THE BASICS OF QUALIFIED IMMUNITY

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Supreme Court of the United States
United States Court of Appeals for the Fifth Circuit
United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

REPRESENTATIVE CASES

Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) (granted qualified immunity to elementary school principals on First Amendment challenge involving claims of viewpoint discrimination against student religious speech).

Berkman v. City of Keene, 311 S.W.3d 523 (Tex. App. – Waco 2009, pet. denied) (dismissed for lack of jurisdiction because contract for provision of city utilities did not fall within the limited waiver of governmental immunity for contracts).

Davis v. Dallas County Schs., 259 S.W.3d 280 (Tex. App. – Dallas 2008, no pet.) (en banc) (upheld decision of the trial court granting summary judgment in workers' compensation retaliation case).

Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).

Poteet v. Sullivan, 218 S.W.3d 780 (Tex. App. – Fort Worth 2007, pet. denied) (upheld decision of the trial court granting summary judgment to municipality in Fourth and Fifth Amendment challenge to a domestic violence civil standby).

Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006) (upheld municipal ordinance in federal civil rights case involving a First Amendment challenge).

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THE BASICS OF QUALIFIED IMMUNITY

I. INTRODUCTION

The purpose of this paper is to explain the defense of qualified immunity. Qualified immunity is an important defense for public officials facing civil rights claims brought pursuant to 42 U.S.C. § 1983, which provides the most common vehicle for bringing constitutional claims against local governments and public officials.

Individual public officials are, in some cases, entitled to immunity from suit and from liability. That immunity can be either absolute or qualified. Common forms of absolute immunity include judicial immunity, prosecutorial immunity, witness immunity and legislative immunity. *See, e.g., Forrester v. White*, 484 U.S. 219 (1988) (judicial immunity); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (prosecutorial immunity); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witness immunity); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (legislative immunity). In most Section 1983 cases and for most public officials, however, the immunity at issue is qualified immunity.

II. PURPOSE AND DEVELOPMENT OF QUALIFIED IMMUNITY

A. *Nulla poena sine lege* – no punishment without law.

The essence of qualified immunity is that state and local officials who carry out their executive and administrative functions without violating clearly established federal law will be protected against personal liability under 42 U.S.C. § 1983, even if their actions did violate federally protected rights.[1] MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 9A.02[A] (4th ed. 2007).

The doctrine of qualified immunity is rooted in traditional concerns about the protection of individuals from vague laws and the *ex post facto* creation of individual liability. Justice Holmes famously explained that "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Qualified immunity applies that traditional criminal law protection in the civil law context. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. *Ashcroft v. al-Kidd*, No. 10-98, 131 S. Ct. 2074, 2085 (May 31, 2011). When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It is "the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Lanier*, 520 U.S. at 270-71; *accord Hope v. Pelzer*, 536 U.S. 730, 740 n.10 (2002).

There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Lanier*, 520 U.S. at 266 (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). Second, as a sort of junior version of the vagueness doctrine, the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *Lanier*, 520 U.S. at 266. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *Id.* In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *Id.* at 267.

The Supreme Court has explained that the application of qualified immunity attempts to reconcile two important competing considerations. First, "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). "On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *see also Harlow*, 457 U.S. at 806 ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.").

The Supreme Court has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with qualified immunity, shielding them from civil damages liability as long as their actions

[1] Section 1983 does not create any substantive rights; rather, it provides a method of protecting federal rights secured elsewhere. *Albright v. Oliver*, 510 U.S. 266, 269-71 (1994).

could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.*; *Lanier*, 520 U.S. at 267 ("When broad constitutional requirements have been 'made specific' by the text or settled interpretations, willful violators 'certainly are in no position to say that they had no adequate notice that they would be visited with punishment. … They are not punished for violating an unknowable something.'"). Without the protection afforded by qualified immunity, public officials might be unwilling to carry out their public responsibilities "with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); *see also Elder v. Holloway*, 510 U.S. 510, 514 (1994).

B. The changing nature of qualified immunity from a subjective to an objective analysis.

Following the English common law, early American courts permitted suits against executive or administrative branch public officials, but required that plaintiffs prove two basic elements: (1) the deprivation of a right; and (2) malice on the part of the public official.[2] A claim for misfeasance or misprision of public office, as the claim was called, could not be maintained against public officials if the officials' actions resulted from "a mistake in law, either civilly, or criminally, and when their motives are pure, and untainted with fraud or malice." *Jenkins v. Waldron*, 11 Johns. 114, 120-21 (N.Y. 1814).

Qualified immunity is the modern term used to describe this traditional deference given to public officials in the performance of their duties. The second element of misfeasance of public office (i.e., "malice"), became a requirement that public officials act in "good faith" – both objectively and subjectively. *See Harlow*, 457 U.S. at 815. The objective element involved a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Id.* (citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The subjective component, however, referred to "permissible intentions." *Harlow*, 457 U.S. at 815. The Court explained that an official is not entitled to qualified immunity if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* (emphasis removed).

The subjective element of the good-faith qualified immunity defense frequently proved incompatible with the Supreme Court's assumption that the standard would permit insubstantial lawsuits to be quickly terminated. *Id.* at 814-816. Qualified immunity is intended to protect public officials from both liability *and* the burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Protection from the burdens of litigation (such as discovery and trial), however, is effectively lost if a case is erroneously permitted to go to trial. *Id.*; *see also Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (citing *Mitchell*); *Husley v. Owens*, 63 F.3d 354 (5th Cir. 1995). Since disputed questions of fact may not be decided on motions for summary judgment, "an official's subjective good faith [was] considered to be a question of fact that … inherently require[ed] resolution by a jury." *Harlow*, 457 U.S. at 816. Because of the problems with the subjective standard, the Supreme Court, in its 1982 decision in *Harlow*, rejected the subjective component of "good faith" and adopted an objective standard.

The Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time the incident occurred. *Id.* If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. *Id.* If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. *Id.* at 818-19. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, he is entitled to qualified immunity. *Id.* at 819. But even then, the defense turns primarily on objective factors. *Id.*

Harlow was intended to simplify qualified immunity, but it has been generally unsuccessful. Besides the voluminous quantity of case law in the courts of appeals, the qualified immunity defense has been the subject of numerous Supreme Court decisions attempting to clarify and resolve the scope of this new standard for qualified immunity.[3] As one commentator

[2] Ted Sampsell-Jones, *Reviving* Saucier*: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 728-31 (2007).

[3] *Reichle v. Howards*, No. 11-262, 132 S. Ct. 2088 (June 4, 2012); *Filarsky v. Delia*, No. 10-1018, 132 S. Ct. 1657 (April 17, 2012); *Messerschmidt v. Millender*, No. 10-704, 132 S. Ct. 1235 (February 22, 2012); *Ryburn v. Huff*, No. 11-208, 132 S. Ct. 987 (January 23, 2012); *Ashcroft v. al-Kidd*, No. 10-98, 131 S. Ct. 2074 (May 31, 2011); *Camreta v. Greene*, No. 09-1454, 131 S. Ct. 2020 (May 26, 2011); *Ortiz v. Jordan*, No. 09-737, 131 S. Ct. 884 (January 24,

has noted, "[t]he *Harlow* immunity standard represents a clear case of good intentions gone awry. It is hard to view the uncertainties, intricacies, and voluminous decisional law generated by *Harlow* as being anything other than a legal nightmare." MARTIN A. SCHWARTZ AND JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES 338 (3d ed. 1999).

III. A BRIEF OVERVIEW OF RECENT DEVELOPMENTS IN QUALIFIED IMMUNITY

The past several years have seen some important developments in qualified immunity. While these cases are discussed in the course of the more comprehensive analysis of qualified immunity found below, this quick summary provides a faster reference for these recent developments:

- *Reichle v. Howards*, No. 11-262, 132 S. Ct. 2088 (June 4, 2012), held that members of the Secret Service on detail protecting Vice President Cheney were entitled to qualified immunity when they had probable cause to arrest a suspect for committing a federal crime, even in the face of the suspects claim that he was arrested in retaliation for his protected political speech. At the time of the arrest it was not clearly established that an arrest supported by probable cause could violate the First Amendment, nor did the Court establish that as the standard.
- *Filarsky v. Delia*, No. 10-1018, 132 S. Ct. 1657 (April 17, 2012), held that private individuals temporarily retained by the government to carry out the government's work are entitled to seek qualified immunity from suit under Section 1983. Those individuals whose conduct is "fairly attributable to the state" can be sued as a state actor under Section 1983 and, consequently, are also generally entitled to seek qualified immunity on equal footing with individuals who are employed on a full-time or permanent basis by the government.
- *Messerschmidt v. Millender*, No. 10-704, 132 S. Ct. 1235 (February 22, 2012), held that police officers are generally entitled to qualified immunity as to the execution of an invalid search and seizure warrant if the warrant was approved by a neutral magistrate. In the ordinary case, the officer cannot be expected to question the magistrate's probable-cause determination because it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.
- *Ryburn v. Huff*, No. 11-208, 132 S. Ct. 987 (January 23, 2012), held that police officers were entitled to qualified immunity as to a warrantless search of a home because no prior Supreme Court decision had found a Fourth Amendment violation on facts even roughly comparable and some prior opinions could be read as pointing in the opposite direction.
- *Ashcroft v. al-Kidd*, No. 10-98, 131 S. Ct. 2074 (May 31, 2011), held that Attorney General Ashcroft did not violate clearly established law on a Fourth Amendment seizure, despite the fact that a district court had previously entered an order against Ashcroft prohibiting the same type of Fourth Amendment seizure as unconstitutional. *al-Kidd* reaffirms the Supreme Court's commitment to qualified immunity as a generally available defense for public officials. It held that public officials are entitled to qualified immunity unless existing precedent has placed the constitutional question beyond debate. Qualified immunity gives government officials "breathing room to make reasonable but mistaken judgments about open legal questions." When properly applied, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."
- *Camreta v. Greene*, No. 09-1454, 131 S. Ct. 2020 (May 26, 2011), held that lower courts should not rule on whether a constitutional violation has occurred if (1) the court grants qualified immunity because the law was not clearly established and (2) one or both of the parties no longer have an on-going interest in the constitutional question.[4]

2011); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Arizona v. Gant*, 556 U.S. 332 (2009); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Scott v. Harris*, 550 U.S. 372 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Chavez v. Martinez*, 538 U.S. 760 (2003); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Hanlon v. Berger*, 526 U.S. 808 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *United States v. Lanier*, 520 U.S. 259 (1997); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995); *Elder v. Holloway*, 510 U.S. 510 (1994); *Wyatt v. Cole*, 504 U.S. 158 (1992); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Siegert v. Gilley*, 500 U.S. 226 (1991); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Davis v. Scherer*, 468 U.S. 183 (1984).

[4] However, less than a week later in *al-Kidd*, the Court apparently departed from its injunction in *Camreta*. The Court held that there was no constitutional violation despite (1) holding that the law was not clearly established and (2) the fact that the defendant, John Ashcroft, no longer has an on-going interest in the constitutional question since he is no

- *Ortiz v. Jordan*, No. 09-737, 131 S. Ct. 884 (January 24, 2011), held that a qualified immunity plea, not upheld at the summary judgment stage, may be pursued at trial, but, at that stage, the plea must be evaluated in light of the character and quality of the evidence received in court. A public official who asserts qualified immunity at the summary judgment stage may take an interlocutory appeal, but waives the right to appeal the summary judgment motion itself if he waits until trial.
- *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), held that school officials were entitled to qualified immunity, despite the Court's conclusion that they violated the Fourth Amendment rights of a 13-year-old student by searching her bra and underpants for drugs when there was no reason to suspect that the drugs presented a danger or were concealed in her undergarments. The Court explained that, despite its conclusion that a prior Supreme Court precedent prohibited the search, the officials were entitled to qualified immunity because lower courts had reached divergent conclusions regarding how the Court's prior precedent applied to such searches. While qualified immunity is not the guaranteed product of disuniform views of the law in the other courts if the Supreme Court has been clear, the presence of sufficiently numerous and well-reasoned opinions counsels doubt as to whether the Supreme Court was sufficiently clear in its prior statement of the law.
- *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), held that the heightened pleading standard enunciated in *Bell v. Twombly*, 550 U.S. 544 (2007), applies to all civil litigation, including civil rights claims, and must be met in order to overcome an assertion of qualified immunity by a public official. To survive a motion to dismiss based on qualified immunity, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. In addition, when a public official asserts the defense of qualified immunity at the pleadings stage, the district court should not allow any discovery (even against other defendants) until the assertion of qualified immunity is resolved.
- *Arizona v. Gant*, 556 U.S. 332 (2009), held that police officers conducting vehicle searches in violation of the Fourth Amendment would be entitled to qualified immunity because the unconstitutional search was widely taught in police academies and law enforcement officers had relied on their mistaken interpretation of case law in conducting vehicle searches during the past 28 years.
- *Pearson v. Callahan*, 555 U.S. 223 (2009), overturned *Saucier v. Katz*, 533 U.S. 194 (2001), and held that lower courts may grant qualified immunity because the law is not clearly established without first determining whether the plaintiff has alleged or shown the deprivation of a constitutional right. In addition, the Court held that public officials are entitled to rely on decisions from other circuits and from state supreme courts and, consequently, the law is not clearly established for purposes of qualified immunity if there is disagreement among the courts. Finally, the Court explained that evidence that the law is not clearly established can be derived from later judicial decisions that create a conflict in the case law.

IV. THE CURRENT ANALYTICAL FRAMEWORK FOR QUALIFIED IMMUNITY.

The analytical framework for qualified immunity has varied through the years and is still inconsistently applied. As it currently stands, courts considering an assertion of qualified immunity may consider two basic questions or prongs:

(1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show that the public official's conduct violated a constitutional right?" *Scott v. Harris*, 550 U.S. 372, 377 (2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

(2) "[W]hether the right was clearly established … in light of the specific context of the case." *Scott*, 550 U.S. at 377.

Prior to 2001, the Supreme Court advised lower courts that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)). In *Saucier v. Katz*, 533 U.S. 194, 201 (2001), the Supreme Court made that suggestion a mandate, requiring lower courts to resolve the first question (whether there was a constitutional violation) before considering the second question (whether the law was clearly established). *See Pearson*, 555 U.S. at 232. In 2009, however, the Supreme Court reversed *Saucier* and restored discretion to lower courts to decide

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whether or not a ruling on the constitutional question should precede consideration of whether the law was clearly established. *Id.* at 236.

While both parts of the qualified immunity test still exist, lower courts may now "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." *Id.*; *see also Crostley v. Lamar County*, No. 12-40288, 2013 U.S. App. LEXIS 10850, *14-*15 (5th Cir. May 29, 2013). In making this change in the qualified immunity procedure, the Supreme Court noted that the *Saucier* rule "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Pearson*, 555 U.S. at 236-37. "There are 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." *Id.*

The only time that lower courts must consider both prongs is if they are going to deny qualified immunity to a public official. *Lytle v. Bexar County*, 560 F.3d 404, 409 (5th Cir. 2009); *see also Ramirez v. Martinez*, No. 11-41109, 2013 U.S. App. LEXIS 9757, *21-*23 (5th Cir. May 15, 2013). On the other hand, lower courts should not consider the first prong (violation of a protected right) if the court grants qualified immunity because the law was not clear and if one of the parties no longer has a continuing personal stake in the constitutional question in dispute. *Camreta v. v. Greene*, No. 09-1454, 131 S. Ct. 2020, 2033-34 (May 26, 2011) (vacating the portion of the Ninth Circuit's decision holding that officers had violated the Fourth Amendment); *but see Ashcroft v. al-Kidd*, No. 10-98, 131 S. Ct. 2074 (May 31, 2011) (deciding constitutional question despite fact that defendant was no longer a public official and had been granted qualified immunity because the law was not clear) *and Morgan v. Swanson*, 659 F.3d 359, 385 (5th Cir. 2011) (en banc) (interpreting *Camreta* as a recommendation, rather than as a mandate).

A. The first prong: Do the facts show the public official's conduct violated a federally protected right?

While lower courts are generally not required to address the first (violation of rights) prong, many courts continue to utilize the first prong for the simple reason that, if there was no constitutional violation, then no further inquiries concerning qualified immunities are necessary. *Los Angeles County v. Rettele*, 550 U.S. 609, 616 (2007) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). In order for the district court to make this determination, the court should begin with the basic elements of every Section 1983 claim and examine the plaintiff's claim to see if the plaintiff has stated a claim which satisfies those basic elements.

1. The History of Section 1983

Section 1983 does not create any substantive rights; rather, it provides a method of protecting federal rights secured elsewhere. *Albright v. Oliver*, 510 U.S. 266, 269-71 (1994). Moreover, not every alleged tort or wrong constitutes a violation of a civil right. *Id.* at 269-71; *Baker v. McCollan*, 443 U.S. 137, 142 (1979); *see also Jones v. Lowndes County*, 678 F.3d 344, 352 (5th Cir. April 18, 2012) ("An alleged violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution."). For example, not every injury suffered by one prisoner at the hands of another translates into constitutional liability for prison officials responsible for the victim's safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). As Justice Scalia noted in *City of Monterrey v. Del Monte Dunes*, 526 U.S. 687, 724 (1999), "Section 1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim creating the statute itself, but by an extrinsic body of law to which the statute refers. In this respect, Section 1983 is . . . a prism through which many different lights may pass."

What is now called Section 1983 was enacted as Section 1 of the Civil Rights Act of 1871, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes." *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989). "The immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedman and loyal white citizens by groups such as the Ku Klux Klan." *Id.* While most of the Civil Rights Act of 1871 was designed to combat the actions of groups like the Klan, Section 1 sought to remedy "the failure of the state courts to enforce federal law designed for the protection of the freedman." *Id.* at 725. Section 1 of the Civil Rights Act of 1871, generally called Section 1983, creates a private cause of action for damages against state and local governments and officials for violations of the United States Constitution and laws. *Cf. Monell v. Dep't of Social Svcs.*, 436 U.S. 658, 683-90 (1978). Section 1983 currently states,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

2. Elements of a Section 1983 Claims

To prevail on a claim under Section 1983, "a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law." *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *West v. Atkins*, 487 U.S. 42 (1988). One commentator has noted, though, that "It is more accurate … to view a § 1983 claim for relief as comprising four separate requirements: (1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused, (3) by the conduct of a person (4) who acted under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 1.04[A] (4th ed. 2007) (internal quotation marks omitted). Each of these four elements will be discussed in greater detail below.

a. Violation of a right protected by federal law

The range of cases involving Section 1983 is remarkable. Below is a small selection of decisions from the Fifth Circuit within the past couple of years involving Section 1983 claims:

- *Wyatt v. Fletcher*, No. 11-41359, 2013 U.S. App. LEXIS 11045 (5th Cir. May 31, 2013) (allegation that high school softball coaches disclosed a student's sexual orientation constituting an invasion of privacy was not a violation of the Fourteenth Amendment);
- *Crostley v. Lamar County*, No. 12-40288, 2013 U.S. App. LEXIS 10850 (5th Cir. May 29, 2013) (Fourth Amendment claim of false arrest);
- *Ramirez v. Martinez*, No. 11-41109, 2013 U.S. App. LEXIS 9757 (5th Cir. May 15, 2013) (Fourth Amendment claim of excessive force);
- *Curtis v. Anthony*, 710 F.3d 587 (5th Cir. 2013) (allegation that officer's use of a dog-scent lineup procedure was unreliable and constituted fraud); and
- *Bowlby v. City of Aberdeen*, 681 F.3d 215 (5th Cir. 2012) (Fifth Amendment challenge to revocation of a business permit without due process);
- *Edmonds v. Oktibbeha County*, 675 F.3d 911 (5th Cir. 2012) (Fifth Amendment privilege against self-incrimination challenge to the voluntariness of a confession given by a minor after being separated from his mother during interrogation);
- *Cantrell v. City of Murphy*, 666 F.3d 911 (5th Cir. 2012) (Fourteenth Amendment claim that officers separating a toddler from his mother created a "special relationship" between the officers and the toddler imposing a duty upon them to care for and protect the toddler from his death);
- *Morgan v. Swanson*¸ 659 F.3d 359 (5th Cir. 2011) (en banc) (First Amendment free speech challenge to restrictions on the distribution of religious materials by elementary school students to their classmates during school).

While many types of claims can be brought pursuant to Section 1983, certain types of claims can be brought pursuant to Section 1983 as well as more recently enacted statutory remedies, such as Title VII. This dual-remedy structure permits a plaintiff to choose the more favorable remedy. For instance, if a plaintiff believes that he or she was discriminated against in employment based on race, the plaintiff may bring suit under Title VII and/or Section 1983. *Lauderdale v. Tex. Dep't of Crim. Justice*, 512 F.3d 157, 166 (5th Cir. 2007) ("parallel causes of action"); *Southard v. Tex. Bd. of Crim. Justice*, 114 F.3d 539, 549 (5th Cir. 1997) ("supplemental remedies"). Under Title VII, unlike Section 1983, a local government entity can be held liable under a theory of *respondeat superior*. *Indest v. Freeman Decorating*, 164 F.3d 258, 262 (5th Cir. 1999). However, Title VII, unlike Section 1983, imposes caps on the available damages. *See* 42 U.S.C. § 1981a(b)(3); *see also Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1284 (11th Cir. 2008) (declining to consider Title VII caps on punitive damages in considering reasonableness of punitive damage award under Section 1983).

Within the past decade, cases alleging a violation of an individual's free exercise of religion have been steadily shifting away from the First Amendment and toward federal and state statutes. This shift is largely attributable to the legislative reaction to the Supreme Court's free exercise decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court held that the "rational basis" test applies to

general laws of neutral applicability that impinge on religious beliefs and practices. For land use claims and claims involving institutionalized persons, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) provides a much more plaintiff-oriented standard than exists under the First Amendment. *See* 42 U.S.C. § 2000cc *et seq.* Similarly, at the state level, Texas has enacted the Religious Freedom Restoration Act (RFRA), which applies more generally to claims based on the exercise of religion. *See* TEX. CIV. PRAC. & REM. CODE § 110.001 *et seq.*

b. Proximate cause

A defendant in a Section 1983 cause of action cannot be held liable if the deprivation alleged is "too remote a consequence" of the defendant's acts. *Martinez v. California*, 444 U.S. 277 (1980). The defendant must have actively participated in, or been a "moving force" behind, the alleged deprivation. *Oklahoma City v. Tuttle*, 471 U.S. 808, 819-20 (1985). Courts should look to common law tort causation principles in evaluating causation under Section 1983. *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005). As the Supreme Court has pointed out, Section 1983 liability "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

c. By the conduct of a "person"

This element evokes at least two different connotations. The first and most straightforward connotation involves the conduct of individual flesh and blood persons. The second and less obvious connotation involves the conduct of entities as persons.

(1) Individual Persons

A Section 1983 claimant must establish that the defendant was either personally involved in the deprivation or that his wrongful actions were causally connected to the deprivation. *Jones v. Lowndes County*, 678 F.3d 344, 349 (5th Cir. 2012).

(a) Personal involvement

Personal involvement is an essential element of a civil rights cause of action under Section 1983. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) (citing *Rizzo v. Goode*, 423 U.S. 362, 371-372, 377 (1976)). Liability may be found only if there is personal involvement of the officer being sued. *Watson v. Interstate Fire & Casualty Company*, 611 F.2d 120, 123 (5th Cir. 1980); *Nettles v. Griffith*, 883 F. Supp. 136 (E.D. Tex. 1995). An individual official generally cannot be liable in a civil rights action unless he directly and personally participates in the conduct that deprives the plaintiff of the rights, privileges and immunities secured to him by the United States Constitution. *Hill v. Anderson*, 381 F. Supp. 906 (E.D. Okla. 1974). In order to successfully plead a cause of action in a civil rights case, a plaintiff must enunciate a set of facts that illustrate the defendant's participation in the alleged wrong. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). In addition, the action of the individual must constitute an intentional act; negligence is categorically insufficient. *Sama v. Hannigan*, 669 F.3d 585, 594 (5th Cir. 2012) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

(b) Supervisory personnel

Lawsuits against supervisory personnel based on their position of authority are claims for liability based on the doctrine of *respondeat superior*. There is no *respondeat superior* or vicarious liability for supervisory officials in Section 1983 actions. *Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990). A supervisor may, however, be liable if there is: (1) personal involvement in a Constitutional deprivation; (2) a causal connection between the supervisor's wrongful conduct and a Constitutional deprivation; or (3) if supervisory officials instituted a policy so deficient that the policy itself is a repudiation of rights and is the moving force behind a Constitutional deprivation. *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987). In the context of a failure to supervise or train, a plaintiff must show that: (1) the supervisor failed to either supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference. *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375 (5th Cir. 2005); *see also Jones*, 678 F.3d at 349. Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Id.* (citing *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 410 (1997)); *see also Porter v. Epps*, 659 F.3d 440, 446-49 (5th Cir. 2011) (granting qualified immunity as to supervisory liability claims).

(c) The actions of third-parties

The flip side of requiring personal involvement before holding an individual liable under Section 1983 is that there is ordinarily no duty to protect people from third-party violence. "Ordinarily, a state official has no constitutional duty to protect an individual from private violence." *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (en banc) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989)). This general rule, the *DeShaney* rule, is not absolute, however, and "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection

with respect to particular individuals." *DeShaney*, 489 U.S. at 198.

(i) Special relationships

First, "[w]hen the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of personal liberty,' the state creates a 'special relationship' between the individual and the state that imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence." *McClendon*, 305 F.3d at 324 (citing *DeShaney*, 489 U.S. at 200). The Supreme Court has applied the special relationship exception to the *DeShaney* rule when a state incarcerates a prisoner or involuntarily commits someone to an institution. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

In addition to the circumstances of incarceration and involuntarily institutionalization, the Fifth Circuit has applied the special relationship exception to the placement of children in foster care. *Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 856 (5th Cir. 2012) (en banc) (citing *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990)). The Fifth Circuit explained that the state's duty to care for children in foster care stems from the limitation which the state has placed on the individual's ability to act on his own behalf. *Doe*, 675 F.3d at 856.

The en banc Fifth Circuit has, three times, considered whether to expand the special relationship exception to the relationship between public schools and their students. *Doe*, 675 F.3d at 856; *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997) (en banc); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc). Each time, the en banc court has rejected arguments expanding the special relationship exception to cover public school students. Most recently, the Fifth Circuit reaffirmed that schools are not *constitutionally* required to ensure students' safety from private actors. *Doe*, 675 F.3d at 857. Despite the young age and immaturity of many children, they are not attending the school through the "affirmative exercise of [state] power;" they are attending school because their parents voluntarily chose to send them there (as one of several ways to fulfill their compulsory education obligations), and the parents remain responsible for their childrens' basic needs. *Doe*, 675 F.3d at 861 (quoting *DeShaney*, 489 U.S. at 200).

(ii) State-created dangers

Second, the Supreme Court in *DeShaney* rejected the claim that there was a special relationship between a child and the state, noting that "while the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S. at 201. Based on this language in *DeShaney* about creation or enhancement of danger, a majority of the federal courts of appeals (but not the Fifth Circuit) have recognized a second exception to the general rule that the State is not obligated to protect individuals from private harm. This second exception is generally called the "state-created danger" theory. *McClendon*, 305 F.3d at324-325.

Assuming that the state-created danger theory is viable, a plaintiff must (1) show that the state actors increased the danger to him, and (2) show that the state actors acted with deliberate indifference. *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001)). The "key to the state-created danger cases is the state actors' culpable knowledge and conduct in affirmatively placing the individual in a position of danger, effectively stripping the person of his ability to defend himself, or cutting off potential sources of private aid." *Rivera*, 349 F.3d at 249 (citing *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)). "To be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson*, 38 F.3d at 201. In addition, the state actor must have created or increased the danger to a "known victim." *Rios v. City of Del Rio*, 444 F.3d 417, 423-425 (5th Cir. 2006). The state actor must be aware of an immediate danger facing a known victim; liability does not extend to "all foreseeable victims." *Rios*, 444 F.3d at 424 n.7 (citing *Lester v. City of College Station*, 103 Fed. Appx. 814 (5th Cir. 2004)). To establish deliberate indifference for purposes of state-created danger, the plaintiff must show that the environment created by the state actors is dangerous; they must know it is dangerous; and they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. *Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc).

The "state-created danger" theory is not currently recognized within the Fifth Circuit. *See, e.g., McClendon*, 305 F.3d at 325 ("we have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers"); *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010).[5]

[5] One panel of the Fifth Circuit previously held that the court had recognized the state-created danger theory. *Breen v. Tex. A&M Univ.*, 485 F.3d 325 (5th Cir. 2007) (discussing *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533 (5th Cir. 2003)). However, the panel later withdrew that portion of its opinion

(2) Entities as persons

Cities, counties, school districts and other local governmental entities are "persons" for purposes of Section 1983 litigation. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). For these entities, though, liability only attaches if a constitutional deprivation is caused by the entity itself. *Id*. As the Supreme Court explained, the proper analysis of local government liability under Section 1983 requires courts to separate two issues: (1) whether the plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the local government entity is responsible for that violation. *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Qualified immunity, however, does not apply to local government entities, only individual public officials. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 436 (5th Cir. 2008).

d. Under color of law

Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights "under color" of state law. 42 U.S.C. 1983. Consequently, anyone whose conduct is "fairly attributable to the state" can be sued as a state actor under Section 1983. *Filarsky v. Delia*, No. 10-1018, 132 S. Ct. 1657 (April 17, 2012).

The traditional definition of acting under color of state law requires that the defendant in a Section 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941); *accord Monroe v. Pape*, 365 U.S. 167, 187 (1961) (adopting *Classic* standard for purposes of Section 1983), overruled in part on other grounds, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 695-701 (1978); *Polk County v. Dodson*, 454 U.S. 312, 317-318 (1981). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Court made clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, "that conduct [is] also action under color of state law and will support a suit under § 1983." *Id.* at 935. In such circumstances, the defendant's alleged infringement of the plaintiff's federal rights is "fairly attributable to the State." *Lugar*, 457 U.S. at 937; *see also West v. Atkins*, 487 U.S. 42, 49 (1988).

A public official generally acts under color of state law when, while performing in his official capacity or exercising his official responsibilities, he abuses the position given to him by the State. *West*, 487 U.S. at 50; *but see Dodson*, 454 U.S. at 325 (public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding).

A private person may only be found to be a state actor if one of four rigorous tests is met. These tests are: (1) the symbiotic relationship test, *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); (2) the public function test, *Jackson*, 419 U.S. at 353; *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); (3) the close nexus test, *Blum*, 457 U.S. at 1004-05; and (4) the joint participation test. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 152 (1970); *Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990).

B. The second prong: Was the federal right clearly established in light of the specific context of the case?

The Supreme Court has stated that the qualified immunity "clearly established" federal law standard "is simply the adaptation of the fair warning standard to give officials…the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 520 U.S. 259, 270-271 (1997). The objective reasonableness standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

1. "Clearly established law"

Exactly how to describe the second prong of the qualified immunity analysis is not always clear. Probably the most complete description is in *Anderson v. Creighton*, 483 U.S. 635 (1987), where the Supreme Court stated that "[w]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful 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." *Id.* at 639. The two key phrases are "objective legal reasonableness" and "clearly established."

The Fifth Circuit has noted that the questions of "objective legal reasonableness" and "clearly established" are different, albeit related, inquiries. *See Tolan v. Cotton*, No. 12-20296, 2013 U.S. App. LEXIS 8548, *12 (5th Cir. April 25, 2013); *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir. 2005); *Ramirez v. Knoulton*, 542 F.3d 124, 128-29 (5th Cir. 2008) (emphasizing objective reasonableness component in fact specific context of an excessive force case). Descriptions of the second prong of the qualified immunity test become confusing, however, because the courts sometimes provide a different

sua sponte and without explanation. *Breen v. Tex. A&M Univ.*, No. 04-40712, 2007 U.S. App. LEXIS 18181 (5th Cir. July 26, 2007). The en banc Fifth Circuit recently confirmed that the state-created danger theory has *not* been recognized by the Fifth Circuit. *Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc)

definition in keeping with the relative importance to the specific case of the two categories. *Compare Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407-8 (5th Cir. 2007) (second prong is "objective reasonableness") *with Brown v. Miller*, 519 F.3d 231, 236-37 (5th Cir. 2008) (second prong is "clearly established"). Adding to this confusion, recent Supreme Court decisions on qualified immunity before *Pearson* had dropped any mention of "objective legal reasonableness." *See, e.g., Saucier*, 533 U.S. at 201; *but see Pearson*, 555 U.S. at 244 ("This inquiry 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.'").

If the question of qualified immunity is heavily driven by an interpretation of the case law, using the "clearly established" aspect of the second prong is probably the most useful. In other cases, however, where specific facts highlight the objective reasonableness of the public official's actions, using the "objective reasonableness" language reminds the Court that it is not concerned solely with the state of the law, but also with the understanding of the facts that the public official had at the time of the incident.

In order for a constitutional right to be clearly established for purposes of qualified immunity, the contours of the right must have been sufficiently clear at the time of the alleged constitutional violation. "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (emphasis in original). A public official will not be held liable unless "it is obvious that no reasonably competent [official] would have concluded that" the conduct at issue would not violate the Constitution. *Reichle*, 132 S. Ct. at 2093; *Malley*, 475 U.S. at 341; *see also Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004). If public officials "of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341; *see also Haggerty*, 391 F.3d at 655.

"It is important to emphasize that [the clearly established] inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier*, 533 U.S. at 201). Public officials are "not charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547, 557 (1967). A right is "clearly established" if its "contours . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000) (citing *Anderson*, 483 U.S. 635). "This is not to say that 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." *Id.*; *see also Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012) ("the law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights" (quoting *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004))); *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008) (While it is not necessary that there be a "commanding precedent" that holds that the "very action in question" is unlawful, the unlawfulness must be "readily apparent from relevant precedent in sufficiently similar situations.").[6]

Prior to *Pearson*, the Fifth Circuit held that decisions from outside the controlling jurisdiction do not clearly establish the law unless there is "a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful." *See Williams v. Ballard*, 466 F.3d 330, 333 (5th Cir. 2006) ("Because at the time there was no binding precedent clearly establishing the right, we must determine if other decisions at the time showed 'consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were law'") (citing *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc)). In the Fifth Circuit's current formulation, for a legal principle to be clearly established, the court must be able to point to controlling authority – or a robust consensus of

[6] Some examples may be useful for understanding the particularized nature of the inquiry. For instance, in *Waganfeald v. Gusman*, 674 F.3d 475, 485 (5th Cir. 2012), the Fifth Circuit held, "There is no particularized, clearly established law which would have instructed Hunt that, under the Sixth Amendment, he had to allow pre-trial detainees to use their cell phones when land lines were disrupted." Similarly, in *Cantrell v. City of Murphy*, 666 F.3d 911, 921 (5th Cir. 2012), the Fifth Circuit granted qualified immunity because plaintiffs did not cite any cases "involving sufficiently similar situations that would have provided reasonable officers with notice that they had an affirmative constitutional duty to provide medical care and protection to a young child when they temporarily physically separated the child from his mother." Plaintiff's attempt to analogize cases involving placing children in foster care was unsuccessful since the two situations were materially distinguishable, and did not provide a reasonable official with notice that an affirmative constitutional duty to provide medical protection and care to a child removed from his mother was clearly established. *Id.* The great detail of the relevant facts cited by the court illustrates the importance of considering the particularized nature of prior case law for purposes of determining whether the law was clearly established.

persuasive authority – that defines the contours of the right in question with a high degree of particularity and that places the statutory or constitutional question beyond debate. *Waganfeald v. Gusman*, 674 F.3d 475 (5th Cir. 2012) (quoting *Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc), and *al-Kidd*, 131 S. Ct. at 2083).

In *Pearson*, the Supreme Court clarified that decisions from other circuits could establish that the law is *not* clearly established. The Court held that courts *must* consider the decisions of other judges, even when they are from other circuits, when deciding whether the law was clearly established. Public officials "are entitled to rely on existing lower court cases without facing personal liability for their actions." *Pearson*, 555 U.S. at 244. In addition, cases decided after the events at issue can prove that the law was not clearly established. *Pearson* mentioned that two of the cases from other circuits were decided after the events at issue, thus supporting a finding that the law was not clearly established when a "Circuit split on the relevant issue had developed *after* the events that gave rise to the suit." *Id.* (emphasis added). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Reichle v. Howards*, No. 11-262, 132 S. Ct. 2088 (June 4, 2012); *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997). The Supreme Court held that if judges disagree on whether the precise conduct at issue is unlawful, it is unfair to hold public officials personally liable merely because the judges were in another circuit or state or because the judges issued their decisions after the events at issue.

To the extent that it may not have been clear before, the Supreme Court's decision in *Pearson* makes clear that public officials should not be held to a higher standard than judges. To that end, the Supreme Court held that public officials "are *entitled* to rely on existing lower court cases without facing personal liability for their actions." *Pearson*, 555 U.S. at 244 (emphasis added). Public officials are "entitled to rely" on cases from other circuits as well as from State Supreme Courts. *Id.* at 243-44. However, "disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear" if the Supreme Court has been clear. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 366 (2009). Nevertheless, if there are sufficiently numerous lower court cases interpreting a Supreme Court precedent differently than the Supreme Court would interpret it and those opinions include "well-reasoned majority and dissenting opinions," the state of the law "counsel[s] doubt that [the Supreme Court was] sufficiently clear in the prior statement of law." *Id.*

The importance of other judicial decisions was recently emphasized by the Supreme Court and the Fifth Circuit, both pointing to the opinions of other judges as a basis for granting qualified immunity. *Messerschmidt v. Millender*, No. 10-704, 132 S. Ct. 1235, 1250 (February 22, 2012); *Ryburn v. Huff*, No. 11-208, 132 S. Ct. 987, 990 (January 23, 2012); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc); *but see Swindle v. Livingston Parish Sch. Bd.*, 655 F.3d 386 (5th Cir. 2011) (denying qualified immunity despite fact that district court judge held that there was no constitutional violation).[7]

"Further, the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken." *Wooley*, 211 F.3d at 919 (citing *Stem v. Ahearn*, 908 F.2d 1, 5 (5th Cir. 1990)). The issue typically is a question of law. *Wooley*, 211 F.3d at 919 (citing *Pierce*, 117 F.3d 866).

Where there is no clearly settled Constitutional law violated by a defendant, there is no liability for compensatory damages even if clearly settled state law was violated. *Davis v. Scherer*, 468 U.S. 183, 194 and n.12 (1987). A violation of a clear governmental regulation, standing alone, does not mean that clearly settled Constitutional law was violated, even though the plaintiff may argue that the defendant's conduct was purely ministerial, not discretionary, and thus not protected by qualified immunity. *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986).[8] Also, a holding that the law is "settled" does not bind a court to determine that the law was clearly established. *Matherne v. Wilson*, 851 F.2d 752, 758 (5th Cir. 1988).

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[7] The significance assigned to the (mistaken) decisions of other judges appears to be a point of contention among the judges on the Fifth Circuit and the justices on the Supreme Court. Notably, both *Messerschmidt* and *Morgan* were decisions of sharply divided courts in which a majority of the Supreme Court and en banc Fifth Circuit, respectively, granted qualified immunity, but a strong dissent largely rejected reliance on the decisions of other judges and courts.

[8] The "ministerial duty" exception to qualified immunity "is extremely narrow in scope." *Gagne v. Galveston*, 805 F.2d 558, 560 (5th Cir. 1986). The Fifth Circuit has interpreted the Supreme Court as having firmly rejected any claim that the qualified immunity defense "is lost when an official is engaged in routine tasks." *Id.* "A law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984). "Thus, if an official is required to exercise his judgment, even if rarely or to a small degree, the Court would apparently not find the official's duty to be ministerial in nature." *Gagne*, 805 F.2d at 560. In addition, *Davis* stressed that the breach of a ministerial duty would forfeit qualified immunity only if that breach itself gave rise to the cause of action for damages. *Id.* (citing *Davis*, 468 U.S. at 196 n.14).

2. "Objective legal reasonableness"

In determining the objective reasonableness of the defendant's behavior, the court must judge the behavior against the clearly established law at the time of the alleged incident. *Johnson v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994); *Wooley*, 211 F.3d at 919 (citing *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994)). However, even if the defendant-officer's conduct actually violates the plaintiff's constitutional rights, the officer is entitled to qualified immunity if the conduct was objectively reasonable. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). The court's focus in its analysis should be on the official's entitlement to qualified immunity rather than on the merits of the plaintiff's claims. *Poole v. City of Shreveport*, 691 F.3d 624, 630 (5th Cir. 2012). Such a focus will aid the court in performing an objective analysis of the facts and circumstances surrounding the alleged constitutional violation. *See id.* Thus, the ultimate question regarding the issue of qualified immunity is whether a reasonable public officer could have believed that the actions of the defendant official were lawful in light of clearly established law and the information the public official possessed at the time. *See Anderson*, 483 U.S. at 641.

An officer's conduct is not objectively reasonable when "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997). This issue, too, generally is a question of law, but denial of summary judgment based on a material factual dispute would be appropriate if there are underlying historical facts in dispute that are material to resolution of the question of whether the defendant acted in an objectively reasonable manner. *Mangieri*, 29 F.3d 1012.

The plaintiff has the burden of coming forward with competent summary judgment evidence sufficient to create a fact issue as to whether the defendant's conduct was not objectively reasonable. *Malley*, 475 U.S. at 341; *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). In some cases, a hearing or trial may be required to determine the issue. *See Enlow v. Tishomingo County*, 962 F.2d 501, 513 (5th Cir. 1992); *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993); *Presley v. City of Benbrook*, 4 F.3d 405, 409-10 (5th Cir. 1993). When factual issues are still in dispute at the time of trial, a court may not be able to make a decision as to whether officers are entitled to qualified immunity until the factual issues are resolved by a jury. *See Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993). In such cases, the jury will have to decide "the underlying historical facts in dispute that are material to the resolution of the question whether the defendants acted in an objectively reasonable manner in view of existing law and facts available to them." *Id.* at 435; *see also Presley*, 4 F.3d at 409-10.

C. The extraordinary circumstances exception

Even when the federal law is clearly established, the official may be able to prove "extraordinary circumstances," showing that he "neither knew nor should have known of the relevant legal standard," in which case the immunity defense should be sustained. *Harlow*, 457 U.S. at 819. This "extraordinary circumstances" exception has been most often addressed when the defendant official has relied on advice of counsel. *See Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998).

V. PROCEDURAL ASPECTS OF QUALIFIED IMMUNITY.

A. Burdens of pleading and persuasion

Qualified immunity is an affirmative defense that the defendant official has the burden of pleading. *Gomez v. Toledo*, 446 U.S. 635 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 586-587 (1998). In *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), the Supreme Court reaffirmed the ruling in *Gomez* that qualified immunity is a defense that must be pleaded by a defendant official. Generally, affirmative defenses (including qualified immunity) must be raised in the first responsive pleading. *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009). However, the Fifth Circuit has permitted a late assertion of qualified immunity where the plaintiff's theory of the case had changed and there was an intervening Supreme Court decision on point. *Id.* at 578.

Once the affirmative defense of qualified immunity is raised, the burden is then on the plaintiff to prove that the government official is not entitled to qualified immunity. *Wyatt v. Fletcher*, No. 11-41359, 2013 U.S. App. LEXIS 11045, *12 (5th Cir. May 31, 2013); *see also Crostley v. Lamar County*, No. 12-40288, 2013 U.S. App. LEXIS 10850, *28 (5th Cir. May 29, 2013) ("When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense") (quoting *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). "Although qualified immunity is 'nominally an affirmative defense,' the plaintiff bears a heightened burden 'to negate the defense once properly raised.'" *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012)(quoting *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)); *see also Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

In order to prove that the government official is not entitled to qualified immunity, the Supreme Court in *Siegert v. Gilley* went on to rule that a plaintiff must allege a violation of a clearly established constitutional right. Consistent with the Supreme Court's decision in *Siegert*, numerous court decisions have held that when the defendant properly raises the defense of qualified immunity, the plaintiff has the burden of showing the violation of a clearly established right. *Farias v. Bexar*

County Bd. of Trs., 925 F.2d 866, 875 (5th Cir. 1991); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir. 1994); *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir. 1982); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982); *Hampton v. Oktibbeha County Sheriff Dep't*, 480 F.3d 358 (5th Cir. 2007) (citing *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997)).

The plaintiff's burden is different depending on the stage in the litigation. As the Supreme Court has emphasized, a public official has the right to assert qualified immunity at both the pleading (motion to dismiss) stage and based on the evidence (usually in a motion for summary judgment). *See Behrens v. Pelletier*, 516 U.S. 299 (1996). In determining whether the plaintiff has met the required burden, "a court must decide whether the facts that a plaintiff has alleged (see *Fed. Rules Civ. Proc. 12(b)(6), (c)*) or shown (see *Rules 50, 56*) make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232.

In a motion to dismiss, the court will determine whether the facts as alleged by the plaintiff establish the violation of a constitutional or other federal right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). At the summary judgment stage, the court will consider whether the defendant is entitled to qualified immunity, viewing all the evidence in the light most favorable to the plaintiff. *Davis v. McKinney*, 518 F.3d 304, 310 (5th Cir. 2008) (citing *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) (en banc)). In addition, a jury may be given the issue of qualified immunity if that defense is not resolved on summary judgment. *Brown v. Sudduth*, 675 F.3d 472, 482 (5th Cir. 2012) (citing *Melear v. Spears*, 862 F.2d 1177, 1184 (5th Cir. 1989)).

In regards to claims of "deliberate indifference", the proper method of approaching these claims is not whether the individual defendant did not take care of some problems that he could have, but whether the individual defendant did *anything* to improve the plaintiff's situation. *See, e.g., Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 531-32 (5th Cir. 1994) (in affirming a judgment granting a Rule 12(b)(6) motion to dismiss on the basis of qualified immunity, the Fifth Circuit held that the single act of a school official's hiring of security guards for a school dance where student was fatally shot conclusively established that the school official did not act with deliberate indifference, even though school official had actual knowledge that firearm violence was likely at dance).

B. Immunity from suit as well as from damages

Qualified immunity embodies not only an immunity against the threat of liability, but also an entitlement not to stand trial or face the other burdens of litigation, so long as the official did not violate clearly established federal law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Such entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id.*; *see also Scott v. Harris*, 55 U.S. 372, 376 n.2 (2007) (citing *Mitchell*); *Husley v. Owens*, 63 F.3d 354 (5th Cir. 1995).

In *Crawford-El*, 523 U.S. at 593 n.14, the Supreme Court stated that *Harlow* did not create "an immunity from *all* discovery . . . limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity." District courts have discretion to protect officials from "unnecessary and burdensome discovery." *Id.* The Court also outlined several tools available to district courts to protect public officials from overbroad discovery including: (1) requiring a Rule 7 reply; (2) granting a motion for a more definite statement under Rule 12(a); (3) before permitting discovery, the district court can determine whether, assuming the truth of the plaintiff's allegations, the defendant's conduct violated clearly established federal law; and (4) allowing only "focused depositions." *Id.* at 597-600

In *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc), the Fifth Circuit articulated the following pleading and discovery rules for Section 1983 claims subject to the defense of qualified immunity: (1) Rule 9(b)'s "short and plain" statement requirement means that the plaintiff must allege more than mere conclusions in the complaint; (2) when qualified immunity is asserted as a defense, the district court, under Rule 7, on a defendant's motion or sua sponte, in its discretion may order the plaintiff to submit a reply tailored to the immunity defense - - - "vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist" *Schultea*, 97 F.3d at 1434; and (3) the district court may ban discovery until the plaintiff's specific factual assertions show that there are material issues of fact pertinent to immunity defense. The Fifth Circuit ruled in *Schultea* that although "narrowly tailored" discovery may be allowed on factual issues relevant to qualified immunity, discovery should not be allowed until the district court finds that the plaintiff's heightened pleading asserts facts which, if true, would overcome the defense of qualified immunity. "The district court should thus rule on a motion to dismiss before allowing discovery. The allowance of discovery without this threshold showing is immediately appealable as a denial of the true measure of protection of qualified immunity." *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991, 995 (5th Cir. 1995).

The Supreme Court clarified in *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009), that no discovery in a case should proceed until the qualified immunity issue

is resolved. Many courts would permit discovery to proceed against defendants who did not or could not (e.g., governmental entities) assert qualified immunity. The Supreme Court rejected this method, explaining that it is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for the party asserting qualified immunity to participate in the process to ensure that the case "does not develop in a misleading or slanted way that causes prejudice to their position." *Id.* Even if not subject to discovery orders, the official asserting qualified immunity "would not be free from the burdens of discovery." *Id.*

Applying the principle that no discovery on a case should proceed until the qualified immunity issue is resolved, the Fifth Circuit recently held that a district court abused its discretion when it refused to rule on a qualified immunity defense until general discovery had been completed. *Backe v. Leblanc*, 691 F.3d 645, 648 (5th Cir. 2012). The Fifth Circuit stated that the district court doubly abused its discretion by refusing to rule on a motion to dismiss based on qualified immunity and by failing to limit discovery to the facts necessary to rule on the qualified immunity defense. *Id.* at 649. Instead the court should have (1) ruled on the motion to dismiss, and (2) issued a discovery order "narrowly tailored" to the scope of determining the qualified immunity issue, and only allowed general discovery after limited discovery, if necessary. *See id.* at 648.

C. Appealing denials of qualified immunity

Unlike a federal district court's order granting qualified immunity, a federal district court's denial of qualified immunity is immediately appealable to the Court of Appeals as long as the immunity issue may be resolved as a matter of law. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Elizondo v. Green*, 671 F.3d 506, 509 (5th Cir. 2012) (stating an order granting qualified immunity is not immediately appealable since it can be "fully and fairly reviewed after a final judgment). On appeal from a denial of a motion for summary judgment based on qualified immunity, the court of appeals has jurisdiction to determine whether the disputed facts are material to the claim of qualified immunity and whether the district court otherwise applied the proper legal standards. *Dudley v. Angel*, 209 F.3d 460, 461 (5th Cir. 2000) (citing *Gerhart v. Hayes*, 201 F.3d 646, 648-49 (5th Cir. 2000)); *Meyer v. Austin Indep. Sch. Dist.*, 161 F.3d 271, 273-274 (5th Cir. 1998); *Meadours v. Ermel*, 483 F.3d 417 (5th Cir. 2007). In an appeal from a denial of an assertion of qualified immunity, an appellate court is free to review a district court's determination that the issues of fact in question are material. *Gerhart*, 201 F.3d at 648.

When a district court denies a motion for summary judgment on the ground that "genuine issues of material fact remain," the district court has made two distinct legal conclusions. First, the court has concluded that the issues of fact in question are *genuine*. *Gerhart*, 201 F.3d at 648. Second, and more significantly, the district court has concluded that the issues of fact are *material*, i.e., resolution of the issues might affect the outcome of the suit under governing law. *Id.* While the first issue, genuineness, is not reviewable in an interlocutory appeal, the second issue, materiality, is reviewable. Stated simply, in an appeal from a denial of an assertion of qualified immunity, an appellate court is free to review a district court's determination that the issues of fact in question are material. *Id.* at 648; s*ee also Colston v. Barnhart*, 146 F.3d 282 (5th Cir. 1998); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *see also Zarnow v. City of Wichita Falls*, 500 F.3d 401, 409 n.2 (5th Cir. 2007).

When a public official seeks interlocutory review of an order denying qualified immunity, the appellate court has jurisdiction to review the order "to the extent that it turns on an issue of law." *Gonzales v. Dallas County*, 249 F.3d 406, 411 (5th Cir. 2001) (citing *Lemoine v. New Horizons Ranch & Center, Inc.*, 174 F.3d 629, 633-34 (5th Cir. 1999)); *see also Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008). The Court of Appeals may, therefore, determine whether all of the conduct that the district court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of objective legal reasonableness. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997). Consequently, on appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal. *Gonzales*, 249 F.3d at 411 (citing *Berryman v. Rieger*, 150 F.3d 561, 562-63 (6th Cir. 1998)).

The mere existence of some factual dispute is not enough to defeat appellate jurisdiction over an interlocutory appeal: If the disputed facts are not material to the legal question, "the denial of summary judgment is reviewable as a question of law." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000).

If a public official does not take an interlocutory appeal from the denial of his motion for summary judgment, he cannot appeal denial of the motion after trial. *Ortiz v. Jordan*, No. 09-737, 131 S. Ct. 884 (2011). Instead, the public official can only appeal based on trial motions (e.g., motion for judgment as a matter of law).