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## Unclear and Unestablished: Exploring the Supreme Court/Tenth Circuit Disconnect in Qualified Immunity Jurisprudence

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**UNCLEAR AND UNESTABLISHED:  
EXPLORING THE SUPREME  
COURT/TENTH CIRCUIT DISCONNECT IN  
QUALIFIED IMMUNITY JURISPRUDENCE**

Josiah Cohen\*

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INTRODUCTION

Since the founding, Americans have sought a perfectly calibrated government that vigorously protects, but never violates, citizens' individual rights.<sup>1</sup> To accomplish this, government must balance orderly security and individual liberty. This

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1. THE FEDERALIST NO. 1 (Alexander Hamilton), NO. 51 (James Madison).

liberty-or-security dilemma is significant to the study of the United States Constitution. Since at least the 1960s, the Supreme Court has repeatedly confronted this dilemma in the context of police use-of-force cases.<sup>2</sup> In these cases, the Supreme Court routinely grants summary judgment to police officers based on qualified immunity, thereby denying relief to aggrieved citizens.<sup>3</sup>

Although citizens are theoretically able to recover damages under Section 1983 of Title 42 for constitutionally violative force by government actors, qualified immunity protects government agents from liability when the alleged violation does not implicate a right that is “clearly established” by law.<sup>4</sup> In order to show that a right is clearly established, plaintiffs must plead facts nearly identical to existing precedent. Furthermore, a critical Supreme Court decision allows federal courts to consider *only* whether the right in question has been clearly established by prior caselaw with similar facts. If that right has not been clearly established, courts may grant qualified immunity without ever deciding whether the government conduct violated a constitutional right at all. On the question of whether government actors acted in violation of clearly established law, the Supreme Court has not ruled in favor of a Section 1983 plaintiff in over a decade.<sup>5</sup>

This pattern has elicited a litany of disapproval from critics who see it as a means of “keep[ing] the doors to the courthouse closed.”<sup>6</sup> For example, Professor Theodore Eisenberg has observed that the “gap between having a legal right and having an effective remedy . . . has rarely been wider than in litigation under Section 1983,”<sup>7</sup> and Professor Noah Feldman has concluded simply that the Supreme Court wants fewer suits against police to go forward.<sup>8</sup> Critics like Professors Eisenberg and Feldman fear that the insurgent, judge-made qualified immunity doctrine has metastasized to frustrate the ambitions of Section 1983.

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2. Joshua Minner, *Deadly Force in the Tenth Circuit*, 43 OKLA. CITY U. L. REV. 171 (2019); *e.g.* *Monroe v. Pape*, 365 U.S. 167 (1961).

3. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017)

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

5. Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MIN. L. REV. HEADNOTES 62, 63 (2016).

6. Schwartz, *supra* note 3, at 6.

7. THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION* 11 (5th ed. 2007).

8. Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG (Jan. 9, 2017, 3:08 PM), [<https://perma.cc/48T6-CLUY>].

Other critics worry that federal qualified immunity jurisprudence is creating constitutional stagnation. By dismissing a claim solely because the alleged right was not clearly established, courts bypass a valuable opportunity to clearly establish a right for the benefit of future plaintiffs.

Recently, the Supreme Court confirmed these points of criticism, reversing two Tenth Circuit opinions denying officers qualified immunity for use of force. In both cases, the Supreme Court only addressed the issue of whether the right in question had been clearly established, and declined to rule on whether a constitutional violation had actually occurred. The first decision was *Aldaba v. Pickens*, where the Tenth Circuit had denied officers qualified immunity for causing the death of a mentally ill hospital patient.<sup>9</sup> To overturn *Aldaba*, the Court relied on its reasoning found in the companion case, *Mullenix v. Luna*.<sup>10</sup> The second case to be vacated was *Pauly v. White*.<sup>11</sup> There, the Supreme Court vacated another Tenth Circuit denial of qualified immunity, this time for officers who shot and killed a man through the window of his home. In a stern per curiam opinion, the Court signaled its frustration with the Tenth Circuit and other lower courts:

In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.<sup>12</sup>

Despite the Court's apparent frustration and insistence on a more stringent standard, the Tenth Circuit has continued both to uphold decisions denying qualified immunity and to overturn opinions granting qualified immunity in excessive-force cases.<sup>13</sup> This Comment explores the Tenth Circuit's post-*Aldaba* and post-*Pauly* decisions and offers two explanations for the apparent disconnect. The first explanation is that the Tenth Circuit is

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9. *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), *vacated*, *Pickens v. Aldaba*, 577 U.S. 972 (2015).

10. *See* 577 U.S. 7 (2015).

11. 814 F.3d 1060 (10th Cir. 2017), *vacated*, *White v. Pauly*, 137 S.Ct. 548 (2017).

12. *Pauly*, 137 S.Ct. at 551–52 (internal quotations and citations omitted).

13. *See* Table 1, *infra*.

simply bucking the Supreme Court's admonitions. A second and equally plausible explanation is that this apparent disconnect actually represents a new, uneasy ecosystem in which lower courts deny qualified immunity via long, intensely fact-based opinions using an analysis that predates the Supreme Court's fateful *Pearson v. Callahan* decision.

This Comment contains four parts. Part I offers a brief overview of Section 1983 litigation, qualified immunity, and their application to officer use-of-force cases. Part II reviews some of the criticism and concern generated by the Supreme Court's qualified immunity decisions. Part III reviews recent Tenth Circuit qualified immunity decisions in light of the criticism explored in Part II. Specifically, it shows that the *Mullenix/Aldaba* and *Pauly* decisions have done little to deter the Tenth Circuit from finding for plaintiffs, developing constitutional law, and relying on Tenth Circuit precedent. Finally, Part IV concludes by offering two explanations for this apparent disconnect.

## I. SECTION 1983, EXCESSIVE FORCE, AND QUALIFIED IMMUNITY

This Part begins with a brief overview of Section 1983 and how the Supreme Court's qualified immunity analysis came to thwart several of Section 1983's objectives. It then turns its attention to the aforementioned Tenth Circuit qualified immunity decisions that the Supreme Court overturned.

### A. *Section 1983 and Qualified Immunity in the Supreme Court*

Congress enacted what is now Section 1983, Title 42, as Section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.<sup>14</sup> Congress intended this provision to allow courts to enforce the Fourteenth Amendment in southern states, where state-sponsored acts of white supremacist violence were rampant.<sup>15</sup> However, several Supreme Court decisions rendered this provision largely ineffectual,<sup>16</sup> and the number of Section 1983

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14. 42 U.S.C. § 1983; Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1780 (2016).

15. Cover, *supra* note 14, at 1780.

16. See generally *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating the 1875 Civil Rights Act); *United States v. Harris*, 106 U.S. 629 (1883) (overturning criminal indictments filed pursuant to the Ku Klux Klan Act for lynching African

suits plummeted before the turn of the century.<sup>17</sup> But by the mid-twentieth century, this trend reversed due to significant shifts in civil-rights legislation, prosecution, and jurisprudence.<sup>18</sup>

The 1960s Supreme Court cited states' historic failure to prosecute violence against African Americans as a basis for creating a new federal remedy: a cause of action against individual police officers for Section 1983 violations.<sup>19</sup> Later on, the Supreme Court went even further, relying on Section 1983 to strike down state statutes. In *Tennessee v. Garner*, for instance, the Court struck down a Tennessee statute authorizing police officers to use any means necessary to arrest fleeing or resisting subjects.<sup>20</sup> This was the first time the Supreme Court connected Section 1983 to the Fourth Amendment, treating the use of deadly force as a seizure subject to the Fourth Amendment's reasonableness requirement.<sup>21</sup> In *Graham v. Connor*, the Court developed a three-part test for determining the "reasonableness" of an officer's conduct.<sup>22</sup> Courts would consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of officers or others, and (3) whether the suspect is actively resisting or evading arrest (the "*Graham* factors.")<sup>23</sup> The Court noted that the proper inquiry was an objective standard that would be "judged from the perspective of a reasonable officer on the scene," and that would "embody allowance for the fact that police officers are often forced to make split-second judgments."<sup>24</sup>

Qualified immunity entered Supreme Court Section 1983 jurisprudence as a modest good faith exception to government liability for public officials who believed that their conduct was

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Americans); *United States v. Cruikshank*, 92 U.S. 542, 557 (1875) (overturning federal criminal indictments filed pursuant to the 1870 Civil Rights Act for involvement in lynching African Americans). See also Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 11 (1985).

17. Cover, *supra* note 14, at 1780–81.

18. *Id.* at 1782.

19. *Monroe v. Pape*, 365 U.S. 167 (1961).

20. 471 U.S. 1 (1985).

21. *Id.* at 2; Minner, *supra* note 3, at 178.

22. 490 U.S. 386 (1989).

23. *Id.* at 396.

24. *Id.* at 396–97.

lawful.<sup>25</sup> Qualified immunity was rooted in the common law good-faith defense, and the Supreme Court reasoned that Congress would not have silently abolished this tradition by promulgating Section 1983.<sup>26</sup> By 1982, the Court announced its modern qualified-immunity doctrine, greatly expanding it to cover even officials who, on certain occasions, “violate peoples’ rights maliciously.”<sup>27</sup> The newly invigorated qualified immunity caused Section 1983 to become one of the widest gaps between right and remedy in American Law.<sup>28</sup> *Harlow v. Fitzgerald* debuted the Court’s two-prong qualified-immunity test.<sup>29</sup> First in Prong One, courts must determine that a reasonable jury could conclude that a constitutional violation had occurred. Second with Prong Two, courts must conclude that the allegedly violated constitutional right was “clearly established” at the time the action occurred.<sup>30</sup>

As one scholar notes, Prong 2 makes it exceedingly difficult for victims to obtain relief.<sup>31</sup> In order to show that a right is clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate,” and courts must not define clearly established law at a high level of generality.<sup>32</sup> As a practical matter, this means that the plaintiff needs to allege facts nearly identical to one of a handful of cases in which a federal court denied qualified immunity. If the victim cannot point to a judicial decision involving a similar context and the same conduct, the officer is shielded from liability.<sup>33</sup>

At first, the Supreme Court required lower courts to apply the two-prong inquiry in order.<sup>34</sup> Consistent Prong One analyses thus allowed for the development of “clearly established” constitutional rights.<sup>35</sup> However, in 2009 the Court retreated from the

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25. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, THE APPEAL (Jun. 19, 2019), <https://theappeal.org/qualified-immunity-explained/> [https://perma.cc/BEG9-C8RP].

26. See e.g., *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Owen v. City of Indep., Mo.*, 445 U.S. 622, 637 (1980).

27. Ali & Clark, *supra* note 25.

28. Eisenberg, *supra* note 7, at 11.

29. 457 U.S. 800 (1982).

30. *Id.* at 818.

31. Ali & Clark, *supra* note 25.

32. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

33. Ali & Clark, *supra* note 25.

34. *Saucier v. Katz*, 533 U.S. 194, 200 (2001)

35. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1629 n.146 (2011).

rigid two-prong application and instead permitted courts to skip straight to Prong Two.<sup>36</sup> In *Pearson v. Callahan*, the Court held that judges could exercise “sound discretion” in deciding whether to reach the constitutional merits “for the benefit of future litigants or, if they wish, to jump directly to the clearly established prong.”<sup>37</sup> Since then, courts have been willing to grant qualified immunity without ever determining whether a constitutional right had been violated.<sup>38</sup> *Pearson* thus transformed a two-step analysis into two independent and sufficient grounds for granting qualified immunity.

In sum, the Supreme Court’s *Pearson* analysis makes recovery for Section 1983 plaintiffs conditional upon a process of constitutional development that has been largely truncated.<sup>39</sup> For this reason, scholars have criticized qualified immunity for rendering Section 1983 all but toothless. What once struck down state statutes is now afforded a mechanism to bypass the development of constitutional rights altogether. As the next section will demonstrate, the Supreme Court frequently uses this mechanism to overturn lower court denials of qualified immunity without developing the constitutional right at issue.

### B. *Section 1983 and Qualified Immunity in the Tenth Circuit*

Since *Pearson*, the Supreme Court has routinely overturned decisions denying qualified immunity on the grounds that the alleged right in question had not been clearly established. Recently, in *Mullenix v. Luna* and *White v. Pauly*, the Supreme Court overturned two Tenth Circuit rulings on exactly this ground.<sup>40</sup>

The Court’s *Mullenix* decision vacated and remanded the holding in a Tenth Circuit companion case, *Aldaba v. Pickens*.<sup>41</sup>

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36. *Pearson v. Callahan*, 555 U.S. 223 (2009).

37. Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 61 (2016).

38. *E.g.*, *Carabajal v. City of Cheyenne, Wyo.*, 847 F.3d 1203 (10th Cir. 2017); *Beckles v. City of New York*, 492 F. App’x. 181 (2d Cir. 2012); *Hollingsworth v. City of St. Ann*, 800 F.3d 985 (8th Cir. 2015).

39. Comedian Hasan Minhaj has analogized the predicament of post-*Pearson* Section 1983 plaintiffs to that of a job applicant who is not hired due to their lack of work experience. Such an applicant cannot be hired without experience, but cannot gain experience without being hired. *See Patriot Act S4*, E6.

40. 577 U.S. 7, 19 (2015); 137 S. Ct. 548, 552–53 (2017).

41. 844 F.3d 870 (2016).



In *Mullenix*, the representative of the decedent's estate brought a Section 1983 suit against a state trooper, Officer Mullenix, alleging that he had used excessive force when he shot and killed a fleeing motorist approaching spike strips during a high-speed chase.<sup>42</sup> After the district court and the Fifth Circuit denied Officer Mullenix's motion for summary judgment based on qualified immunity, the Supreme Court granted certiorari and reversed. As expected, the per curiam majority skipped straight to Prong Two and inquired only whether the right had been clearly established.<sup>43</sup> The majority faulted the Fifth Circuit for defining "at a high level of generality" the right in question—a right proscribing "deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."<sup>44</sup> According to the majority, the Fifth's Circuit's articulation of that right was merely a reformulation of *Garner's* 'general' test for excessive force. The Fifth Circuit should have instead considered qualified immunity in the specific context of the case i.e. a car chase. Since the Supreme Court's car-chase-specific precedent did not put the constitutional question beyond debate, the Court reversed the Fifth Circuit's decision denying qualified immunity to Officer Mullenix.

In strong dissent, Justice Sotomayor seemed to champion precisely the "general" test embodied by *Garner* but lambasted by the majority. Rather than interrogate the facts for sufficiently similar precedent, Sotomayor insisted that the question of whether the right was clearly established turned on "whether, under all the circumstances known to Mullenix, there was a governmental interest in shooting at the car rather than waiting for it to run over spike strips." She labeled the majority's concerns about over-generalizing the right at stake a "red herring," insisting that the right in question was indeed clearly established because "Mullenix seemed to have *no* reasons to prefer shooting to following orders [not to shoot]." Sotomayor also noted her concern over "the culture this Court's decision supports." "By sanctioning a shoot first, think later approach to policing, the Court renders the protections of the Fourth Amendment hollow."<sup>45</sup> By voicing popular constitutional and policy criticisms of the

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42. *Mullenix*, 577 U.S. at 8–11.

43. *Id.* at 7–11.

44. *Id.* at 12–16.

45. *Id.* at 21–24.

Court's post-*Pearson* framework, Sotomayor's dissent urges the Court to return to an earlier and less stringent standard.

Having decided *Mullenix*, the Supreme Court vacated another Tenth Circuit case, *Aldaba v. Pickens*, for rehearing under the newly clarified standard.<sup>46</sup> In *Aldaba I*, the Tenth Circuit denied qualified immunity to officers whose use of a taser caused the death of a mentally ill hospital patient. The patient, Mr. Leija, had refused vital medications, and the nurse had called law enforcement to assist with administering an injection.<sup>47</sup> After *Mullenix*, Judge Phillips, the lone dissenter in *Aldaba I*, wrote the opinion on remand. He concluded that, like the Fifth Circuit in *Mullenix*, the Tenth Circuit had erred on the clearly established question. Judge Phillips contended that the Tenth Circuit had erred by relying on precedent with "markedly different" facts than the one at hand. Although the plaintiff had relied on three cases involving the unlawful use of a taser, Judge Phillips stressed that the facts in *Aldaba* were too distinct to be controlled by those previous decisions.<sup>48</sup> Since none of the previous cases involved officers acting to restrain a patient to allow the administration of "life-saving care," no case squarely governed. Accordingly, the Tenth Circuit remanded the case with instructions to grant summary judgment in favor of the officers.<sup>49</sup>

In *White v. Pauly*, the Supreme Court reviewed yet another Tenth Circuit denial of qualified immunity only two years after *Mullenix/Aldaba*. In that case, the plaintiff's estate brought a Section 1983 action alleging that officers used excessive force when they shot and killed Samuel Pauly through the window of his New Mexico home.<sup>50</sup> According to the contested facts, two officers had arrived at brothers Samuel and Daniel Pauly's home, but had failed to announce themselves. The Pauly brothers only heard the words, "We're coming in. We're coming in." Officer White arrived at the scene sometime later, heard one of the brothers say, "We have guns," drew his own gun, and took cover. Daniel Pauly fired two shots, after which another officer returned fire. Several seconds later, White shot and killed Samuel Pauly through a window. The District Court denied qualified immunity, and a divided Tenth Circuit panel affirmed on the

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46. *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015) [hereinafter, *Aldaba I*]; *Aldaba*, 844 F.3d 870 [hereinafter, *Aldaba II*].

47. *Aldaba I*, 777 F.3d at 1161–62.

48. *Aldaba II*, 844 F.3d at 870–77.

49. *Id.* at 879–80.

50. *Pauly*, 137 S. Ct. 548 at 548–51.

grounds that the first two officers should have understood that failing to announce themselves would have prompted Pauly's right to self-defense, and that a reasonable officer in White's position would have warned Samuel Pauly to drop his weapon. According to the Supreme Court, the Tenth Circuit reached this conclusion by erroneously relying on "general statements" from *Garner* and *Graham*.<sup>51</sup>

Once again, the Supreme Court faulted the Tenth Circuit's "clearly established" jurisprudence.<sup>52</sup> According to the Court, the Tenth Circuit had "misunderstood the 'clearly established' analysis" when it "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." Instead, like the Fifth Circuit in *Mullenix*, the Tenth Circuit relied on an overly general reformulation of *Graham* and *Garner*, erroneously citing cases that did "not by themselves create clearly established law outside an obvious case."<sup>53</sup>

After *Pearson*, and especially after near back-to-back reversals on the same prong, one might expect the Tenth Circuit to begin denying qualified immunity more routinely. Because almost every new case is bound to involve some degree of novelty, insistence on fact-specificity appears to doom most Section 1983 plaintiffs on Prong Two. It seems that so long as the constellation of facts involves some articulable factor distinguishing the case from past precedent, the Tenth Circuit is bound not only to summarily dismiss the case via qualified immunity, but also, per *Pearson*, to decline the opportunity to clearly establish the implicated right for future litigants.

As this Comment will demonstrate, this is not the case. The next Part examines some of the concerns surrounding the impact of the Supreme Court's qualified-immunity Prong Two doctrine. Then, I turn to recent Tenth Circuit decisions to demonstrate that these concerns have yet to uniformly materialize.

## II. QUALIFIED IMMUNITY CONCERNS

As noted, constitutional law scholars are concerned that lower courts will use the Supreme Court's qualified immunity doctrine to summarily deny relief to Section 1983 plaintiffs and

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51. *Id.* at 550.

52. *Id.* at 551.

53. *Id.* at 552 (internal quotations omitted).

stagnate the development of constitutional law. In addition to these more generalized concerns, several scholars have voiced concerns over the effect that the Supreme Court's qualified-immunity decisions might have on circuit court qualified-immunity jurisprudence. This Part focuses on two such concerns—strategic decision-making and negating circuit courts' capacity to clearly establish the law.

The first concern is the encouragement of judicial “strategic behavior.” Professors Aaron Nielson and Christopher Walker opined that when they have discretion over whether to jump straight into Prong Two, certain judges may purposely avoid the constitutional merits in Section 1983 claims even in cases where they could establish a constitutional right by ruling on those merits.<sup>54</sup> Drawing on data from hundreds of circuit court opinions, Nielson and Walker indicated that the ideological composition of the three-judge panels are often outcome determinative.<sup>55</sup> While this is unsurprising, Nielson and Walker also pointed out that when panels are ideologically divided, the discretion afforded judges in Section 1983 may lead to undesirable strategic conduct. Such strategic behavior may be manifesting itself in two ways.

First, judges may feel compelled to preserve consensus by concluding that the alleged violation did not implicate clearly established law (jumping straight to Prong Two). These “compromise” decisions prevent the panel from fragmenting. As Judge Posner reminds us, “[judges] are all-too-human workers,” susceptible to pressures like “dissent-aversion” and “collegiality” when working to achieve a consensus with their judicial colleagues. Thus, in qualified-immunity cases, the psychology of group decision-making may play a greater role in the final

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54. Nielson & Walker, *supra* note 37, at 63.

55. *Id.* at 63–64:

Panels composed unanimously of judges appointed by a Republican President are more likely to . . . find no constitutional violation. Conversely, panels entirely appointed by a Democratic President are more likely than any other type of panel to recognize a new constitutional right. And judges appointed by a Democratic President behave differently when they write, rather than join, an opinion. On mixed panels, however, there are no statistically significant differences in how the panels behave along these dimensions—regardless of which party is in the majority on the panel. In other words, when panels are ideologically divided, pronounced differences disappear, which itself could suggest strategic behavior via a collegial concurrence or even a majority compromise to avoid dissent.

decision than personal points of views, especially on ideologically divided panels.<sup>56</sup>

Second, Nielson and Walker suggested that judges may be issuing unpublished opinions to purposely avoid clearly establishing rights. Unpublished opinions relieve circuit court judges from the burden of issuing detailed opinions in cases that do not raise novel legal issues. However, unpublished opinions generally do not create precedent. This is especially important in qualified-immunity cases. “Since whether immunity applies is highly fact-dependent, it follows that unpublished opinions that do not provide the facts necessarily are less able to clearly establish the law.”<sup>57</sup> The option of resolving an appeal without creating ripples may factor strongly into a judge’s decision to find for a plaintiff on a particular hours without “clearly establishing” that same relief for later plaintiffs.

In addition to strategic behavior, critics cite concern that the Supreme Court is threatening lower courts’ capacity to create clearly established precedent. Although *Harlow* left open the question of which precedent could clearly establish Section 1983 rights, circuit courts routinely rely on their own precedent and, occasionally, on other circuits. The Supreme Court itself denied qualified immunity to state officials in *Hope v. Pelzer*, citing “binding Eleventh Circuit precedent.”<sup>58</sup>

Despite this longstanding practice, Professor Kit Kinports worries that the Supreme Court may be signaling a covert sea-change.<sup>59</sup> In recent years, the Supreme Court has employed equivocal language questioning whether circuit courts could rely on their own past decisions or the decisions of other circuits.<sup>60</sup> For example, in 2012, Justice Thomas prefaced a discussion of the Tenth Circuit’s treatment of prior caselaw with the following: “Assuming arguendo that controlling Court of Appeals’ authority could be a dispositive source of clearly established law. . .”<sup>61</sup> Despite a 2011 opinion describing a “robust ‘consensus of cases of persuasive authority’” as necessary to support a denial of immunity,<sup>62</sup> Justice Alito recharacterized this same description as what a Section 1983 plaintiff must show “at a

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56. RICHARD A. POSNER, *HOW JUDGES THINK* 31–33 (paperback ed. 2010).

57. Nielson & Walker, *supra* note 37, at 76.

58. 536 U.S. 730, 741–42 (2002); Kinports, *supra* note 5, at 69.

59. Kinports, *supra* note 5, at 62.

60. *Id.* at 69–72.

61. *Reichle v. Howards*, 566 U.S. 658, 665–66 (2012); *see also id.* at 70.

62. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 742 (2011); Kinports, *supra* note 5, at 71.

minimum.”<sup>63</sup> In one opinion for the Court, he deployed equivocal language to obscure whether “a robust consensus of cases of persuasive authority’ could itself clearly establish the federal right” alleged by a plaintiff.<sup>64</sup> This leads Professor Kinports to worry that, through equivocal language, “the Supreme Court’s qualified immunity opinions . . . have made a *sub silentio* assault on constitutional tort suits.”<sup>65</sup>

### III. TENTH CIRCUIT OPINIONS SINCE *MULLENIX/ALDABA* AND *PAULY*

Clearly, critics worry that the Supreme Court’s recent qualified-immunity decisions will converge to deny relief to constitutional-tort plaintiff, stagnate the development of constitutional rights, encourage strategic decision-making on the circuit court level, and negate the precedential value of circuit court precedent. Considering these concerns, especially in light of near back-to-back reversals in excessive force cases, it is worth analyzing the trends in Tenth Circuit use-of-force decisions since *Mullenix/Aldaba* and *Pauly*. As we shall see, many of the critics’ concerns do not present themselves in Tenth Circuit decisions involving officer use of force.

First and foremost, the Tenth Circuit still denies qualified immunity to officers in excessive-force claims. Second, rather than decide these cases “strategically,” the Tenth Circuit seems to have no issue engaging Prong One. The court also appears to be using unpublished opinions to resolve routine cases, not strategically avoiding dissents or creating precedent. Finally, the Tenth Circuit continues to rely on its own preexisting precedent to determine whether the right in question is clearly established.

#### A. *The Tenth Circuit is Still Denying Qualified Immunity*

The Tenth Circuit continues to deny qualified immunity in Section 1983 use-of-force suits. Since *Mullenix/Aldaba* and *Pauly*, it has denied qualified immunity to police officers in most published decisions where it reached the merits of the case.

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63. *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); Kinports, *supra* note 5, at 71.

64. *City and Cnty. of S.F., Cal. v. Sheehan*, 135 S.Ct. 1765, 1778 (2015); Kinports, *supra* note 5, at 71.

65. Kinports, *supra* note 5, at 64.

**Table 1:** Denials of Qualified Immunity in Published Opinions

Name	Cite	Deny QI?
<i>Estate of Ceballos v. Husk</i>	919 F.3d 1204 (2019)	YES
<i>McCoy v. Meyers</i>	887 F.3d 1034 (2018)	YES
<i>Lee v. Tucker</i>	904 F.3d 1145 (2018)	YES
<i>Colbruno v. Kessler (I)</i>	928 F.3d 1155 (2019)	YES
<i>Colbruno v. Kessler (II)</i>	928 F.3d 1155 (2019)	NO
<i>Perea v. Baca</i>	817 F.3d 1198 (2016)	YES
<i>Davis v. Clifford</i>	825 F.3d 1131 (2016)	YES
<i>Redmond v. Crowther</i>	882 F.3d 927 (2018)	NO
<i>Carabajal v. Cheyenne</i>	847 F.3d 1203 (2017)	NO
<i>Smart v. Wichita</i>	951 F.3d 1161 (2020)	YES <sup>66</sup>

In *Lee v. Tucker*, one year after the Supreme Court vacated *Aldaba*, a fractured Tenth Circuit panel again denied qualified immunity to officers who used a taser in violation of the Fourth Amendment.<sup>67</sup> The majority concluded that the officers violated the plaintiff's rights by applying the *Graham* factors.<sup>68</sup> In approaching Prong Two, the judges had learned their lesson from *Mullenix/Aldaba*, detailing at length their conclusion that past precedent clearly established the plaintiff's rights.<sup>69</sup> The majority concluded that a single Tenth Circuit decision, *Cavanaugh v. Woods Cross City*, was "sufficiently analogous" to the facts at hand to establish "that the use of a Taser without warning on a non-resisting misdemeanant violates the Fourth Amendment's excessive force protections."<sup>70</sup> Notably, *Cavanaugh* was the same case the court cited as the clearly establishing precedent in its vacated *Aldaba I* opinion.<sup>71</sup>

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<sup>66</sup> In *Smart v. Wichita*, the majority granted qualified immunity on two claims, but overturned the lower court's grant of qualified on the third claim. Judge Bacharach dissented, arguing for a denial of qualified immunity on all three claims. I discuss this case below in greater detail.

<sup>67</sup> *Lee v. Tucker*, 904 F.3d 1145, 1149–50 (2018).

<sup>68</sup> *Id.* at 1149.

<sup>69</sup> *Id.* at 1149–50.

<sup>70</sup> *Id.* (citing *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010)).

<sup>71</sup> *Aldaba I*, 777 F.3d 1148, 1157.

From the *Tucker* opinions, it is not at all clear that the Supreme Court had accomplished what it had set out to do in *Mullenix*. Judge Phillips, the lone *Aldaba I* dissenter, again dissented in *Tucker*.<sup>72</sup> He argued that *Mullenix* and *Aldaba II* should control, and pointed out that *Aldaba I* had been vacated after having relied on the same piece of caselaw.<sup>73</sup> Judge Phillips also detailed the policy justifications for the doctrine of qualified immunity, just as the Supreme Court had done in *Mullenix*.<sup>74</sup> From Phillips' perspective, there was simply no logic in accepting that the facts in *Tucker* could satisfy the "clearly established" requirement when those of *Mullenix/Aldaba* could not.

The *Tucker* opinions might underscore the limited impact that the Supreme Court's directives will have on qualified-immunity cases. Despite its strongly worded admonitions, the Supreme Court simply lacks capacity to review every denial of qualified immunity at the circuit court level.<sup>75</sup> The Court can clarify its standard—more facts, greater specificity, greater similarity to past precedent—but it cannot have the final say on every Section 1983 use-of-force claim. In *Tucker*, the majority and dissent did what every circuit court must do in the wake of *Mullenix/Aldaba* and *Pauly*: precisely calibrate the newly articulated qualified-immunity standard. How many facts must the court observe? How much specificity is required? To what extent must the case resemble past precedent?

The split in *Tucker* was one of degree, not kind. As circuit courts continue to wrestle with this standard, it is far from clear that *Mullenix* and *Pauly* have succeeded in "closing the courthouse" doors to Section 1983 plaintiffs, who continue to overcome qualified immunity in the Tenth Circuit. In sum, if it is true the Supreme Court has been signaling lower courts to allow fewer suits against police officers, the Tenth Circuit has declined the invitation.

However, this trend is not as pronounced in unpublished opinions, where only two out of ten decisions denied qualified immunity.<sup>76</sup> Despite Professors Nielson and Walker's concerns,

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72. *Tucker*, 904 F.3d at 1151.

73. *Id.* at 1158–59.

74. *Id.* at 1151.

75. See *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring) (stating in a qualified-immunity case that the "question [of the reasonableness of officer's conduct], which turns entirely on an interpretation of the record in one particular case, is a quintessential example of the kind that we almost never review.").

76. See Table 2, *infra*.



this appears to be the result of Tenth Circuit judges using unpublished opinions “properly” to dispose of easy cases. I take up a detailed discussion of these unpublished opinions below.

**Table 2:** Denials of Qualified Immunity in Unpublished Opinions

Name	Cite	Deny QI?
<i>Myers v. Brewer</i>	773 F. App'x 1032 (2019)	YES
<i>Osterhout v. Morgan</i>	763 F. App'x 757 (2019)	YES
<i>Choate v Huff</i>	773 F. App'x 484 (2019)	NO
<i>Crall v. Wilson</i>	769 F. App'x 573 (2019)	NO
<i>Ronquillo v. Denver</i>	720 F. App'x 434 (2017)	NO
<i>Brown v. Colorado Springs</i>	709 F. App'x 906 (2017)	NO
<i>Malone v. Cnty. of Dona Ana</i>	707 F. App'x 552 (2017)	NO
<i>Johnson v. Peay</i>	704 F. App'x 738 (2017)	NO
<i>Starrett v. Lander</i>	699 F. App'x 805 (2017)	NO
<i>Scott v. Albuquerque</i>	711 F. App'x 871 (2017)	NO

*B. The Tenth Circuit is Developing Constitutional Law in Section 1983 Disputes*

Despite Nielson and Walker’s concerns about post-*Pearson* courts’ incentives to decide Section 1983 cases “strategically,” the data also indicate that the Tenth Circuit has a greater appetite for constitutional development than the Supreme Court.<sup>77</sup> Unlike the Supreme Court, the Tenth Circuit routinely conducts a Prong One analysis in order to determine whether a constitutional right was violated before deciding whether or not that right was clearly established. And rather than using Prong Two to avoid dissents, it has published several such opinions over vigorous dissents.<sup>78</sup>

77. See Table 3, *infra*.

78. See, e.g., *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1223; see also *Tucker*, 904 F.3d at 1151; and *Colbruno v. Kessler*, 928 F.3d 1155, 1166 (2019).

**Table 3:** Prong One and Prong Two Analyses in Published Opinions

Case	Cite	Violate Right?	Right Clearly Established?
<i>Ceballos v Husk</i>	919 F.3d 1204 (2019)	YES	YES
<i>McCoy v Meyers</i>	887 F.3d 1034 (2018)	YES	YES
<i>Lee v Tucker</i>	904 F.3d 1145 (2018)	YES	YES
<i>Colbruno v. Kessler (I)</i>	928 F.3d 1155 (2019)	YES	YES
<i>Colbruno v. Kessler (II)</i>	928 F.3d 1155 (2019)	NO ANALYSIS	NO
<i>Perea v. Baca</i>	817 F.3d 1198 (2016)	YES	YES
<i>Davis v. Clifford</i>	825 F.3d 1131 (2016)	YES	YES
<i>Redmond v. Crowther</i>	882 F.3d 927 (2018)	NO	NO
<i>Carabajal v. Cheyenne</i>	847 F.3d 1203 (2017)	NO	NO
<i>Smart v. Wichita</i>	951 F.3d 1161 (2020)	YES	YES

The Tenth Circuit’s willingness to develop constitutional law may indicate some level of frustration with the harshness of the Supreme Court’s qualified-immunity standard. In *Smart v. Wichita*, Judge McHugh departed from the post-*Pearson* framework entirely, concluding a Prong One analysis in favor of the plaintiff before concluding Prong Two in favor of the officers, granting qualified immunity. In this case, Wichita Police Officers Froese and Chafee fatally shot Mr. Marquez Smart, a Black man, five times in the back. The plaintiffs’ medical expert concluded “that Mr. Smart was on the ground when he suffered the final three shots.”<sup>79</sup> The facts of the case were bitterly contested, including whether Mr. Smart had discharged a firearm and whether he had been armed at all. Mr. Smart’s estate sued the City of Wichita alleging three constitutional violations: (1) shooting an unarmed man, (2) failing to warn Mr. Smart before

79. Estate of Smart v. City of Wichita, 951 F.3d 1161, 1161–68 (10th Cir. 2020).

shooting, and (3) shooting Mr. Smart after it became clear he posed no threat.

The court unanimously denied qualified immunity with respect to the third violation. With respect to the first violation—shooting an unarmed man—the majority conducted a six-page Prong One analysis and decided that a reasonable jury could have found that the officers violated Mr. Smart’s constitutional right to be free from excessive force.<sup>80</sup> However, the majority ultimately concluded that this right had not been established.<sup>81</sup>

The importance of this opinion is difficult to overstate. In a published opinion, Judge McHugh utilized a pre-*Pearson* framework. Declining the Supreme Court’s invitation to skip to Prong Two, the majority diligently analyzed the Wichita Police Officers’ conduct as shown by the evidence. Although the majority ultimately granted summary judgment on qualified-immunity grounds, the Prong One analysis serves to “clearly establish” a constitutional right for unarmed civilians to be free from excessive force, empowering future Section 1983 plaintiffs and putting police officers on notice. Although one cannot say for sure, this departure from a strict post-*Pearson* analysis might reveal some sympathy with prevailing criticism of the Supreme Court’s harsh qualified-immunity framework.

The Tenth Circuit engages in Prong One analyses in unpublished opinions as well. This may further indicate that, contrary to Professors Nielson and Walker’s concerns, the Tenth Circuit is not relying on unpublished opinions as a way to avoid constitutional development.

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80. *Id.* at 1169–72.

81. *Id.* at 1173–74. Judge Bacharach dissented and stated his arguments for denying qualified immunity on all three claims. *Id.* at 1178.

**Table 4:** Prong One and Prong Two Analyses in Unpublished Opinions

Name	Cite	Prong One	Prong Two
<i>Myers v. Brewer</i>	773 F. App'x 1032 (2019)	YES	YES
<i>Osterhout v. Morgan</i>	763 F. App'x 757 (2019)	MAYBE	YES
<i>Choate v Huff</i>	773 F. App'x 484 (2019)	NO ANALYSIS	NO
<i>Crall v. Wilson</i>	769 F. App'x 573 (2019)	NO	NO
<i>Ronquillo v. Denver</i>	720 F. App'x 434 (2017)	NO	NO
<i>Brown v. Colorado Springs</i>	709 F. App'x 906 (2017)	NO ANALYSIS	NO
<i>Malone v Cnty. of Dona Ana</i>	707 F. App'x 552 (2017)	NO ANALYSIS	NO
<i>Johnson v. Peay</i>	704 F. App'x 738 (2017)	NO	NO
<i>Starrett v. Lander</i>	699 F. App'x 805 (2017)	NO	NO
<i>Scott v. Albuquerque</i>	711 F. App'x 871 (2017)	YES	NO

Furthermore, with a few notable exceptions, the Tenth Circuit's unpublished decisions seem to involve "routine" fact patterns warranting the use of an unpublished opinion. In its two unpublished opinions denying qualified immunity, the facts as found by the district court indicated an extreme act of unnecessary deadly violence and violence against a non-resisting arrestee.<sup>82</sup> Three decisions granting qualified immunity involved suspects fleeing in cars, which (according to *Mullenix*) should not

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82. See *Myers v. Brewer*, 773 F. App'x 1032, 1037 (2019) (involving an officer who shot a deadly beanbag round from six to eight feet away at an unarmed citizen who was not suspected of a crime and was not resisting arrest); see also *Osterhout v. Morgan*, 763 F. App'x 757 (2019).

be held to implicate clearly established rights.<sup>83</sup> Two decisions involved truly novel fact patterns.<sup>84</sup> And one involved a plaintiff who urged the district court to conduct the clearly established inquiry via a reformulation of *Graham* and *Garner*, a method rejected by the Supreme Court in *Pauly*.<sup>85</sup> Finally, two decisions involved plaintiffs who simply failed to cite precedent with sufficiently analogous facts.<sup>86</sup>

As this analysis shows, the Tenth Circuit appears to deploy unpublished opinions to resolve easy Section 1983 decisions rather than to avoid fracturing opinions or establishing precedent. At the very least then, contrary to the concerns of Professors Nielson and Walker, the Tenth Circuit's published and unpublished opinions indicate that collegiality and dissent-aversion have not deterred Tenth Circuit judges from constitutional development.

*C. The Tenth Circuit is Relying on Circuit Court Caselaw to Clearly Establish Plaintiffs' Rights*

Despite Professor Kinports's concerns to the contrary, the Tenth Circuit still relies on its own precedent to determine whether a right is "clearly established."<sup>87</sup> In every case examined for this Comment, the Tenth Circuit announced the standard for resolving Prong Two as hinging on Supreme Court or Tenth Circuit precedent.<sup>88</sup>

As discussed, the majority in *Lee v. Tucker* resolved the case for the plaintiff by relying on only a single prior Tenth Circuit opinion.<sup>89</sup> Although this elicited a passionate dissent, Judge Phillips only disputed the adequacy of the precedent itself, never questioning the majority's method of relying on Tenth Circuit

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83. *Crall v. Wilson*, 769 F. App'x 573 (2019); *Malone v. Bd. of Cnty. Comm'rs. for Cnty. of Dona Ana*, 707 F. App'x 552 (2017); *Johnson v. Peay*, 704 F. App'x 738 (2017).

84. *Choate v Huff*, 773 F. App'x 484 (2019) (involving injuries sustained by a police dog); *Estate of Ronquillo v. City and Cnty. of Denver*, 720 F. App'x 434 (2017) (involving the use of a robot).

85. *Brown v. City of Colorado Springs*, 709 F. App'x 906, 914 (2017).

86. *See Starrett v. City of Lander*, 699 F. App'x 805, 807 (2017); *Scott v. City of Albuquerque*, 711 F. App'x 871, 876–78 (2017).

87. *See, e.g., Colbruno*, 928 F.3d at 1164; *Redmond*, 882 F.3d at 936; *Estate of Ceballos*, 919 F.3d at 1214; *Tucker*, 904 F.3d at 1149–50.

88. *See, e.g., McCoy v. Meyers*, 887 F.3d 1034, 1044 (2018); *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016).

89. *Tucker*, 904 F.3d at 1149–50.

precedent.<sup>90</sup> In 2019, the Tenth Circuit again resolved Prong Two in favor of the plaintiffs on the basis of a single Tenth Circuit decision, which again prompted dissent.<sup>91</sup> Interestingly, in *Perea v. Baca*, the Tenth Circuit cited several prior published opinions as well as two previous unpublished Tenth Circuit opinions in concluding that the right in question had been clearly established.<sup>92</sup>

Furthermore, since *Pauly/Aldaba*, the Tenth Circuit has explicitly held that it can rely on other circuits' caselaw when the number of cases is "overwhelming."<sup>93</sup> In *Davis v. Clifford*, in addition to citing one prior Tenth Circuit case, the judges relied on two decisions from other circuit courts of appeal to bolster its conclusion that "the use of disproportionate force to arrest an individual who has not committed a serious crime and who poses no threat to herself or others constitutes excessive force."<sup>94</sup>

Thus, despite the Supreme Court's equivocal language, the Tenth Circuit still relies on its own published and unpublished precedent, and decisions from other circuits, for Prong Two analysis.

#### IV. WHERE ARE WE NOW? TWO EXPLANATIONS FOR THE SUPREME COURT/TENTH CIRCUIT DISCONNECT

As demonstrated, while the Supreme Court routinely grants qualified immunity, the Tenth Circuit continues to deny it in a majority of recent cases. Furthermore, the Tenth Circuit frequently declines the Supreme Court's invitation to side-step Prong One and continues to rely on its own precedent and, occasionally, the precedent of other circuit courts. This leaves us with several important questions. What accounts for this apparent disconnect? What impact, if any, did the Supreme Court's *Mullenix* and *Pauly* admonitions have on the Tenth Circuit's qualified-immunity jurisprudence?

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90. *Id.* at 1157–59 (Phillips, J., dissenting).

91. *Estate of Ceballos*, 919 F.3d at 1215, 1224 (2019).

92. 817 F.3d at 1204.

93. *See, e.g., Estate of Ceballos*, 919 F.3d at 1213.

94. 825 F.3d 1131, 1137 (2016).

A. *Resistance or New Status Quo?*

On the one hand, the Supreme Court/Tenth Circuit disconnect offers the conclusion that the Tenth Circuit is simply disregarding the Supreme Court altogether. We might be able to infer this conclusion from the Supreme Court's rebuke in *Pauly* and Judge Phillips' dissent in *Tucker*.<sup>95</sup> If true, critics of the Supreme Court's qualified-immunity jurisprudence may breathe an uneasy sigh of relief. The Supreme Court simply cannot review every federal use-of-force claim and is thus limited to issuing occasional admonishments. Further, for the moment, the Supreme Court has not been willing to prohibit circuit courts from resolving Section 1983 claims with their own precedent. Unless the Supreme Court has the appetite for resolving many more use-of-force cases, then the post-*Mullenix* universe is not one in which Section 1983 plaintiffs automatically lose.

On the other hand, it is equally plausible to conclude that these dynamics do not suggest revolt so much as precisely the new ecosystem necessitated by the post-*Mullenix* and -*Pauly* ceasefire. Under this explanation, the Supreme Court loudly announced a rigid standard that merely effectuated more detailed, fact-intensive Prong Two analyses from circuit courts. In this way, these decisions rest on what Professor Frederic Bloom has termed a "noble lie."<sup>96</sup> They require "an interpretive method less rigorous in its reality than in its rhetoric." By loudly announcing this "noble lie," an outwardly inflexible standard that appears to doom recovery for most Section 1983 plaintiffs, the Supreme Court may have succeeded only in "constraining judicial discretion and narrowing judicial choice" at the circuit court level. Circuit court discretion is constrained because the court must analyze facts and at least purport to find sufficiently similar facts in existing precedent. The circuit court's choices are narrowed by proscribing a "general" reformulation of *Graham* and *Garner*, a standard that would be preferable to Section 1983 plaintiffs and to Justice Sotomayor.

The Court, after all, was fully aware of its limited resources when it resolved *Mullenix*, *Aldaba*, and *Pauly*. Further, the Court repeatedly justifies qualified-immunity decisions with the purported need to discourage judicial Monday morning quarterbacking with respect to officers' split-second decisions. By

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95. See *Pauly*, 137 S.Ct. at 551–52; see *Tucker*, 904 F. 3d at 1156–57.

96. Frederic Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1030 (2009).

insisting on detailed, fact-intensive deliberations, the Court emphasizes the importance of putting police officers “on notice” about specific conduct giving rise to Section 1983 liability. So despite the criticism elicited by its decisions, perhaps the Court called not for opinions routinely denying relief, but for longer, more detailed, more fact-intensive opinions.

Of course, even this new status quo may prove unsatisfactory to critics. If precisely the same use-of-force fact patterns present in two different federal jurisdictions, does the Constitution protect its citizens equally? Will the force of our constitutional protections wax and wane according to geography, panel ideology, and appetite for Prong Two analysis? If the current status quo persists, then federal use-of-force jurisprudence at the district and circuit court levels may be shaped more by local criminal-court politics than by anything resembling a unified constitutional jurisprudence. Although arguably at odds with the federal ambitions of Section 1983, this outcome is symmetrical with a critical policy justification behind qualified immunity, putting officers on notice. As differences in federal qualified-immunity jurisprudences calcify, law officers and citizens alike are placed “on notice” regarding what comprises a constitutional violation in the use-of-force context. In light of Section 1983’s failure to provide comprehensive national policy, citizens may turn to state legislatures to clarify officer use-of-force law. Several states have already codified their own versions of Section 1983 into their statutes or constitutions.<sup>97</sup> They could go even further and statutorily eliminate qualified immunity altogether, as Colorado did in the wake of the 2020 Black Lives Matter protests.<sup>98</sup>

### B. *Smart v. Wichita: Resistance and Status Quo in Action*

Both explanations—“resistance” and “new status quo”—were on display in the drama of *Smart v. Wichita*. In their briefs,

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97. See Jamilah King & Samantha Michaels, *California Just Passed New Limits on Police Use of Force. Not Everyone Is Happy With the Compromise*, MOTHER JONES (Aug. 19, 2019), <https://www.motherjones.com/crime-justice/2019/08/california-newsom-police-use-of-force-bill-stephon-clark-black-lives-matter-opposition/> [<https://perma.cc/KF7X-XVLD>].

98. See Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020), <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=7b7c351b378a>. [<https://perma.cc/9QFT-DRF2>].



the decedent's estate and amici rooted for resistance. Citing qualified immunity's "questionable foundation," Smart's estate quoted the district magistrate judge's concerns over qualified immunity's "continued march toward fully insulating police officers from trial," and pointed to a "growing, cross-ideological chorus of jurists and scholars" criticizing qualified immunity.<sup>99</sup> The ACLU's amicus brief went even further, urging the Tenth Circuit to "add its voice to the larger dialogue" on qualified immunity by reversing the grant of qualified immunity and "address[ing] the shortcomings of the doctrine."<sup>100</sup>

Despite these calls to resist, the *Smart* decision and dissent both challenge the notion that the Tenth Circuit is resisting the Supreme Court's qualified-immunity standard. Apparently taking seriously the Supreme Court's call for specificity, the *Smart* majority opinion reads thirty pages, while the dissent reads seventeen. Both opinions scrutinize facts; both opinions even utilize a diagram of the city block on which Mr. Marquez was shot. The majority opinion did not shy away from the Supreme Court's recent admonishments, acknowledging that "the Supreme Court has repeatedly chastised courts for relying in such a [general] manner on its broad statement of the law in *Garner*," citing *Mullenix*.<sup>101</sup> Utilizing the fact-intensive inquiry mandated by *Mullenix/Aldaba* and *Pauly*, the majority ultimately denied qualified immunity on one claim and clearly established a cause of action for future litigants on a second claim.

Perhaps we can conclude that because it denied the "general" analysis in *Garner*, the Tenth Circuit will return to the Supreme Court's pre-*Pearson* practice of a two-step analysis on all qualified-immunity decisions. Even if judges reluctantly conclude that a right in question is not "clearly established," they appear willing to engage in a Prong One analysis for the benefit of future litigants. This return to a pre-*Pearson* analysis may act as a "release valve" for the Supreme Court's highly criticized standard for qualified immunity.

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99. Brief for Appellant at 48–50, *Smart v. Wichita*, 951 F.3d 1161 (10th Cir. 2020) (cleaned up).

100. Brief for ACLU et al. as Amici Curiae at 4–5, 16, *Smart*, 951 F.3d 1161.

101. *Smart*, 951 F.3d at 1174.

## CONCLUSION

Time will tell whether the current state of affairs represents an uneasy ceasefire between a frustrated superior court and a recalcitrant inferior, or whether this represents a semi-stable state of affairs under which circuit courts can reach common-sense conclusions in controversial and difficult disputes. The Supreme Court may indeed continue to overturn denials of qualified immunity, and may continue to ratchet up an already stringent standard. Conversely, the Court may prove satisfied that highly fact-intensive decisions do not describe constitutional rights at a high level of generality. Circuit courts may take a more cautious approach by enumerating clearly established constitutional rights through a pre-*Pearson* analysis. At the very least, the lawyers and lawmakers may wish to rethink both the legislative intent behind Section 1983 and the policy goals behind qualified immunity, as well as whether and how those ambitions can be reconciled moving forward. Specifically, they may wish to consider how protections for good-faith official conduct can remain a narrow exception (rather than an insurmountable burden) for aggrieved use-of-force plaintiffs.

Such rethinking is probably politically necessary for lawmakers who still believe qualified immunity should play some role in use-of-force cases. In the wake of Black Lives Matter protests sparked by the slaying of George Floyd, popular qualified-immunity debates surged. Colorado promulgated the Enhance Law Enforcement Integrity Act, which allows plaintiffs to bypass qualified immunity altogether in officer use-of-force suits.<sup>102</sup> The United States House of Representatives proposed the Ending Qualified Immunity Act, which would expressly end qualified immunity in the United States.<sup>103</sup> With 66 co-sponsors, it is the first ever bill to have “tripartisan” support (Libertarian, Republican, Democrat) in Congress.<sup>104</sup> Even if legislative efforts stall, the debate seems to have reached the Supreme Court Justices. And although the Supreme Court ultimately denied a recent invitation to reconsider qualified immunity altogether, none other than Justice Thomas dissented from the denial of

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102. S.B. 217, 2020 Leg., 72nd Sess. (Co. 2020); see Sibilla, *supra* 98, at n. 103.

103. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020)

104. Billy Binion, *With 1 Republican Cosponsor, Rep. Justin Amash Gains Tripartisan Support To End Qualified Immunity*, Reason (Jun. 11, 2020), <https://reason.com/2020/06/11/justin-amash-tom-mcclintock-republican-cosponsor-tripartisan-support-to-end-qualified-immunity> [<https://perma.cc/6WXA-9W6K>].

review, expressing “strong doubts” about the court’s current qualified-immunity doctrine.<sup>105</sup> Together with Sotomayor’s *Mullinix* dissent, Thomas’s dissent shows that the Court’s current qualified-immunity framework elicits less than unanimous enthusiasm.

It remains to be seen whether or how the Tenth Circuit’s qualified immunity decisions can be fully reconciled with the Supreme Court’s framework. For now at least, the Tenth Circuit seems to be comfortable with granting relief to unlawful use-of-force victims and with developing constitutional law, whether through outright defiance, delicate fact-intensive analyses, or some combination of the two. For the moment, a pre-*Pearson* adherence to both prongs of the qualified immunity test affords plaintiffs slightly better odds of relief. But until legislative solutions or revised Supreme Court doctrine present a less exacting standard, another Supreme Court/Tenth Circuit clash over “clearly established” law remains a possibility.

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105. *Baxter v. Bracey*, 140 S.Ct. 1862, 1865 (2020) (*cert. denied*) (Thomas, J., dissenting).