# THE BASICS OF QUALIFIED IMMUNITY

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State Bar of Texas
Supreme Court of the United States
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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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## 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. For most public officials the immunity at issue is qualified immunity.

## II. 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:

- *Lane v. Franks*, No. 13-483, 2014 U.S. LEXIS 4302 (June 19, 2014), held that a community college president was entitled to qualified immunity because it was not clearly established at the time that a public employee could not be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities. The existence of discrepancies in Eleventh Circuit precedent only served to highlight that the law was not clearly established.
- *Plumhoff v. Rickard*, No. 12-1117, 2014 U.S. LEXIS 3816 (May 27, 2014) held that police officers were entitled to qualified immunity as to a Fourth Amendment excessive force claim asserted by the daughter of a deceased driver, since the officers did not violate the deceased driver's Fourth Amendment rights when they fired a total of 15 shots during a 10 second span because the fleeing driver posed a grave public safety risk and the officers acted reasonably in using deadly force to end that risk. In the alternative, the Court determined that no clearly established law precluded the officers' actions because existing case law at the time of the incident in question was "cast at a high level of generality" and did not clearly establish that the officers' conduct was unreasonable.
- *Wood v. Moss*, No. 13-115, 2014 U.S. LEXIS 3614 (May 27, 2014), held that the Secret Service agents were entitled to qualified immunity because it was not clearly established that when engaged in crowd control, they bear a First Amendment obligation to make sure that groups with conflicting viewpoints are at all times in equivalent positions to the President and his motorcade.
- *Tolan v. Cotton*, No. 13-551, 2014 U.S. LEXIS 3112 (May 5, 2014), held that summary judgment should not have been granted to an officer on the basis of qualified immunity because the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to the non-moving party when there were conflicts in the account of the events that occurred leading up to the shooting of an unarmed suspect outside his home. The Court vacated and remanded with the instruction that the Fifth Circuit properly give credit and draw factual inferences in the non-movant's favor when determining whether the officer's actions violated clearly established law.
- *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.[1]
- *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.

## III. 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.

The lower courts may "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 Plumhoff v. Rickard*, No. 12-1117, 2014 U.S. LEXIS 3816, *15-*16 (May 27, 2014); *Crostley v. Lamar County*, 717 F.3d 410, 422 (5th Cir. 2013). In allowing the lower courts to consider either qualified immunity prong first, the Supreme Court noted that requiring courts to address the first prong first in every case "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009). "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) 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 the 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

[1] 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 longer United States Attorney General.

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.

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).

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:

- *Morgan v. Swanson*¸ No. 13-40433, 2014 U.S. App. LEXIS 10293 (5th Cir. June 3, 2014) (First Amendment free speech challenge alleging viewpoint discrimination when parent prevented from distributing religious materials to other consenting adults in the classroom);
- *Harris v. Serpas*, 745 F.3d 767 (5th Cir.2014) (Fourth Amendment claim of excessive force);
- *Hogan v. Cunningham*, 722 F.3d 725 (5th Cir. 2013) (Fourth Amendment unlawful arrest);
- *Haverda v. Hays County*, 723 F.3d 586 (5th Cir. 2013) (First Amendment retaliation claim);
- *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 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);
- *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);

## 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 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 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.").[2]

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 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

[2] 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.

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. *See e.g. Lane v. Franks*, No. 13-483, 2014 U.S. LEXIS 4302 (June 19, 2014) (the existence of discrepancies in Eleventh Circuit precedent only served to highlight that the law was not clearly established.); *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).[3]

"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).[4] Also, a holding that the law is "settled" does not bind a court to determine that the law was clearly established.

[3] 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.

[4] 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).

*Matherne v. Wilson*, 851 F.2d 752, 758 (5th Cir. 1988).

The Fifth Circuit recently clarified another aspect of the relationship between "clearly established" and the "objective legal reasonableness" inquiry in rejecting a defendant-officer's contention that an individual's rights were not "clearly established" at the time because it was unclear whether the Fourth and Fifth Amendment rights against excessive-force could be applied extraterritorially and he was, therefore, entitled to qualified immunity. *Hernandez v. United States*, No. 11-50792, 2014 U.S. App. LEXIS 12307, *76-*77 (5th Cir. June 30, 2014). In rejecting this claim, the Fifth Circuit held that the lack of clarity of whether the officer's actions could be challenged, did not alter the standard of conduct required under the Fourth and Fifth Amendment, and the "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*(holding that a Border Agent, standing in the U.S., that shot and killed an unarmed fifteen year-old that was hiding under the pillars of a bridge across the Mexican Border, was not entitled to qualified immunity; although it was unclear at the time whether the Constitutional protections applied to the victim extraterritorially, no reasonable officer would have understood the Agent's conduct to be lawful).

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. *Johnston 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 v. Fitzgerald*, 457 U.S. 800, 819 (1982). 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).

## IV. 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 pled 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*, 718 F.3d 496, 510 (5th Cir. 2013); *see also Crostley v. Lamar County*, 717 F.3d 410, 422 (5th Cir. 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)).

The Supreme Court recently reiterated the standard that should be applied in resolving questions of qualified immunity at the summary judgment stage. *Tolan v. Cotton*, No. 13-551, 2014 U.S. LEXIS 3112 (May 5, 2014). In *Tolan v. Cotton*, a plaintiff who was shot outside of his home, after being wrongly stopped and accused of automobile theft due to a incorrectly ran license plate number, brought a Fourth Amendment excessive force claim against the officer. *Id.* at **2-**7. The Fifth Circuit concluded that the officer was entitled to qualified immunity, despite several conflicts in the record regarding the events that occurred before the shooting, reasoning that the officer's use of force was not unreasonable and did not violate a clearly established right. *Id.* at **7.

In vacating and remanding, the Supreme Court restated the two-pronged inquiry regarding qualified immunity, stating that the first prong "asks whether the facts '*taken in the light most favorable to the party asserting the injury*…show the officer's conduct violated a [federal] right.'" *Id.* at **9 (emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The second prong "asks whether the right in question was 'clearly established' at the time of the violation." *Tolan*, 2014 U.S. LEXIS 3112, **9. While acknowledging that the courts have discretion in deciding the order in which to determine the two prongs, the Supreme Court was clear in stating that the courts "may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Id.* The Supreme Court held that the Fifth Circuit improperly failed to draw factual inferences and give proper credit to the evidence of the nonmoving party when it discounted Tolan's account of the events which included that he was not agitated, the driveway was clearly lit, and he was on his knees when the officer shot him.

### 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.* This allowance of discovery went against the purpose of the qualified immunity doctrine which is to "free officials from the concerns of litigation, including avoidance of disruptive discovery. *Williams-Boldware v. Denton County*, 741 F.3d 635, 643 (5th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

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); *see also Zapata v. Melson*, No. 13-40762, 2014 U.S. App. LEXIS 7347 (5th Cir. April 18, 2014) (finding jurisdiction to entertain an interlocutory appeal taken from a district court's discovery order where the district court failed to rule on the defendant's defense of qualified immunity). 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. *Backe*,691 F.3d 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). 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 genuine and material. *See Plumhoff v. Rickard*, No. 12-1117, 2014 U.S. LEXIS 3816, at *12-*15 (March 4, 2014). One exception to this power of review for a denial of qualified immunity is in the limited context of when the genuineness determination is unrelated to the analysis of qualified immunity and is actually nothing more than a limited factual issue. *Id.* The limited example given by the Supreme Court of when that type of review was appropriate was in the case of *Johnson v. Jones*, a qualified immunity case in which the Supreme Court held that a district court's denial of qualified immunity was not immediately appealable because of a question of "evidence sufficiency," i.e. the plaintiff claimed that certain officers had beaten him, but the officers moved for summary judgment alleging that they were not present at the time of the beating and had nothing to do with it. 515 U.S. 304, 307-309 (1995). In cases with similar purely factual disputes, the appellate court lacks jurisdiction to consider the genuineness determination made by the district court. *Plumhoff*, 2014 U.S. LEXIS 3816, at * 14.

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).