenix*, 136 S. Ct. at 312 (quotations and citations omitted).

[70] Valdez v. Roybal, 186 F. Supp. 3d 1197, 1273 (D.N.M. 2016) (citing Harlow v. Fitzgerald, 457 U.S. 800, 813–14 (1982)).

A. The Lower Courts' Reactions to the Supreme Court's Treatment of Qualified Immunity

To find the existence of a clearly established right, a federal court must now "conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent, would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right."[71] Put another way, the court must enunciate "a concrete, particularized description of the right."[72] Various federal circuits have recognized that the case law now requires them to be much more precise in their definition of clearly established rights.[73] "After laying out the factual circumstances [of a case] in a sufficiently specific fashion, the court must determine whether the official's conduct violated a clearly established rule."[74] To make this determination, the court must consider "either if courts have previously ruled that *materially similar conduct* was unconstitutional, or if a general constitutional rule already identified in the decisional law applies with obvious clarity to the specific conduct at issue."[75]

B. The Tenth Circuit's Resistance to the Strengthening of Qualified Immunity

In spite of the shift in Supreme Court jurisprudence beginning with *Ashcroft* and continuing with *Mullenix*, the Tenth Circuit continued to apply its sliding scale analysis in several cases, often using the scale to deny defendants qualified immunity. First, in *Estate of Booker v. Gomez*, the court applied the sliding scale in a combination Fourth and Fourteenth Amendments case.[76] The case stemmed from an incident where the plaintiffs' decedent died while in custody after

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[71] Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 639 (3d Cir. 2015) (citations omitted).

[72] Hagans v. Franklin Sheriff's Office, 695 F.3d 505, 508 (6th Cir. 2012); *see also Spady*, 800 F.3d at 638 (finding that the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context . . . ." (citations omitted)); Cordova v. Aragon, 569 F.3d 1183, 1193 (10th Cir. 2009) (finding that, while a general principle regarding the use of deadly force against a fleeing felon was correct, "it still beg[ged] the question of what constitute[d] a *sufficient* threat" for purposes of the case pending before the court).

[73] *See, e.g.*, Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892, 907–08 (4th Cir. 2016) ("The constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure."); *Hagans*, 695 F.3d at 509 ("Defined at the appropriate level of generality—a reasonably particularized one—the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force.").

[74] Contreras v. Doña Ana Cty. Bd. of Comm'rs, No. 18-156 GBW/GJF, 2018 WL 5832152, at *8 (D.N.M. Nov. 7, 2018).

[75] Estate of Reat v. Rodriguez, 824 F.3d 960, 964–65 (10th Cir. 2016) (quotation and citation omitted); *see also* Bishop v. Szuba, 739 F. App'x 941, 945 (10th Cir. 2018) (formulation of the right cannot "fail[ ] to discuss the 'particularized' facts of th[e] case . . . ." (citation omitted)).

[76] Estate of Booker v. Gomez, 745 F.3d 405 (10th Cir. 2014).

officers pinned him face-down to the ground, placed him in a chokehold, and tased him.[77] In response to the defendants' assertion that plaintiffs could not "rely on Fourth Amendment case law to show that any violation of Mr. Booker's constitutional rights was clearly established," the court found that, under the sliding scale approach, "Fourth Amendment case law addressing whether force is 'reasonable' is relevant to the first due process excessive force factor: the relationship between the amount of force used and the need presented."[78] The Tenth Circuit also relied upon a Sixth Circuit case which rejected the argument "that excessive force law was not clearly established because it was unclear whether the Fourth or Fourteenth Amendment applied."[79] Ultimately, the court ruled, "despite any uncertainty about which constitutional amendment govern[ed] the Plaintiffs' excessive force claim, the 'legal norms' underlying the three-factor due process analysis—proportionality, injury, and motive—were clearly established at the time of Mr. Booker's death."[80] The Tenth Circuit found that two of its prior cases regarding the use of tasers and pressure on the back, as well as "the weight of authority from other jurisdictions" regarding neck restraint, "put Defendants on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate."[81] In *Estate of Booker*, the Tenth Circuit—using its sliding scale analysis—freely intermixed cases arising under the Fourth and Fourteenth Amendments to deny the defendants qualified immunity.[82]

In *Browder v. City of Albuquerque*, the Tenth Circuit again denied qualified immunity, relying on its sliding scale to determine that a city police officer violated the plaintiffs' Fourteenth Amendment rights when, while not on official business, he sped through a red light and caused a terrible crash.[83] In *Browder*, then Tenth Circuit Judge, and now United States Supreme Court Justice, Neil Gorsuch noted that "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing."[84] While noting that the court had not faced many cases involving deadly traffic accidents with officers speeding on their own business, Judge Gorsuch found that both the Supreme

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[77] *Id.* at 409.

[78] *Id.* at 427–28 (citing *id.* at 424 n.26).

[79] *Id.* (citing Harris v. City of Circleville, 583 F.3d 356, 367 (6th Cir. 2009)).

[80] *Estate of Booker*, 745 F.3d at 428.

[81] *Id.* at 428–29 (citations and footnote omitted).

[82] *See id.* at 424–28.

[83] Browder v. City of Albuquerque, 787 F.3d 1076, 1082–83 (10th Cir. 2015).

[84] *Id.* at 1082.

Court and the Tenth Circuit had "spoken unmistakably to this situation" such that qualified immunity was inappropriate.[85]

Additionally, in *Davis v. Clifford*,[86] the Tenth Circuit reversed a grant of qualified immunity to two police officers, finding that, "[i]f proven, their alleged use of force against a misdemeanant who did not pose an immediate threat to herself or others would be excessive under clearly established law."[87] While the court again acknowledged *Casey*'s adoption of the sliding scale, it also recognized the Supreme Court's admonishment against defining clearly established law at a high level of generality.[88] Nonetheless, the panel in *Davis* opined that it "need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as [the defendant officers] allegedly did."[89] The panel found that, "[w]hen an officer's violation of the Fourth Amendment is particularly clear . . . we do not require a second decision with greater specificity to clearly establish the law."[90] The court also ruled that "a reasonable officer would know based on his training that the force used was not justified."[91]

By contrast, in *A.M. v. Holmes*, the plaintiff claimed, *inter alia*, that a school resource officer violated her minor son's "clearly established Fourth Amendment right to be free from an excessively forceful arrest" when the officer handcuffed the boy before driving him to a detention center.[92] The officer arrested the boy for interfering with the educational process in violation of state law after observing the boy disrupt his class by making fake burping noises and otherwise engaging

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[85] *Id.* at 1083 (first citing County of Sacramento v. Lewis, 523 U.S. 883, 854 n.13 (1998) (noting expressly that even when a court finds that an officer did not violate the Constitution, when a private person suffers a serious physical injury due to a police officer's intentional misuse of his vehicle, a viable due process claim can arise); and then citing Checki v. Webb, 785 F.2d 534, 538 (5th Cir.1986)); *see also Browder*, 787 F.3d at 1083 (warning "that an officer who kills a person while speeding at 60 miles an hour on surface streets absent any emergency and in violation of state law invites a Fourteenth Amendment claim." (citing Williams v. City & County of Denver, 99 F.3d 1009 (10th Cir. 1996), *vacated*, 140 F.3d 855 (10th Cir. 1997)).

[86] Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016).

[87] *Id.* at 1133.

[88] *Id.* at 1136 (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)).

[89] *Id.* at 1136 (quoting Casey v. City of Federal Heights, 509 F.3d 1278, 1285 (10th Cir. 2007)).

[90] *Id.* at 1136 (quoting Morris v. Noe, 672 F.3d 1185, 1197 (10th Cir. 2012) (quotation omitted)).

[91] *See Davis*, 825 F.3d at 1137; *see also id.* at 1135–36 (applying the factors from *Graham v. Connor*, 490 U.S. 386, 396 (1989), regarding whether a particular use of force is excessive for purposes of the Fourth Amendment, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." (citing *Graham*, 490 U.S. at 396)); *Davis*, 825 F.3d at 1137 (citing *Morris*, 672 F.3d at 1198); Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

[92] A.M. v. Holmes, 830 F.3d 1123, 1150–51 (10th Cir. 2016).

in "horseplay."[93] The plaintiff pointed to *Graham* as binding precedent clearly establishing the relevant constitutional right, arguing that there was no need to handcuff and transport her son after his arrest.[94] However, the Tenth Circuit found that "*Graham*, though certainly an excessive-force lodestar, provides no guidance concerning whether an officer, when effecting an arrest supported by probable cause, must refrain from using handcuffs because the arrestee is a minor."[95] The court further noted that, under its sliding scale approach, it would "not gainsay that, under certain circumstances where the excessive force is of a particularly egregious nature (e.g., an incredibly reckless taking of a human life by a law-enforcement officer), *Graham* or little more may qualify as the clearly established law that defeats a qualified-immunity defense."[96] The court ultimately held "[i]t would border on the fatuous" for the plaintiff to suggest that the officer's handcuffing of her son "constitutes one of those rare instances of egregious conduct where *Graham*, alone, would be a sufficient source of clearly established law."[97] Thus, the court rejected the plaintiff's argument for overcoming qualified immunity, finding that the facts of the case were not egregious enough to relieve the plaintiff of the burden of finding specific cases that clearly established the constitutional right.

Similarly, in *Estate of Lockett v. Fallin*, the Tenth Circuit again contrasted its sliding scale approach with the precept that courts should not define clearly established law at a high level of generality.[98] In that case, the estate of a death row inmate claimed that the inmate's prolonged execution constituted torture, violating his Eighth Amendment rights.[99] The plaintiff estate generally alleged that defendants violated the inmate's "clearly established right to be free from cruel and unusual punishment."[100] However, the court found that the estate did "not account for how cruel-and-unusual-punishment claims operate in the execution context."[101] The court reasoned that, "because capital punishment is constitutional, lawful means must exist to carry it out," and that "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only

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[93] *See id.* at 1141.

[94] *See id.* at 1152.

[95] *Id.* (citations omitted).

[96] *Id.* at 1153 n.17 (citing Pauly v. White, 814 F.3d 1060, 1075 (10th Cir. 2016) ("Thus, when an officer's violation of the Fourth Amendment is particularly clear from Graham itself, we do not require a second decision with greater specificity to clearly establish the law." (quotation and citations omitted)).

[97] *A.M.*, 830 F.3d at 1153 n.17.

[98] Estate of Lockett v. Fallin, 841 F.3d 1098, 1107 (10th Cir. 2016) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

[99] *See generally id.* at 1105–06.

[100] *Id.* at 1109.

[101] *Id.*

from the prospect of error in following the required procedure."[102] The court recognized that the inmate suffered during his execution; however, "that alone does not make out an Eighth Amendment claim."[103] While acknowledging that cases almost never have exactly the same circumstances such that the sliding scale required less specificity as conduct becomes more obviously egregious, in *Lockett*, the court was unable to find Eighth Amendment cases announcing clearly established law applicable to the facts of that case.[104] The Tenth Circuit similarly tempered its application of the sliding scale in several unpublished opinions from 2013 to 2016, further signifying the court's declining use of the scale in its qualified immunity cases.[105]

V. THE BEGINNING OF THE END FOR THE SLIDING SCALE: *ALDABA V. PICKENS*

In *Aldaba v. Pickens*, a panel of the Tenth Circuit affirmed the denial of summary judgment to the defendant officers, who used a stun gun to detain the plaintiff's decedent.[106] The court reviewed several previous cases in which the Tenth Circuit explored "the reasonableness of taser use in general without discussing the specific ramifications of law enforcement's use of tasers against the mentally and physically ill."[107] The split Tenth Circuit panel found—applying the sliding scale—"that it is not objectively reasonable to employ a taser as the initial use of force against a seriously ill, non-criminal subject who poses a threat only to himself and is showing only passive resistance, regardless of whether they provide a warning first."[108]

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[102] *Id.* (internal quotation marks omitted) (quoting Baze v. Rees, 553 U.S. 35, 47 (2008)).

[103] *Id.* at 1110.

[104] *Id.* at 1113.

[105] *See* Wilson v. City of Lafayette, 510 F. App'x 775, 777 (10th Cir. 2013) ("[I]n all events, however, it remains necessary for the plaintiff to demonstrate that 'every reasonable official would have understood that what he did violated the law." (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)))); Waters v. Coleman, 632 F. App'x 431, 435 (10th Cir. 2015) ("'[E]xisting precedent must have placed the statutory or constitutional question confronted by the official beyond debate.' . . . If the facts place the case in the 'hazy border between excessive and acceptable force,' the law is not clearly established." (quoting Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (internal quotation marks omitted))); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (internal quotation marks omitted); *see also* Ornelas v. Lovewell, 613 F. App'x 718, 721–22 (10th Cir. 2015) ("[E]ven assuming Trooper Lovewell's kick amounted to a use of excessive force . . . Ornelas would . . . have to provide a case with a substantially similar set of facts to prevail." (citing Casey v. City of Federal Heights, 509 F.3d 1278, 1284 (10th Cir. 2007))). *But see* Cook v. Peters, 604 F. App'x 663 (10th Cir. 2015) (denying qualified immunity in "forceful takedown" case).

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

[107] *Id.* at 1159–60.

[108] *See generally id.* at 1159–61.

Later that year, the Supreme Court vacated the Tenth Circuit's judgment and remanded for further deliberation in light of *Mullenix*.[109] On remand from the Supreme Court, the Tenth Circuit noted in *Aldaba II* that, in *Mullenix*, the Supreme Court declined to follow "the Fifth Circuit's analysis applying Trooper Mullenix's acts against a general legal rule—that is, a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others—to meet the requirement of clearly established law."[110] The Tenth Circuit noted that the Supreme Court "looked to see if any case would make it clear to every reasonable official that Trooper Mullenix's actions would amount to excessive force in violation of the Fourth Amendment" but was unable to find a case that did so.[111] In light of *Mullenix*, the Tenth Circuit applied the facts against existing precedent to see whether every reasonable official would have known that those facts would establish excessive force "beyond debate."[112] The court found that it had erred in its prior opinion "by relying on excessive-force cases markedly different from this one."[113] In its prior opinion, the Tenth Circuit panel relied on its "sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity" and "relied on several cases resolving excessive-force claims."[114] However, "none of those cases remotely involved a situation" as that which was presented in the *Aldaba* case: "three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment."[115] Therefore, the court began to recognize that it could not rely on prior cases with merely somewhat analogous facts in setting forth "clearly established" law.

Indeed, in *Aldaba II*, the Tenth Circuit noted that its sliding scale approach may have fallen out of favor, because the sliding-scale test relied, in part, on *Hope*, and the Supreme Court's most recent qualified immunity decision at that time (*Mullenix*) did not invoke *Hope*.[116] The Tenth Circuit explained:

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[109] Pickens v. Aldaba, 136 S. Ct. 479 (2015); *see also* Middaugh v. City of Three Rivers, 629 F. App'x 710 (6th Cir. 2015) (affirming denial of qualified immunity to police officers in due process/wrongful seizure case), *vacated and remanded*, Piper v. Middaugh, 136 S. Ct. 2408 (2016), *on remand*, Middaugh v. City of Three Rivers, 684 F. App'x 522 (6th Cir. 2017) (reversing denial of qualified immunity).

[110] Aldaba v. Pickens *(Aldaba II)*, 844 F.3d 870, 873–74 (10th Cir. 2016) (quotations omitted).

[111] *See id.* at 874 (citing Mullenix v. Luna, 136 S. Ct. 305, 310 (2015)).

[112] *Id.* at 874. (citing *Mullenix*, 136 S. Ct. at 312).

[113] *Id.* at 876.

[114] *Id.*

[115] *Id.*

[116] *See id.* at 874 n.1.

> To show clearly established law, the *Hope* Court did not require earlier cases with "fundamentally similar" facts, noting that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." . . . This calls to mind our sliding-scale approach measuring the egregiousness of conduct . . . . But the Supreme Court has vacated our opinion here and remanded for us to reconsider our opinion in view of *Mullenix*, which reversed the Fifth Circuit after finding that the cases it relied on were "simply too factually distinct to speak clearly to the specific circumstances here." . . . We also note that the majority opinion in *Mullenix* does not cite *Hope v. Pelzer* . . . . As can happen over time, the Supreme Court might be emphasizing different portions of its earlier decisions.[117]

Ultimately, the Tenth Circuit reiterated that "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[118] While positing that plaintiffs could still "overcome a qualified-immunity defense without a favorable case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate."[119] Thus, the Tenth Circuit began to appreciate how the Supreme Court had buttressed the qualified immunity defense, and began to question whether the sliding scale still had a place in qualified immunity jurisprudence.

VI. ALONG CAME *PAULY*

In its 2016 decision in *Pauly v. White*, a divided panel of the Tenth Circuit upheld the denial of qualified immunity to three state police officers after one of the officers shot and killed the plaintiffs' decedent while investigating a road rage incident in October of 2011.[120] The shooting officer arrived at the decedent's house after the other two officers, who had been attempting to coax the decedent and his brother (the road rage suspect) out of the house, allegedly shouted "we're coming in."[121] The brothers armed themselves; one of them shouted, "we have guns" and proceeded to fire two warning shots near the back of the house.[122]

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[117] *Id.* at 874 n.1 (citations omitted); *see also* McGarry v. Bd. Comm'rs, 294 F. Supp. 3d 1170, 1187–88 (D.N.M. 2018).

[118] *Aldaba II*, 844 F.3d at 877 (internal quotation marks and citations omitted).

[119] *Id.* (internal quotation marks and citations omitted).

[120] Pauly v. White *(Pauly I)*, 814 F.3d 1060, 1064 (10th Cir.), *reh'g denied*, 817 F.3d 715 (10th Cir. 2016), *vacated*, 137 S. Ct. 548 (2017).

[121] *See generally id.* at 1066.

[122] *Id.* at 1066–67.

The plaintiffs' decedent then pointed a handgun in the direction of the shooting officer, White.[123] Believing that the decedent shot one of his fellow officers, and seeing the gun pointed in his direction, White shot the decedent.[124] In denying the officer's qualified immunity on the plaintiffs' Fourth Amendment excessive force claim under the sliding scale approach, the court looked to its prior decision in *Casey*, finding that "[a]ny objectively reasonable officer in [White's] position would well know that a homeowner has the right to protect his home against intruders and that the officer has no right to immediately use deadly force in these circumstances."[125]

Nearly a year later, in *White v. Pauly*, the Supreme Court vacated and remanded the Tenth Circuit panel majority, finding that Officer White was entitled to qualified immunity because he "did not violate clearly established law" when he shot and killed the plaintiffs' decedent.[126] In so ruling, the Supreme Court noted that this was not a case where it was obvious that there was a violation of clearly established law, under the unique set of facts and circumstances presented, "in light of White's late arrival on the scene."[127] The Court also found that there was no Fourth Amendment principle which mandated an officer in White's position "to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here."[128] The Supreme Court—with palpable frustration—reiterated "the longstanding principle that clearly established law should not be defined at a high level of generality."[129] Instead, "the clearly established law must be 'particularized' to the facts of the case."[130]

The Supreme Court ultimately vacated and remanded the divided Tenth Circuit panel's decision, faulting the panel for failing to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment, and for relying on *Graham* and *Garner* (and their Court of Appeals progeny) which "lay out excessive-force principles at only a general level."[131] Although the Supreme Court acknowledged that "general statements of the law are

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[123] *Id.* at 1067.

[124] *See id.* at 1066–67. "The entire incident took less than five minutes." *Id.* at 1067.

[125] *Id.* at 1084.

[126] White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam).

[127] *See id.* at 552.

[128] *Id.*

[129] *White*, 137 S. Ct. at 552 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

[130] *White*, 137 S. Ct. at 552 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)); *see also* Doe v. Woodard, 912 F.3d 1278, 1298 (10th Cir. 2019), *cert. denied*, I.B. v. Woodard, 139 S. Ct. 2616 (2019); *cf.* Pyle v. Woods, 874 F.3d 1257, 1263–64 (10th Cir. 2017).

[131] *See White*, 137 S. Ct. at 550–52.

not inherently incapable of giving fair and clear warning[,]" it also reemphasized that "*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'"[132] Otherwise, "[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."[133] In the three years since it decided *White v. Pauly*, the Supreme Court has repeatedly reaffirmed this "particularity" or "specificity" requirement in qualified immunity cases.[134] In that same period, the federal circuits have consistently applied the Supreme Court's qualified immunity jurisprudence in the same manner.[135]

VII. THE SLOW DEATH OF THE SLIDING SCALE AFTER *ALDABA* AND *PAULY*

Because the Supreme Court reversed the Tenth Circuit twice in recent years, the circuit began openly questioning its sliding scale approach in its 2017

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[132] *Id.* at 552 (first quoting United States v. Lanier, 520 U.S. 259, 271 (1997); then quoting Brosseau v. Haugen, 543 U.S. 194, 199 (2004)).

[133] *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 639).

[134] *See* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019), *on remand*, 921 F.3d 1172 (9th Cir. 2019) (affirming grant of summary judgment based on qualified immunity); District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) ("[T]he clearly established standard . . . requires a high degree of specificity" (quotations omitted)); Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam) ("[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015))); Ziglar v. Abbasi, 137 S. Ct. 1843, 1866–67 (2017); *see also* McKnight v. Petersen, 137 S. Ct. 2241 (2017) (vacating and remanding for further consideration in light of *White v. Pauly*), *on remand*, Petersen v. Lewis Cty., 697 F. App'x 490, 491 (9th Cir. 2017) (finding that, even if the defendant officer had acted unreasonably, the plaintiff "failed to identify any clearly established law putting [defendant] on notice that, under these facts, his conduct was unlawful." (citation omitted)).

[135] *See, e.g.*, Ganek v. Leibowitz, 874 F.3d 73, 81 (2d Cir. 2017); Thompson v. Howard, 679 F. App'x 177, 181–82, 182 n.9 (3rd Cir. 2017); E.W. v. Dolgos, 884 F.3d 172, 185–87 (4th Cir. 2018) (finding that even where school resource officer "used unreasonable force disproportionate to the circumstances presented . . . amount[ing] to excessive force," plaintiff's "right not to be handcuffed under the circumstances of this case was not clearly established at the time of her seizure"); Davidson v. City of Stafford, 848 F.3d 384, 394 (5th Cir. 2017) (assuming "that the specific *White*/*Mullenix* admonition applies to all qualified immunity cases regardless of the constitutional violation charged"); Melton v. Phillips, 875 F.3d 256, 265 n.9, 265–66 (5th Cir. 2017) (en banc), *cert denied*, 138 S. Ct. 1550 (2018); Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 992–94 (6th Cir. 2017); Kemp v. Liebel, 877 F.3d 346, 351–53 (7th Cir. 2017); Estate of Walker v. Wallace, 881 F.3d 1056, 1060–61 (8th Cir. 2018); Thompson v. Rahr, 885 F.3d 582, 587 (9th Cir. 2018) (finding that although police officer's use of excessive force violated plaintiff's constitutional rights, officer was entitled to qualified immunity because plaintiff's right not to have a gun pointed at him under the circumstances was not clearly established at the time the events took place), *cert denied*, 139 S. Ct. 381 (2018); S.B. v. City of San Diego, 864 F.3d 1010, 1015–16 (9th Cir. 2017); Knopf v. Williams, 884 F.3d 939, 946–50 (10th Cir. 2018); Redmond v. Crowther, 882 F.3d 927, 935, 938–39 (10th Cir. 2018); McCoy v. Meyers, 887 F.3d 1034, 1043, 1053 (10th Cir. 2018); Gates v. Khokhar, 884 F.3d 1290, 1302–03 (11th Cir. 2018), *cert denied*, 139 S. Ct. 807 (2019); *see also* Lindsey v. Hyler, 918 F.3d 1109, 1113 (10th Cir. 2019).

opinion in *Sause v. Bauer*.[136] In *Sause*, the plaintiff alleged that two police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct—in particular, laughing at the plaintiff, mocking her, and telling her that she could not pray—before citing her for disorderly conduct and interfering with law enforcement.[137] On the defendants' assertion of qualified immunity, the Tenth Circuit framed the relevant "clearly established law" inquiry as involving:

> a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation.[138]

The Tenth Circuit noted it had recently called into question the sliding-scale approach it first identified in *Casey*.[139] While questioning whether the sliding-scale method even survived the Supreme Court's recent decision in *Mullenix*, the Tenth Circuit ultimately held that the sliding scale would not aid the plaintiff in overcoming the qualified immunity defense.[140]

One month after deciding *Sause*, the Tenth Circuit handed down its decision in *Lowe v. Raemisch*, in which the court continued to scrutinize the sliding-scale approach.[141] In that case, a state prisoner sued two senior prison officials under Section 1983, alleging that he was deprived of outdoor exercise for two years

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[136] Sause v. Bauer, 859 F.3d 1270, 1276 (10th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2561 (2018), *on remand*, 733 F. App'x 456 (10th Cir. 2018).

[137] *See generally Sause*, 859 F.3d at 1273.

[138] *Id.* at 1275.

[139] *Id.* at 1276 n.3 (citing Aldaba v. Pickens (*Aldaba II*), 844 F.3d 870, 874 n.1 (10th Cir. 2016)).

[140] *Id.* at 1276 n.3 (citing Mullenix v. Luna, 136 S. Ct. 305 (2015)). As noted above, the Supreme Court reversed the grant of qualified immunity in the officers' favor, noting that it was "unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful," and that plaintiff did not "state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it [was] impossible to analyze petitioner's free exercise claim." *See Sause*, 138 S. Ct. at 2563. However, the Court "did not take issue with the Tenth Circuit's formulation as it related to the First Amendment claim. Instead, the Court reversed the grant of qualified immunity because the Tenth Circuit failed to address the Fourth Amendment claim inextricably intertwined with the plaintiff's First Amendment claim." Contreras v. Doña Ana Bd. of Comm'rs, No. 18-156 GBW/GJF, 2018 WL 5832152, at *7 n.5 (D.N.M. Nov. 7, 2018); *see also Sause*, 138 S. Ct. at 2562-63.

[141] Lowe v. Raemisch, 864 F.3d 1205 (10th Cir. 2017), *cert denied*, 139 S. Ct. 5 (2018).

and one month in violation of his Eighth Amendment right to be free from cruel and unusual punishment.[142] On appeal of the district court's denial of the defendants' motions to dismiss, the Tenth Circuit assumed the officials violated the prisoner's Eighth Amendment rights, but nevertheless found that the denial of outdoor exercise for two years and one month did not violate a clearly established constitutional right.[143] The court found that the deprivation of outdoor exercise for two years and one month was not so obviously unlawful that a constitutional violation would be "undebatable."[144] While acknowledging that, "[e]ven in the absence of egregious conduct, [a] constitutional violation may be so obvious that similar conduct seldom arises in [its] cases," the Tenth Circuit ultimately "consider[ed] whether [its own] precedents render[ed] the legality of the conduct undebatable."[145] The court then posited that its "sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity."[146] The Tenth Circuit acknowledged that "[t]he possibility of a conflict arises because the sliding-scale approach may allow [the court] to find a clearly established right even when a precedent is neither on point nor obviously applicable."[147] However, the Tenth Circuit declined to decide whether its sliding-scale approach conflicts with Supreme Court precedent, given that "the defendants lacked clearly applicable precedents showing whether denial of outdoor exercise for two years and one month was sufficiently serious to constitute a violation of plaintiff's clearly established Eighth Amendment rights."[148]

Nearly ten months after the Supreme Court reversed the denial of qualified immunity in *White v. Pauly*, on remand the Tenth Circuit itself reversed the denial of qualified immunity to all three of the defendant officers in *Pauly II*.[149] The two-judge panel majority spent much of the opinion analyzing whether or not the allegedly reckless actions of the officers precipitated the need to use deadly force.[150] Nonetheless, the three panel members unanimously found that the defendant officers were entitled to qualified immunity.[151] The court noted that, in its prior

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[142] *See id.* at 1206–07.

[143] *Id.* at 1207.

[144] *Id.* at 1210 (emphasis omitted).

[145] *Id.* at 1210–11 (first citing Safford United Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377–78 (2009); then citing Aldaba v. Pickens (*Aldaba II*), 844 F.3d 870, 877 (10th Cir. 2016)).

[146] *Id.* at 1211 n.10 (citing *Aldaba II*, 844 F.3d at 874 n.1).

[147] *Lowe*, 864 F.3d at 1211 n.10 (first citing *Aldaba II*, 844 F.3d at 874 n.1; then citing Mascorro v. Billings, 656 F.3d 1198, 1208 n.13 (10th Cir. 2011) (declining to apply the standards of *Hope v. Pelzer*, 536 U.S. 730 (2002) to a situation where the constitutional violation was not obvious)); *see also* Knopf v. Williams, 884 F.3d 939, 950 n.10 (10th Cir. 2018).

[148] *See Lowe*, 864 F.3d at 1211 n.10.

[149] *See generally* Pauly v. White *(Pauly II)*, 874 F.3d 1197 (10th Cir. 2017).

[150] *See generally id.* at 1203–06, 1211–22.

[151] *See id.* at 1222–23.

opinion, the panel majority relied on the *Casey* sliding-scale test in affirming the denial of qualified immunity to the three individual defendants.[152] However, following remand, the unanimous panel found that (1) there was no case "close enough on point to make the unlawfulness of [Officer White's] actions apparent"; (2) Officer White's "alleged use of excessive force was not clearly established in the circumstances of this case" and "therefore cannot serve as the basis of liability for" any of the officers; and (3) neither of the other officers "committed a constitutional violation in his own right."[153]

Later, in *McCoy v. Meyers*, the plaintiff claimed that officers utilized excessive force when they struck him repeatedly after he was handcuffed and zip-tied.[154] Even while denying qualified immunity on the plaintiff's claim regarding post-restraint force, the court expressly declined to rely on the sliding scale, and thus, declined to decide its validity.[155] Instead, the court posited that nothing in recent Supreme Court precedent had undercut the merits holding in *Casey* which, along with other Tenth Circuit cases, "should have put the [defendants] on notice that the post-restraint force was excessive."[156] In this same period, the court, without specifically mentioning the sliding scale, reversed denials of summary judgment in a pair of excessive force cases where the district courts relied upon the sliding scale.[157] Nonetheless, in late 2018 the Tenth Circuit assumed, without deciding, that the sliding scale applied in *Nosewicz v. Janosko*, where the court reversed the grant of summary judgment on the plaintiff's excessive force claim.[158] However, the Tenth Circuit found that, even if the sliding scale did not apply, the case warranted reversal because the district court's case law analysis turned on the plaintiff's alleged "active resistance," which the parties disputed as a matter of fact.[159] This decision further clouded the Tenth Circuit's approach to whether, and in what circumstances, it would continue to apply the sliding scale. While the court openly questioned the scale in its published, precedential opinions in 2018, the court's later (albeit unpublished) 2018 case on the subject was ambiguous about whether or not the court should continue to apply the scale.

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[152] *Id.* at 1208–09 (quoting *Pauly I*, 814 F.3d 1060, 1083–84 (10th Cir. 2016)).

[153] *Pauly II*, 874 F.3d at 1223 (citations omitted).

[154] *See* McCoy v. Meyers, 887 F.3d 1034, 1042 (10th Cir. 2018).

[155] *See id.* at 1053 n.22.

[156] *Id.* (first citing Dixon v. Richer, 922 F.2d 1456 (10th Cir. 1991); then citing Weigel v. Broad, 544 F.3d 1143 (10th Cir. 2008)).

[157] *See* Malone v. Board of Comm'rs, 707 F. App'x 552 (10th Cir. 2017) (reversing *Malone v. Board of Comm'rs*, No. CIV 15-0876 JB/GBW, 2016 WL 5400381 (D.N.M. Aug. 27, 2016); Farrell v. Montoya, 878 F.3d 933 (10th Cir. 2017) (reversing *Farrell v. DeTavis*, No. 15-cv-1113 SMV/LAM, 2016 WL 10859789 (D.N.M. Aug. 30, 2016)).

[158] Nosewicz v. Janosko, 754 F. App'x 725, 733 n.8 (10th Cir. 2018).

[159] *See id.*

More recently, in *Bailey v. Twomey*,[160] the court again briefly acknowledged the continued existence of the sliding scale, but nonetheless looked to the "particularity" standard set forth in more recent qualified immunity case law.[161] In *Bailey*, officers were summoned to the plaintiff's house for a domestic situation.[162] The plaintiff—who was afraid of her then-husband—moved to stand behind the officers while her husband collected his personal belongings. While doing so, the plaintiff "brushed or touched" one officer's back; the officer immediately grabbed the plaintiff's wrist, pulled her around, and hit her very hard in the chest, knocking her to the floor.[163] The plaintiff claimed that this constituted excessive force; however, the Tenth Circuit found that the plaintiff failed to point to clearly established law holding that the Fourth Amendment bars an officer from grabbing an individual's wrist and knocking him or her down after feeling the individual touch the officer from behind during the course of overseeing a tense domestic matter.[164] *Bailey* thus casts further doubt on the continued viability of the sliding scale.

VIII. CONCLUSION: SHOULD THE TENTH CIRCUIT ABOLISH OR REPLACE THE SLIDING SCALE?

The central foundation of the Tenth Circuit's sliding scale, *Hope*'s suggestion that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," is increasingly being questioned.[165] Whatever could once be said of the Tenth Circuit's sliding scale approach, its validity in light of the Supreme Court's decade-long reinforcement of the qualified immunity defense is tenuous at best.[166] While the Tenth Circuit has not officially done away

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[160] Bailey v. Twomey, No. 19-8004, 2019 WL 5681312 (10th Cir. Oct. 31, 2019)

[161] Bailey, 2019 WL 5681312 at *3 (citing Quinn v. Young, 780 F.3d 998, 1014 (10th Cir. 2015) (holding that Tenth Circuit's prior opinion in *Morris v. Noe*, 672 F.3d 1185, 1197 (10th Cir. 2012), did not "relieve [p]laintiffs of their obligation to identify clearly established law by reference to decisions that at least ha[d] a substantial factual correspondence with" the case at issue).

[162] *Id.* at *1.

[163] *See id.*

[164] *See id.* at *4–5.

[165] Hope v. Pelzer, 536 U.S. 730, 741 (2002); *see, e.g.*, N.E.L. v. Douglas, 740 F. App'x 920, 928 n.18 (10th Cir. 2018) (noting that the standard set forth in *Hope* regarding clearly established law "appears to have fallen out of favor, yielding to a more robust qualified immunity" (first citing *Aldaba II*, 844 F.3d 870, 874 n.1 (10th Cir. 2016); then citing Mullenix v. Luna, 136 S. Ct. 305, 308, 312 (2015))), *cert. denied*, 139 S. Ct. 1320 (2019); *see also* Nelson v. Donovan, No. 18-cv-01159-MEH, 2019 WL 2602515, at *5 (D. Colo. June 25, 2019). *Cf.* Navarro v. New Mexico Dep't of Pub. Safety, No. 2:16-cv-1180-JMC-CG, 2018 WL 4148452, at *10 n.7 (D.N.M. Aug. 30, 2018) (declining to address plaintiffs' assertion that *Hope v. Pelzer* conflicts with *Kisela v. Hughes*, and finding that "*Kisela* clearly compels this Court to grant qualified immunity where no existing precedent places the statutory or constitutional question beyond debate.").

[166] *See supra* notes 50–136 and accompanying text.

with the sliding scale analysis as of yet, the infrequency with which it has applied the scale over the past few years might be a sign that the court is quietly putting the sliding scale method to rest, as it should.[167]

As it finds no support in any United States Supreme Court precedents, what, if anything, should replace the sliding scale? Instead of a linear scale, the distribution of qualified immunity cases from across the country over the last decade yields something closer to an imperfect bell curve, with obvious *non*-violations of the constitution (e.g., arresting a suspect with a properly-supported warrant and/or clear probable cause, or shooting at a suspect who has fired at the officer or civilians in the area) falling on one side of the curve, while obvious constitutional violations (e.g., shooting a suspect who has clearly and visibly surrendered and is unarmed) lie at the other end of the curve.[168] The vast majority of cases would lie in the middle of the curve. Of that majority—particularly those cases arising in the last four to five years—there is no clearly established case law, nor a robust consensus of cases, particularized to the facts of the case at issue.[169] As cases approach the "obvious constitutional violation" side of the curve, there should be more on-point Supreme Court or circuit opinions that should put reasonable officials on notice that their conduct is unlawful such that qualified immunity might not be appropriate. This is consistent with the Supreme Court's repeated practice of ensuring that settled law is properly applied to even the most fact-intensive qualified immunity cases.[170]

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[167] *See supra* notes 136–59 and accompanying text.

[168] *See generally* Strand v. Minchuk, 910 F.3d 909, 911 (7th Cir. 2018) (denying qualified immunity to a police officer who, in the context of an argument and fist fight over parking tickets, shot a semi-truck driver after the driver stopped fighting, stepped back from the officer, and—with his hands in the air—twice said 'I surrender.").

[169] *See supra* notes 72, 73, 135 and accompanying text.

[170] *See supra* note 30 and accompanying text.