

THE FALL AND RISE OF QUALIFIED IMMUNITY: FROM *HOPE* TO *HARRIS*

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ABSTRACT

In Mitchell v. Forsyth (1985) the Court ruled that interlocutory appeals can be taken by government officials from denials of motions for summary judgment based on qualified immunity. Johnson v. Jones (1995) ruled that these interlocutory appeals are limited to legal questions, not matters of fact. This limited the effect of the Court's holding in Anderson v. Creighton (1987) that some measure of factual similarity between prior reported cases and governmental wrongdoing is necessary to overcome qualified immunity. Hope v. Pelzer (2002) further cabined Anderson by rejecting the Eleventh Circuit's conclusion that government wrongdoing must be "materially similar" to conduct previously declared unconstitutional to support liability.

Qualified immunity's success rate fell precipitously in the Eleventh Circuit following Hope, a decline that was attributable, in large part, to synergy between Hope and Johnson v. Jones. Hope allowed § 1983 plaintiffs to plead facts that more easily withstood qualified immunity. Johnson precluded the Eleventh Circuit from questioning these factual allegations. Together these developments made it difficult for appellate courts to award qualified immunity—at least at the interlocutory stage.

The Supreme Court recently in Scott v. Harris (2007) cast doubt over whether Johnson v. Jones remains sound—and whether qualified immunity will continue its post-Hope wane. In the course of holding that police officers' intentionally ramming a suspect's car did not violate the Fourth Amendment, the Court in Harris implicitly authorized interlocutory fact-finding by appellate courts in § 1983 cases. Specifically, the Court in Harris relied on a videotape of the officers' actions to conclude that their force was reasonable. Because the same videotape was found to be inconclusive by both the district court and the Eleventh Circuit, Harris can only mean that interlocutory appellate fact-finding is sometimes permissible. With this increased appellate scrutiny, qualified immunity rates are likely to increase—especially in the Eleventh Circuit.

Executive officials—be they state or federal—performing discretionary functions are personally liable for violating only “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹ Put another way, these executive officials are immune from liability for violating constitutional principles that they could not have reasonably known. “Qualified immunity,” as this is known, consists of two distinct inquiries. The first is

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¹ Burns v. Reed, 500 U.S. 478, 494 n.8 (1991) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); see also Crawford-El v. Britton, 523 U.S. 574, 587-88 (1998).

whether “the facts alleged show the officer’s conduct violated a constitutional right[]”² The second is whether this right was clearly established—so that a reasonable official should have known of it—at the time of the violation.³ Because “[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made,”⁴ the ultimate question is whether “the officer’s mistake as to what the law requires is reasonable.”⁵

Although the qualified immunity test can be succinctly stated, the judicially-developed doctrine surrounding it has caused consternation and confusion. The disputes that surround qualified immunity are, in part, products of its common law pedigree.⁶ When it enacted 42 U.S.C. § 1983⁷ as part of the Ku Klux Klan Act of 1871, Congress said nothing about defenses, let alone official immunities. Immunity defenses, instead, emerged by way of judicial implication.⁸ Congress must have known, the argument goes, that post-bellum government officials enjoyed various immunities.⁹ Congress consequently must have intended to allow these same, or at least similar, defenses, to constitutional suits under § 1983.¹⁰

Qualified immunity for executive officials first emerged in 1967 in the case of *Pierson v. Ray*, where the Court ruled that arresting officers sued under the Fourth Amendment are entitled to a defense of “good faith and probable cause.”¹¹ So long as they are reasonably mistaken, the Court held, police officers are immune from personal liability for arrests that violate the Fourth Amendment.¹² Following *Pierson*, the Court extended this “reasonable mis-

² *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

³ *Id.*

⁴ *Id.* at 205. “The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.” *Id.* at 208.

⁵ *Id.* at 205.

⁶ *See Crawford-El*, 523 U.S. at 594. The Court in *Crawford-El* stated:

[I]n *Harlow*, as in the series of earlier cases concerning both the absolute and the qualified immunity defenses, we were engaged in a process of adjudication that we had consistently and repeatedly viewed as appropriate for judicial decision—a process “predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”

Id. (citation omitted). Not all scholars agree that qualified immunity was known to the common law. *See, e.g.*, MARK R. BROWN & KIT KINPORTS, *CONSTITUTIONAL LITIGATION UNDER § 1983* 116 (2003) (“[T]here is no common-law basis for either the decision to grant qualified immunity to executive-branch officials or the specific elements of the qualified immunity defense.”).

⁷ 42 U.S.C. § 1983 (2000).

⁸ *See Crawford-El*, 523 U.S. at 594.

⁹ *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 493 n.1 (1994) (Souter, J., concurring) (“[W]e have accorded certain government officials either absolute or qualified immunity from suit if the ‘tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’”).

¹⁰ *See id.*

¹¹ *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.”).

¹² *Id.*

take” defense to virtually all executive agents, including governors,¹³ school officials,¹⁴ presidential aides,¹⁵ and federal law enforcement agents.¹⁶ Perhaps more importantly, the Court let loose the defense from its Fourth Amendment mooring, generalized it,¹⁷ and allowed its assertion in any constitutional context.¹⁸ No longer is the question whether a police officer had reasonable grounds to make an arrest under the Fourth Amendment; it is whether a governmental official should have known that her conduct was lawful.

This Article is divided into two pieces. The first three parts offer a primer on the Supreme Court’s law of qualified immunity.¹⁹ The next four parts criticize how this law has been applied by the United States Court of Appeals for the Eleventh Circuit—arguably the hardest court in the country in which to win a § 1983 damage award.²⁰ Specifically, the second half of the Article explains how the Eleventh Circuit was sidetracked by a strange quest for factual similarity and how it was yoked back on course by the Supreme Court’s 2002 decision in *Hope v. Pelzer*.²¹ The Article further explores the implications of another Eleventh Circuit reversal, *Scott v. Harris*,²² and predicts that *Harris* will likely facilitate an Eleventh Circuit drift back toward unwarranted awards of qualified immunity.

I. LEGAL CLARITY

Whether an official should have known that her conduct was unlawful is, in large part, a question of legal clarity. Through the first score of years following *Pierson*, the Supreme Court worked its way through several practical problems surrounding this issue, but avoided answering the ultimate question of how much clarity is needed.²³ In cases like *Hunter v. Bryant*, for example,

¹³ See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (holding that governor and university president are entitled to qualified immunity based on “all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based”).

¹⁴ See, e.g., *Wood v. Strickland*, 420 U.S. 308, 318-19 (1975) (holding that school officials are entitled to qualified immunity).

¹⁵ See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that presidential aide is entitled to qualified immunity).

¹⁶ See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (per curiam) (holding that Secret Service agents are entitled to qualified immunity); *Anderson v. Creighton*, 483 U.S. 635, 638, 646 (1987) (holding that FBI agent is entitled to qualified immunity).

¹⁷ The Court also dropped the requirement that the official be acting in good faith. See *Harlow*, 457 U.S. at 817-18. After *Harlow*, the question is simply whether a hypothetical, reasonable person would believe the action to be lawful—regardless of the good faith of the actual wrongdoer. *Id.* at 819.

¹⁸ See *id.* at 805, 818 n.30 (allowing qualified immunity defense to First Amendment claim and stating defense in general terms).

¹⁹ See *infra* notes 23-104 and accompanying text.

²⁰ See *infra* notes 105-287 and accompanying text.

²¹ *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

²² *Scott v. Harris*, 127 S. Ct. 1769 (2007).

²³ For example, the Court ruled in *Saucier v. Katz* that constitutional issues must be resolved before immunity questions. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Because this ordering approach has been severely criticized by commentators, see, e.g., Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1926 (2007) (predicting that *Saucier*’s “sequencing requirement may turn out to be short-

the Court concluded *under the facts presented* that Secret Service agents could not have known that an arrest was illegal;²⁴ it did not develop a general algorithm to guide lower courts. As the new century approached, the Court had yet to decide basic issues such as whether legal principles must have been previously announced and applied to similar facts, whether they must have been announced by the Supreme Court (or some lower court with binding authority), or whether analogy and deduction would be expected of officials as part of the measuring stick for legal clarity.

It took a criminal case to force the Court to squarely address these questions. Section 242 of Title 18 of the United States Code makes it a crime for an official to willfully violate the constitutional rights of persons within the jurisdiction of the United States.²⁵ Enacted shortly before § 1983, this criminal statute shares many of its civil cousin's demands, including that the wrongdoing be "under color of" law.²⁶ Because it is a criminal statute, however, § 242 demands scienter—it uses the term "willfully"—and allows a due process "vagueness" defense not generally available to civil defendants, including those charged under § 1983.²⁷ Due process, as any first-year criminal law student knows, requires criminal laws to provide adequate notice of criminality.²⁸ Laws not published (or otherwise made available) to the public cannot, consistent with due process, be enforced;²⁹ nor can vague laws that no reasonable person can understand.³⁰

Because the prohibition in § 242 borrows from constitutional constraints, it presents a prime candidate for due process problems.³¹ The Constitution's meaning, after all, is not always clear. It varies with time and changes with the Court.³² And if it is not clear, it can hardly provide the notice required by due process.³³

The Honorable David W. Lanier, a chancery court judge in rural Tennessee, was convicted under 28 U.S.C. § 242 for willfully violating the constitu-

lived"), and certain Justices, *see, e.g.*, *Los Angeles County v. Rettele*, 127 S. Ct. 1989, 1994 (2007) (per curiam) (Stevens, J., concurring) (arguing that the Court should "disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so"), the Supreme Court in *Pearson v. Callahan*, 494 F.3d 891 (10th Cir. 2007), *cert. granted*, 77 U.S.L.W. 3017 (U.S. Mar. 24, 2008) (No. 07-751), granted review to consider "[w]hether the Court's decision in *Saucier v. Katz* . . . should be overruled?"

²⁴ *Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (per curiam) (holding that Secret Service agents were entitled to qualified immunity even if they lacked probable cause to make arrest).

²⁵ 18 U.S.C. § 242 (2000).

²⁶ Compare *id.* with 42 U.S.C. § 1983 (2000).

²⁷ *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 264, 266, 270-71 (1997) (holding that § 242 satisfied the due process vagueness requirement by giving fair warning).

²⁸ *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 90-91 (2d ed. 1986).

²⁹ *See id.*

³⁰ *See id.*

³¹ *See, e.g., Lanier*, 520 U.S. at 270-71 (holding that § 242 satisfied the due process vagueness requirement by giving fair warning).

³² *See* ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson rev., 4th ed. 2005) (describing how the meaning of the Constitution has changed over the course of the nation's history).

³³ *See, e.g., Lanier*, 520 U.S. at 265 (stating that 18 U.S.C. § 242 would violate due process if constitutional norms were not clear and did not provide fair warning).

tional rights of several women he had sexually assaulted in his courtroom chambers.³⁴ The United States Court of Appeals for the Sixth Circuit (sitting en banc) reversed these convictions because, it claimed, the judge could not have known that rape violated the Constitution.³⁵ No “fundamentally similar” case had ever been handed down by the Supreme Court,³⁶ and the statute itself says nothing about rape.³⁷ In the absence of notice, Judge Lanier’s conviction could not stand.³⁸

The Supreme Court, in *United States v. Lanier*, reversed on two levels.³⁹ First, it concluded that decisions of the Supreme Court itself are not needed to provide due process’s required warning.⁴⁰ The Court had never before limited “the universe of relevant interpretive decisions” to its own opinions,⁴¹ nor did it think that a wise policy.⁴² Because of the historical and analytical links between § 242 and § 1983, the Supreme Court cited several civil constitutional cases⁴³ for the proposition that Courts of Appeals’ decisions, as well as those of the Supreme Court, can clearly establish constitutional rights.⁴⁴

³⁴ See *United States v. Lanier*, 33 F.3d 639, 645 (6th Cir. 1994).

³⁵ *United States v. Lanier*, 73 F.3d 1380, 1388-89 (6th Cir. 1996) (en banc). In sum, the court concluded that because the relevant case law explaining that sexual assault amounted to a constitutional violation was murky at the time of Lanier’s wrongs, criminal prosecution under § 242 was improper: “Such an unprecedented, selective application of the statute in this case was possible only by giving the broadest possible construction to the most ambiguous of federal criminal statutes. The indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand.” *Id.* at 1394.

³⁶ *Id.* at 1393. The Sixth Circuit relied on *Screws v. United States*, 325 U.S. 91, 104 (1945), for the proposition that only Supreme Court “opinions could provide sufficient notice under § 242 to make ‘specific’ the constitutional right in question.” *Lanier*, 73 F.3d at 1393. It stated that “[a]s we interpret the ‘make specific’ requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar.” *Id.*

³⁷ See 18 U.S.C. § 242 (2000) (which does not mention rape). See also *Lanier*, 73 F.3d at 1388 (stating the Supreme Court has not implied rape into § 242).

³⁸ See *United States v. Lanier*, 520 U.S. 259, 263 (1997) (observing that “the court [of appeals] set aside Lanier’s convictions for ‘lack of any notice to the public that this ambiguous criminal statute [i.e., §242] includes simple or sexual assault crimes within its coverage’” (quoting *United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996))).

³⁹ *Id.* at 272.

⁴⁰ *Id.* at 268 (stating that “a decision of this Court . . . is [not] necessary in every instance to give fair warning”).

⁴¹ *Id.* (stating that no case after *Screws* “has held that the universe of relevant interpretive decisions is confined to our opinions”).

⁴² *Id.* at 269. The Court stated:

Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.

Id.

⁴³ Perhaps most importantly, the Supreme Court relied on *Anderson v. Creighton*, 483 U.S. 635 (1987), which is discussed *infra* at notes 48-70 and accompanying text. See *Lanier*, 520 U.S. at 270.

⁴⁴ *Lanier*, 520 U.S. at 269. Two years later, in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court built on this conclusion, searching not only for decisions from the United States Courts of Appeals, but also those from federal district courts and state appellate courts. *Id.*

The Court in *Lanier* next concluded that the Sixth Circuit's "fundamentally similar" requirement was too protective of criminal defendants.⁴⁵ In this regard, the Supreme Court explained that qualified immunity's "clearly established" standard is identical to due process's "fair warning" requirement:

[B]oth serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."⁴⁶

The Court accordingly vacated and remanded to the Sixth Circuit for further proceedings.⁴⁷

II. FACTUAL CERTAINTY

Legal clarity is necessary but not sufficient to overcome qualified immunity. Ten years before it decided *Lanier*, the Court injected a factual dimension into the qualified immunity problem.⁴⁸ Not only must the law clearly state the constitutional rule, but a wrongdoer must also have reasonably *known under all the facts and circumstances* that the clearly stated constitutional rule applied.⁴⁹ *Anderson v. Creighton* involved federal agents who conducted a warrantless entry into a home.⁵⁰ They invoked qualified immunity as a defense, arguing that they believed they had exigent circumstances.⁵¹ The Court agreed: "The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers pos-

at 616. Although it ultimately concluded in *Wilson* that the right declared—the Fourth Amendment's prohibition on police officers' taking media agents into private homes—was not clearly established, it stated that either "controlling authority in the [plaintiffs'] jurisdiction at the time of the incident" or "a consensus of cases of persuasive authority" could clearly establish constitutional law for purposes of qualified immunity. *Id.* at 614-15, 617.

⁴⁵ *Lanier*, 520 U.S. at 270.

⁴⁶ *Id.* at 270-71.

⁴⁷ *Id.* at 272. After concluding that the Constitution's prohibition on sexual assault by state actors was clear enough at the time of Lanier's actions to satisfy the Due Process Clause's "fair warning" requirement, the Court remanded the case to the Sixth Circuit to reconsider, "to the extent the issue remains open," whether Lanier was acting "under color of law." *Id.* at 264 n.2, 271-72. Because Judge Lanier fled to Mexico and thus became a fugitive from justice, the Sixth Circuit on remand never was forced to reconsider its conclusion in *Lanier I* that Judge Lanier acted "under color of law." *United States v. Lanier*, 123 F.3d 945, 946 (6th Cir. 1997). Lanier's fugitive status required that the court simply dismiss his appeal. *See id.* Lanier was later apprehended in Mexico and deported to the United States to serve his criminal sentence. *See United States v. Lanier*, 201 F.3d 842, 844 (6th Cir. 2000).

⁴⁸ *See Anderson*, 483 U.S. at 639-41.

⁴⁹ *Id.* at 641. *See* Teresa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 138-39 (2007) ("[D]efendants might argue that, given the information in their possession at the time of the alleged violation, a reasonable officer would (or could) conclude that the conduct was lawful.").

⁵⁰ *Anderson*, 483 U.S. at 637.

⁵¹ *Id.*

sessed.”⁵² Put more generally, the Court’s point was that mistaken beliefs about legality can be reasonable and can support qualified immunity. This is so because qualified immunity has a factual dimension; not only must constitutional law be facially clear, it must be clear as applied.⁵³ Should reasonable minds differ over the law’s proper application, then qualified immunity is in order.⁵⁴

A number of scholars have complained that the fact-specific nature of *Anderson*’s qualified immunity inquiry causes it to sometimes contradict the ultimate question of legality.⁵⁵ This is particularly true in the Fourth Amendment context, which—like qualified immunity—is premised on ad hoc reasonableness.⁵⁶ To use the facts of *Anderson*, consider a police officer who decides to enter a home without a warrant.⁵⁷ If one concludes the police officer reasonably (though mistakenly) believed exigent circumstances justified the warrantless entry, it would seem there is no violation of the Fourth Amendment.⁵⁸ Because there is no illegality, the officer is simply not liable and does not need qualified immunity as an affirmative defense. If one concludes, in contrast, that the officer unreasonably believed that exigent circumstances existed, his warrantless entry would violate the Fourth Amendment.⁵⁹ Qualified immunity under these facts would obviously prove useful, but can only be logically sorted out if one is willing to recognize that police can be reasonably unreasonable.⁶⁰ Qualified immunity is not possible without this double standard.⁶¹

Justice Stevens made this point in his dissent in *Anderson*.⁶² Specifically, he complained that the Court had created a “double standard of reasonableness—the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably

⁵² *Id.* at 641 (holding that federal agents may be entitled to qualified immunity even if they lacked exigent circumstances to justify warrantless entry).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See, e.g., Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 881-88 (1998) (discussing standards of unreasonable conduct in the context of excessive force); Ravenell, *supra* note 49, at 144-47 (criticizing *Anderson*).

⁵⁶ See Ravenell, *supra* note 49, at 144-45.

⁵⁷ *Anderson*, 483 U.S. at 637.

⁵⁸ The Fourth Amendment question, after all, is whether the police officer reasonably believed that an emergency existed. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 198 (3d ed. 2000).

⁵⁹ *Id.* at 199.

⁶⁰ See Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 252 (2006) (“*Anderson* had endorsed the conclusion that an officer can be unreasonable under the substantive Fourth Amendment standard yet reasonable for purposes of qualified immunity (i.e., reasonably unreasonable).”).

⁶¹ See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 460 (1978) (“Surely [an] officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.”).

⁶² *Anderson*, 483 U.S. at 648 (Stevens, J., dissenting).

could have believed that his conduct was constitutionally reasonable.”⁶³ These “two layers of insulation from liability,”⁶⁴ Justice Stevens complained, are unnecessary because “[t]he concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer.”⁶⁵

Writing for the majority, Justice Scalia responded to Justice Stevens’ complaint by observing that different language could be used to describe the constitutional violation: Justice Scalia noted, “Had an equally serviceable term, such as ‘undue’ searches and seizures been employed, what might be termed the ‘reasonably unreasonable’ argument against application of [qualified immunity] to the Fourth Amendment would not be available”⁶⁶ Justice Scalia was not overly concerned with the logical inconsistency in the Court’s approach because the contradiction could be cured by simply changing the language needed to support one or the other.⁶⁷

Some lower courts, like the Eleventh Circuit, have used Justice Scalia’s suggestion to distinguish qualified immunity from the underlying constitutional violations it excuses.⁶⁸ For example, the Eleventh Circuit recognizes “arguable” probable cause as a defense to liability for unconstitutional searches and seizures (including arrests).⁶⁹ This avoids the patent problem presented by “reasonably unreasonable” behavior, though it does not resolve the implicit inconsistency and accompanying practical problems that infect the analysis.⁷⁰

Though the Supreme Court has not specifically endorsed this approach, it reiterated in *Saucier v. Katz*⁷¹ the difference between reasonableness demanded by the Constitution and that required by qualified immunity:

The qualified immunity inquiry . . . has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the

⁶³ *Id.* at 648.

⁶⁴ *Id.* at 659.

⁶⁵ *Id.* at 661.

⁶⁶ *Id.* at 643. Similarly, in *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), which ruled that Secret Service agents enjoyed qualified immunity even though they lacked probable cause to make an arrest—the Court summarily concluded that the trial “court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.” *Id.* at 228.

⁶⁷ *Anderson*, 483 U.S. at 639-40.

⁶⁸ See, e.g., *Amrine v. Brooks*, 522 F.3d 823, 833 (8th Cir. 2008) (stating that “arguable probable cause” supports qualified immunity); *Guerrero v. Scarazzini*, 274 F. App’x 11, 12-13 (2d Cir. 2008) (same).

⁶⁹ See, e.g., *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007) (“[E]ven if we determine that the officer did not in fact have probable cause, we apply the standard of ‘arguable probable cause,’ that is, whether ‘reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[] could have believed that probable cause existed to arrest’” (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002))) (emphasis omitted); *Crosby v. Monroe County*, 394 F.3d 1328, 1332 (11th Cir. 2004) (same) (citing *Jones v. Cannon*, 174 F.3d 1271, 1283 n.3 (11th Cir. 1999)).

⁷⁰ See Chen, *supra* note 60, at 252 (discussing the many problems raised by *Anderson*).

⁷¹ *Saucier v. Katz*, 533 U.S. 194 (2001).

relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.⁷²

Saucier holds that the substance of qualified immunity's inquiry into reasonableness differs from that behind the Fourth Amendment.⁷³ How different these queries are has yet to be determined by the Court, though there clearly is a difference. In *Brosseau v. Haugen*,⁷⁴ for instance, where a police officer fired a shot through a car window and seriously injured a driver who was trying to start the car and escape from the officer,⁷⁵ the Supreme Court summarily concluded that the officer was immune.⁷⁶ It came to this conclusion even though it recognized that the law of excessive force is basically clear⁷⁷ and notwithstanding the fact that the officer violated the Fourth Amendment.⁷⁸ *Brosseau* thus reiterates what the Court stated in *Saucier*, i.e., that a police officer can reasonably (within the meaning of qualified immunity) violate otherwise clearly established Fourth Amendment dictates.⁷⁹

⁷² *Id.* at 205.

⁷³ *Id.*

⁷⁴ *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam).

⁷⁵ *Id.* at 196-97.

⁷⁶ *Id.* at 201. The district court dismissed and the Ninth Circuit reversed, holding that the requirements from *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), were clearly established. *Haugen v. Brosseau*, 339 F.3d 857, 860, 862 (9th Cir. 2003).

⁷⁷ The Court explained that "the general tests set out in *Graham* and *Garner* . . . are cast at a high level of generality." *Brosseau*, 543 U.S. at 199 (citing *Haugen*, 339 F.3d at 873-74) (9th Cir. 2003)). Although the Court acknowledged that, "in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law," *id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)), the Court concluded that "[t]he present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Id.* Observing that the parties had identified "only a handful" of relevant lower court opinions (i.e., three circuit court decisions), the Court noted that these decisions "found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others," and thus "[t]hese three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case." *Id.* at 200-01.

⁷⁸ *Id.* at 198 & n.3 (noting that the Court did not decide whether the officer violated the Fourth Amendment). Justice Stevens, the lone dissenter, thought that there was "a genuine factual question as to whether a reasonably well-trained officer . . . could have concluded otherwise," and thus he would have delegated that question to a jury. *Id.* at 208 (Stevens, J., dissenting).

⁷⁹ *Saucier v. Katz*, 533 U.S. 194, 205 (2001). In what may be a contradictory decision, the Supreme Court in *Groh v. Ramirez*, held that a federal law enforcement official was not entitled to qualified immunity when he executed a search warrant that violated the Fourth Amendment's requirement that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (emphasis omitted). Writing for a 5-4 majority, Justice Stevens concluded both that the warrant violated the Fourth Amendment's particularity requirement, and that the law enforcement officials were not protected by qualified immunity: "[g]iven that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." *Id.* at 563. Moreover, the majority noted, "because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid." *Id.* at 564. Finally, the Court observed that "even a cursory reading of the warrant in this case—perhaps just a

One can hardly be faulted for not understanding exactly what the difference is between reasonableness for constitutional and qualified immunity purposes. There would not seem to be much room between reasonably believing one's conduct is lawful and reasonably believing it is necessary or correct. Imagine if the law allowed a private citizen a defense like the one recognized in *Anderson, Saucier, and Brosseau*: "I may have been negligent, but I was reasonable in believing that I wasn't." Civil law and criminal law have, for good reason, generally rejected this sort of defense.⁸⁰ It not only blurs the definitional line between fault and responsibility; it gives rise to the procedural miscues described below.⁸¹

III. PROCEDURAL RIGHTS

An additional justification for cases like *Anderson* and *Saucier* is that qualified immunity creates not only a substantive defense, but also affords governmental defendants procedural rights.⁸² Qualified immunity presents a legal question demanding prompt judicial attention, not only by a lone district court judge, but also by a three-judge appellate panel and perhaps even the Supreme Court of the United States.⁸³ The Court in *Hunter*, for example, observed that "[i]mmunity ordinarily should be decided by the court long before trial," rather than be placed "in the hands of the jury."⁸⁴ Likewise, in *Saucier*, the Court concluded that not only was the defendant entitled to qualified immunity, "the

simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* In response to the officer's argument that the search was "the product, at worst, of a lack of due care," the majority replied that "a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at 565 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)). Two of the four dissenters, Justice Kennedy and Chief Justice Rehnquist, agreed that the Fourth Amendment's particularity requirement had been violated but would have granted the petitioner qualified immunity for his "straightforward mistake of fact." *Id.* at 566-67 (Kennedy, J., dissenting). Criticizing the majority for "construing the officer's error as a mistake of law rather than a mistake of fact," these two Justices argued that "the essential question here is whether a reasonable officer in petitioner's position would necessarily know that the warrant had a clerical error in the first place"—that is, "whether an officer can reasonably fail to recognize a clerical error, not whether an officer who recognizes a clerical error can reasonably conclude that a defective warrant is legally valid." *Id.* at 569. Because the majority rejected this reasoning, it may be that the particularity requirement of the Fourth Amendment, unlike the probable cause requirement and the prohibition on excessive force, does not admit to a double-reasonableness standard for qualified immunity.

⁸⁰ See Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen?*, 79 IOWA L. REV. 273, 308 (1994) (footnote omitted) ("Tort law teaches that loss follows wrongdoing. Even though deterrence theory plays a significant role in tort theory, a tortfeasor's reasonable ignorance of the law does not excuse liability.").

⁸¹ See *infra* notes 82-153 and accompanying text.

⁸² See generally BROWN & KINPORTS, *supra* note 6, at 135-41 (describing procedural rights and issues that arise under § 1983).

⁸³ See *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (holding that government officials have right to take interlocutory appeal following denial of motion for summary judgment based on qualified immunity).

⁸⁴ *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

suit should have been dismissed at an early stage in the proceedings.”⁸⁵ Both statements emphasize the Court’s conclusion that qualified immunity insulates the official not only from an award of money damages, but also from the burdens of suit.⁸⁶ The double-reasonableness standard enunciated in *Anderson* (and applied in *Saucier*) can possibly be understood as a prophylactic to protect this procedural right.

Because the defense of qualified immunity is, in part, a question of law, it naturally creates a “super-summary judgment” right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits—because the plaintiff has stated a proper claim and genuine issues of fact exist—summary judgment can still be granted when the law is not reasonably clear.⁸⁷ Consider *Hunter*, where Secret Service agents who had arrested the plaintiff for allegedly threatening the life of President Reagan were sued under the Fourth Amendment.⁸⁸ The district court refused summary judgment for the defense because genuine issues of material fact surrounded the ultimate question of whether the agents had probable cause.⁸⁹ The Supreme Court reversed, finding that summary judgment should have been awarded to the agents, not because genuine factual issues were lacking or the claims were improper, but because the agents’ enjoyed a right to avoid trial.⁹⁰

This procedural advantage is magnified by the collateral order doctrine, which permits immediate appeals from denials of qualified immunity in federal court.⁹¹ The Supreme Court concluded in *Mitchell v. Forsyth* that the denial of qualified immunity before trial in federal court is an appealable collateral order justifying immediate interlocutory review.⁹² The defense can raise qualified

⁸⁵ *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

⁸⁶ See *Saucier*, 533 U.S. at 200-01; *Hunter*, 502 U.S. at 227.

⁸⁷ See, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (holding that officials were entitled to qualified immunity even though they violated the Fourth Amendment by “bring[ing] members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant”).

⁸⁸ *Hunter*, 502 U.S. at 226.

⁸⁹ *Id.*

⁹⁰ *Id.* at 228. In *Saucier*, 533 U.S. 194, (2001), where government officials were charged with using excessive force—the Supreme Court also concluded that genuine factual issues and ultimate illegality did not preclude awarding summary judgment in favor of the defendants before trial. *Id.* at 207-09.

⁹¹ See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (noting that state courts are free to fashion their own rules on interlocutory appeals); *Johnson v. Fankell*, 520 U.S. 911, 921 (1997) (holding that Idaho’s failure to recognize interlocutory appeals did not offend § 1983).

⁹² *Mitchell*, 472 U.S. at 530. The Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996), further ruled that qualified immunity can be raised in a Rule 12(b)(6) motion to dismiss before it is again raised in a motion for summary judgment. *Id.* at 309-11. Given that the Court has consistently referred to qualified immunity as a defense, the holding in *Behrens* appears counter-intuitive. Its use under Rule 12(b)(6) places plaintiffs under pressure to plead its absence, which would seem to transform its absence into an element of the plaintiff’s case rather than a true defense. Because it can be used under Rule 12(b)(6), several lower courts adopted heightened pleading requirements for plaintiffs suing officials under § 1983. The Supreme Court, however, has invalidated these demands in the three cases that have raised the matter. See *Jones v. Bock*, 127 S. Ct. 910 (2007) (holding that inmates need not satisfy heightened pleading requirements notwithstanding adoption of Prison Litigation Reform

immunity at the summary judgment stage and press an immediate appeal should its motion be denied.⁹³ Qualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial.

Mitchell has its bounds, however. It guarantees government officials interlocutory review of legal issues surrounding qualified immunity, but not factual issues.⁹⁴ Resolution of factual questions is reserved—at least at the interlocutory stage—to the judgment of the district court.⁹⁵ The Supreme Court made this clear in *Johnson v. Jones*, which involved claims of excessive force employed by five police officers.⁹⁶ In response to three of the police officers' claims that they were not present during the beating, the district court ruled that genuine issues of fact precluded awards of summary judgment.⁹⁷ The Seventh Circuit dismissed the officers' interlocutory appeal, finding that it had no appellate jurisdiction over factual matters.⁹⁸ The Supreme Court agreed, holding that appellate courts should not ordinarily review evidentiary sufficiency on interlocutory appeal.⁹⁹ Interlocutory jurisdiction, the Court found, is generally confined to questions of law.¹⁰⁰

Whether the Court's holding in *Johnson* is prudential or jurisdictional is unclear. The police officers argued that factual issues often append themselves to legal ones, and thus should just as often fall under an appellate court's pendent jurisdiction.¹⁰¹ The Supreme Court's response was guarded: "Even assuming, for the sake of argument, that it may sometimes be appropriate to exercise 'pendent appellate jurisdiction' over such a matter, . . . it seems unlikely that courts of appeals would do so. . . ."¹⁰² It continued: "[T]he court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason."¹⁰³ Should the lower court fail to make findings or state its assumptions, the Supreme Court reasoned, an appellate court need only review the record to determine "what facts the district court, in the light most favorable to the nonmoving party, likely assumed."¹⁰⁴ Whether deemed a jurisdictional bar or a prudential concern, *Johnson v. Jones* establishes that appellate courts cannot engage in independent fact-finding on interlocutory appeal.

Act); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (holding that heightened evidence standard is not permissible in §1983 suit against officials); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that heightened pleading is not required in § 1983 suits against cities and counties). Thus, heightened pleading requirements of all sorts for § 1983 cases appear highly suspect if not clearly inappropriate.

⁹³ *Mitchell*, 472 U.S. at 526-27.

⁹⁴ See *Johnson v. Jones*, 515 U.S. 304, 313, 319-20 (1995).

⁹⁵ *Id.* at 313.

⁹⁶ *Id.* at 307.

⁹⁷ *Id.* at 308.

⁹⁸ *Id.*

⁹⁹ *Id.* at 317.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 318.

¹⁰² *Id.*

¹⁰³ *Id.* at 319.

¹⁰⁴ *Id.*

IV. A MICROCOSM CALLED THE ELEVENTH CIRCUIT

Ostensibly applying the principles outlined above, the United States Court of Appeals for the Eleventh Circuit quietly became “the circuit of ‘unqualified immunity.’”¹⁰⁵ From roughly 1990 to 2002, constitutional victims’ chances of winning money damages from government officials’ in the Eleventh Circuit closely approached zero.¹⁰⁶ The Eleventh Circuit awarded qualified immunity to government officials in just about every constitutional context imaginable.¹⁰⁷ It used qualified immunity to reject claims arising under the First Amendment’s Free Speech Clause;¹⁰⁸ the Fourth Amendment’s prohibition on the use of excessive force,¹⁰⁹ as well as its prohibitions on unreasonable searches¹¹⁰ and seizures;¹¹¹ the Eighth Amendment’s prohibitions on abuse¹¹² and unsanitary prison conditions;¹¹³ and, the Fourteenth Amendment’s demand of both procedural¹¹⁴ and substantive¹¹⁵ due process. Perhaps the best evidence of the Eleventh Circuit’s austere approach to liability under § 1983 was its willingness to immunize racial discrimination,¹¹⁶ which according to Dean John Jeffries is rarely permissible.¹¹⁷

¹⁰⁵ Elizabeth J. Norman & Eliza E. Jacob, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002) (observing that “the Eleventh Circuit has earned a reputation as being the circuit of ‘unqualified immunity’”).

¹⁰⁶ Norman & Jacob, *supra* note 105.

¹⁰⁷ See *infra* notes 108-16 and accompanying text.

¹⁰⁸ See, e.g., *Denno v. Sch. Bd. of Volusia County*, 182 F.3d 780, 782-83 (11th Cir. 1999) (officials immune for suspending student who brought Confederate flag to school).

¹⁰⁹ See, e.g., *Vaughan v. Cox*, 264 F.3d 1027, 1036-37 (11th Cir. 2001) (officer immune from liability for using deadly force and shooting into moving vehicle), *vacated*, 536 U.S. 953 (2002), *aff’d in part, rev’d in part* 343 F.3d 1323 (11th Cir. 2003).

¹¹⁰ See, e.g., *Wilson v. Jones*, 251 F.3d 1340, 1341 (11th Cir. 2001) (officers immune for strip searching detainee arrested for drunk driving).

¹¹¹ See, e.g., *Redd v. City of Enterprise*, 140 F.3d 1378, 1380-81 (11th Cir. 1998) (officers immune for arresting traveling minister for disorderly conduct).

¹¹² See, e.g., *Sanders v. Howze*, 177 F.3d 1245, 1250-51 (11th Cir. 1999) (failure to prevent suicide by prisoner); *Hill v. Dekalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1198 (11th Cir. 1994) (officials immune in connection with sexual abuse of youthful detainee by center employees).

¹¹³ See, e.g., *Wilson v. Blankenship*, 163 F.3d 1284, 1295 (11th Cir. 1998) (prison officials immune for poor prison conditions).

¹¹⁴ See, e.g., *Harbert Int’l, Inc. v. James*, 157 F.3d 1271, 1274 (11th Cir. 1998) (finding immunity from liability for procedural due process and Fifth Amendment takings violations).

¹¹⁵ See, e.g., *Santamarena v. Ga. Military Coll.*, 147 F.3d 1337, 1338-39 (11th Cir. 1998) (officials immune from liability for rape of female student on college campus).

¹¹⁶ See Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 842 (1998) (observing that the Eleventh Circuit has “frequently found those accused of racial discrimination or other constitutional violations to be immune from suit”).

¹¹⁷ John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 277 (2000) (“Someone who purposely discriminates against racial minorities cannot claim that he or she reasonably thought such action to be lawful. The defense is irrelevant because it is factually incredible.”). See also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 591 (1998) (“Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously ‘bad’ behavior, obviating the need for qualified immunity in a case alleging such discrimination.”). Sister circuits, in contrast, have uniformly refused to entertain qualified immunity as a

In *Mencer v. Hammonds*, to use one example, the plaintiff (Mencer) sued under § 1983 claiming that her public-sector employer failed to promote her because of her race.¹¹⁸ The District Court denied summary judgment, finding that Mencer had “produced sufficient evidence of conduct violative of the equal protection clause on the part of [the defendant to] . . . violate[] clearly established law.”¹¹⁹ On interlocutory appeal, the Eleventh Circuit concluded that it could “review the district court’s preliminary [factual] determination as a means of reaching the issue of clearly established law,”¹²⁰ and then determined that the defendant was entitled to qualified immunity.¹²¹

Mencer demonstrates what the Eleventh Circuit repeatedly stated during the 1990s: “[O]nly in exceptional cases will government actors have no shield against claims made against them. . . .”¹²² Rather than search for common understandings, the Eleventh Circuit demanded legal precision and factual identity: “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.”¹²³ *Arguable* differences in *minor* facts proved enough to defeat liability:

[M]inor variations in some facts (the precedent lacks an *arguably significant* fact or contains an additional *arguably significant* fact not in the circumstances now facing the official) might be very important and, therefore, be able to make the circum-

defense to charges of discrimination against racial or ethnic minorities. *See, e.g.,* *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997) (“[I]t has been clearly established for many years that the Equal Protection Clause prohibits a State, when acting as an employer, ‘from invidiously discriminating between individuals or groups’ based upon race.” (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976))); *Tang v. R.I. Dep’t of Elderly Affairs*, 120 F.3d 325, 327 (1st Cir. 1997) (same).

¹¹⁸ *Mencer v. Hammonds*, 134 F.3d 1066, 1067 (11th Cir. 1998). *See also* *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997) (applying qualified immunity to defeat §§ 1981 and 1983 claims based on racial discrimination).

¹¹⁹ *Mencer*, 134 F.3d at 1068 (quoting district court).

¹²⁰ *Id.* at 1070. The court explained that a “denial of qualified immunity at summary judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated ‘clearly established law’” *Id.* Even though it recognized the first determination was not appealable, *id.* (citing *Johnson v. Jones*, 515 U.S. 304 (1995)), the court concluded that because a “determination of whether the evidence supports finding that a defendant engaged in certain conduct . . . is necessary to reach a determination of whether that conduct violated clearly established law,” *id.*, it could review the district court’s factual analysis. *Id.*

¹²¹ *Id.* at 1071. *See also* *City of Fort Lauderdale*, 126 F.3d at 1379 (applying qualified immunity to defeat §§ 1981 and 1983 claims based on racial discrimination).

¹²² *Lassiter v. Ala. A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc). *See also* *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998) (“This circuit has established stringent standards for a plaintiff seeking to overcome the affirmative defense of qualified immunity . . .”). In rare instances, officials were denied immunity. *See, e.g.,* *Lambert v. Fulton County, Ga.*, 253 F.3d 588, 590 (11th Cir. 2000) (racial discrimination); *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1350 (11th Cir. 2000) (racial discrimination); *Braddy v. Fla. Dep’t of Labor & Employment Sec.*, 133 F.3d 797, 802-03 (11th Cir. 1998) (sexual harassment).

¹²³ *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1280 (11th Cir. 2002) (quoting *Lassiter*, 28 F.3d at 1150) (emphasis omitted).

stances facing an official materially different from the preexisting precedents, leaving the law applicable—in the circumstances facing the official—not clearly established when the defendant official acted.¹²⁴

Even patent wrongs in the Eleventh Circuit escaped § 1983's reach. Judge Barkett's description of the factual record in *Lewis v. McDade* offers an illustration in the context of gender discrimination:

[The defendant] "ran a DA's office rife with gender-discrimination," . . . (1) berating his female employees with pejorative terms such as "hysterical female," "bitch," "blonde bombshell," "smurfette," and "bimbette," (2) photographing his female employees' buttocks, (3) throwing coins and other objects down his female employees' blouses, (4) telling a female employee to uncross and cross her legs again while he watched, (5) stating that the only thing women are good for is "making babies," (6) saying "women don't have the balls to be prosecutors," and (7) embarrassing his female employees with statements such as "you can't come in, Rita doesn't have her clothes on" ¹²⁵

Despite these horrendous facts, which would not have been insulated by qualified immunity in any other circuit,¹²⁶ the Eleventh Circuit ruled that "qualified immunity protects [the defendant] from civil liability because there [was] no pre-existing case which would have put him on notice. . . ." ¹²⁷ Judge Barkett complained to no avail that "a reasonable district attorney, or any other reasonable person, would have known that such outrageous conduct constituted sexual harassment" ¹²⁸

The First Amendment suffered terribly in the Eleventh Circuit. Claims of workplace-retaliation based on speech were rendered frivolous by the Eleventh Circuit's qualified immunity jurisprudence.¹²⁹ Likewise, police were given

¹²⁴ *Marsh v. Butler County*, 268 F.3d 1014, 1032 (11th Cir. 2001) (emphasis added).

¹²⁵ *Lewis v. McDade*, 250 F.3d 1320, 1321 (11th Cir. 2001) (Barkett, J., dissenting from denial of rehearing en banc).

¹²⁶ Less egregious facts have caused other circuits to deny qualified immunity in the context of sexual harassment. *See, e.g., Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 800 n.2 (6th Cir. 2000) ("[B]ecause the law regarding sexual harassment was established at the time Plaintiff brought her claim, Black was not entitled to the defense of qualified immunity."); *Johnson v. Martin*, 195 F.3d 1208, 1220 (10th Cir. 1999) ("[E]ven if the contours of a supervisor's responsibility are uncertain, complete inaction in the face of claimed harassment cannot be objectively reasonable conduct entitling a supervisor to qualified immunity."); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) ("Although the law construing the specific causes of action and remedies provided for by § 1983 and Title IX continues to evolve, . . . it is evident that in 1994 Ms. Crawford had a clearly established right not to be discriminated against or harassed on the basis of her sex."); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994) ("A supervisor who has been apprised of unlawful harassment . . . should know that her failure to investigate and stop the harassment is itself unlawful.")

¹²⁷ *Lewis*, 250 F.3d at 1321. Regardless of how outrageous that behavior may have been, the majority awarded the defendant immunity "because the facts of this case are not sufficiently similar to any pre-existing case." *Id.* at 1322.

¹²⁸ *Id.* at 1321.

¹²⁹ *See Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994) ("Because *Pickering* requires a balancing of competing interests on a case-by-case basis . . . only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights.") (citation omitted). By way of contrast, Professor Jeffries has argued that retaliation based on speech provides the perfect paradigm for official liability: "If the courts are to safeguard protected speech against illegal

blank checks to suppress disagreeable speech on city streets and sidewalks. For example, in *Gold v. City of Miami* a local attorney (Gold) in Miami drove into a bank's parking lot, observed a woman walk to her car parked in a handicapped space, and shouted to a nearby police officer, "Miami police don't do shit."¹³⁰ He was arrested for disorderly conduct.¹³¹ Although the Eleventh Circuit acknowledged that federal courts¹³² and Florida's supreme court had on several occasions "reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers,"¹³³ it nonetheless ruled that the police officers were entitled to qualified immunity.¹³⁴ "The fact-intensive nature of the constitutional inquiry," coupled with a lack of "cases clearly establish[ing] that [the suspect's] actions did not constitute legally proscribed disorderly conduct," led the Eleventh Circuit to absolve the officers of liability.¹³⁵

The Eleventh Circuit also employed questionable procedural devices to assist governmental officials' qualified immunity defenses. The first was a heightened pleading standard.¹³⁶ Prior to *Crawford-El v. Britton*,¹³⁷ the Fed-

retaliation, they must find a way to encourage such claims and to hear them case by case. For this role, damages actions are ideal." Jeffries, *supra* note 117, at 287. *Compare* Myers v. Hasara, 226 F.3d 821, 829 (7th Cir. 2000) (refusing to award qualified immunity in case involving retaliation based on speech).

¹³⁰ *Gold v. City of Miami*, 121 F.3d 1442, 1444 (11th Cir. 1997).

¹³¹ *Id.*

¹³² *See, e.g.*, *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (striking down New Orleans ordinance making it unlawful for "any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police"). Every other Circuit to consider this issue since *Lewis* has found that arrests based on profanity violate clearly established First Amendment standards. *See, e.g.*, *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 164, 166 (5th Cir. 1997) (no qualified immunity for arresting a motorist who told an off-duty policeman at a gas station to "move his damn truck"); *Knox v. Sw. Airlines*, 124 F.3d 1103, 1105, 1109 (9th Cir. 1997) (verbal exchange at airport; demand for officer's name and badge number; refusal to exit immediately after being ordered to do so); *Mackinney v. Nielsen*, 69 F.3d 1002, 1004-05 (9th Cir. 1995) (writing with washable chalk on public sidewalk; failure to immediately stop); *Guffey v. Wyatt*, 18 F.3d 869, 870, 873 (10th Cir. 1994) (arrest of referee at hotly-contested high school basketball game); *Gainor v. Rogers*, 973 F.2d 1379, 1381-82, 1387 (8th Cir. 1992) (arrest of person walking through downtown carrying a large cross and distributing leaflets); *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 504, 509-10 (5th Cir. 1992) (on plaintiff's version, inquiry whether the sheriff had a search warrant or an arrest warrant; taking photographs of the officers); *Buffkins v. City of Omaha, Douglas County, Neb.*, 922 F.2d 465, 467, 473 (8th Cir. 1990) (calling police officer an "asshole"); *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990) (obscene gestures and yelling profanities); *Bailey v. Andrews*, 811 F.2d 366, 371 (7th Cir. 1987) (telling officer "I want my damn dog" and "did you shoot my dog?"); *Vela v. White*, 703 F.2d 147, 149-50 (5th Cir. 1983) (walking down the street; agitated questioning about arrest).

¹³³ *Gold*, 121 F.3d at 1445.

¹³⁴ *Id.* at 1446.

¹³⁵ *Id.* Judge Barkett explained in her dissent from the denial of rehearing en banc that the Eleventh Circuit's approach contradicted the Supreme Court's opinion in *United States v. Lanier*. *See Gold v. City of Miami*, 138 F.3d 886, 887 (11th Cir. 1998) (Barkett, J., dissenting) (citing *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

¹³⁶ *See, e.g.*, *GJR Invs., Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998).

¹³⁷ *Crawford-El v. Britton*, 523 U.S. 574 (1998).

eral Courts of Appeals had split over the propriety of heightened pleading standards in individual-capacity cases filed under § 1983.¹³⁸ Following *Crawford-El*, which specifically ruled that heightened evidentiary standards are not permissible,¹³⁹ most circuits abandoned the practice.¹⁴⁰ The Eleventh Circuit refused.¹⁴¹

Next, the Eleventh Circuit refused to look beyond controlling precedent. Contrary to the Supreme Court's conclusion in *Lanier* that binding precedent was not necessary,¹⁴² and its subsequent statement in *Wilson v. Layne* that qualified immunity requires only that the plaintiff identify either "controlling authority in [its] jurisdiction at the time of the incident that clearly established the rule on which [it] seek[s] to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful,"¹⁴³ the Eleventh Circuit ignored persuasive precedent.¹⁴⁴ Its search for cases with "materially similar" facts was thus confined to published decisions of the Supreme Court, the Eleventh Circuit, and (for some strange reason) the supreme court of the state where the action arose.¹⁴⁵ The result was a vanishingly small vision of fair warning.¹⁴⁶ Every other circuit to address the

¹³⁸ Compare *Breidenbach v. Bolish*, 126 F.3d 1288, 1293 (10th Cir. 1997) (applying heightened pleading standard) with *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 (7th Cir. 1994) (refusing to apply heightened pleading standard).

¹³⁹ *Crawford-El*, 523 U.S. at 589, 592, 600-01.

¹⁴⁰ See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002); *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001); *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* *Christopher v. Harbury*, 536 U.S. 403, 417-18 (2002); *Nance v. Vierегge*, 147 F.3d 589, 590 (7th Cir. 1998).

¹⁴¹ See, e.g., *GJR Invs., Inc.*, 132 F.3d at 1367. In addition to the Eleventh Circuit, the Fifth Circuit still employs some sort of heightened pleading standard in some civil rights cases. See, e.g., *Shipp v. McMahon*, 199 F.3d 256, 260-61 (5th Cir. 2000). Although the First Circuit in *Judge v. City of Lowell*, 160 F.3d 67 (1st Cir. 1998), stated its intent to retain a heightened pleading requirement in cases that focus on the defendant's intent, *id.* at 72-75, courts outside the First Circuit have concluded that *Judge* was overturned by *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), if not *Crawford-El*. See *Gallardo v. DiCarlo*, 203 F. Supp. 2d 1160, 1162-64 (C.D. Cal. 2002); *Greenier v. Pace*, Local No. 1188, 201 F. Supp. 2d 172, 177 (D. Me. 2002).

¹⁴² *United States v. Lanier*, 520 U.S. 259, 269 (1997).

¹⁴³ *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

¹⁴⁴ See, e.g., *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995) ("The remaining cases on which plaintiffs rely do not come from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the Florida Supreme Court and, therefore, cannot show that plaintiffs' right to due process was clearly established.").

¹⁴⁵ See *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) ("We do not understand *Wilson v. Layne*, 526 U.S. 603. . . (1999), to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly."); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 (11th Cir. 1997) (en banc); *Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1531 n.7 (11th Cir. 1996).

¹⁴⁶ Compounding the Eleventh Circuit's cramped vision of relevant precedent in Florida is its continuing refusal to recognize that Florida's Courts of Appeal are empowered to render binding decisions on a state-wide basis. See *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts." (citing *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985))).

matter has concluded, at least since *Wilson*, that a consensus of persuasive cases defeats qualified immunity.¹⁴⁷

Third, unlike most circuits, the Eleventh Circuit maintained an eagerness, even after *Johnson v. Jones*, to review factual sufficiency on interlocutory appeal. In *Mencer v. Hammonds*, for example, the plaintiff (Mencer) sued under § 1983 claiming a racially motivated employment decision.¹⁴⁸ The district court denied summary judgment, finding that Mencer had “produced sufficient evidence of conduct violative of the equal protection clause on the part of [the defendant to] violate[] clearly established law.”¹⁴⁹ On interlocutory appeal, the Eleventh Circuit concluded that it was authorized to “review the district court’s preliminary [factual] determination as a means of reaching the issue of clearly established law.”¹⁵⁰ It explained:

A denial of qualified immunity at summary judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated “clearly established law”¹⁵¹

Even though it recognized that the first determination was not appealable,¹⁵² the court concluded that because a “determination of whether the evidence supports a finding that a defendant engaged in certain conduct . . . is necessary to reach a determination of whether that conduct violated clearly established law,” it could review the district court’s factual analysis.¹⁵³ Contrary to the district court’s finding, the Eleventh Circuit found insufficient evidence of discrimination and awarded the defendant qualified immunity.¹⁵⁴

The Eleventh Circuit by the early part of this decade thus presented a worst-case scenario for constitutional plaintiffs—in no other circuit were § 1983 plaintiffs subjected to the gauntlet of substantive and procedural hurdles presented in the Eleventh Circuit.

¹⁴⁷ See, e.g., *Doe v. Delie*, 257 F.3d 309, 332 (3d Cir. 2001) (Nygaard, J., concurring and dissenting) (“I believe that a “consensus of cases of persuasive authority” had been established by 1995.”) (emphasis added) (citing *Wilson*, 526 U.S. at 617); *Rogers v. M.L. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001) (citing *Wilson*, 526 U.S. at 617); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) (“[T]he court must determine whether the Supreme Court, the District of Columbia Circuit, and, to the extent that there is a consensus, other circuits have spoken clearly on the lawfulness of the conduct at issue.”) (emphasis added); *Jacobs v. City of Chi.*, 215 F.3d 758, 767 (7th Cir. 2000). Several circuits reached this conclusion before the Supreme Court’s decision in *Wilson*. See, e.g., *Vaughn v. Ruoff*, 253 F.3d 1124, 1130 (8th Cir. 2001); *Shabazz v. Coughlin*, 852 F.2d 697, 701 (2d Cir. 1988); *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985).

¹⁴⁸ *Mencer v. Hammonds*, 134 F.3d 1066, 1068 (11th Cir. 1998).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1070.

¹⁵¹ *Id.*

¹⁵² *Id.* (citing *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1071. See also *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1294 (11th Cir. 2000) (finding insufficient evidence on interlocutory appeal).

V. THE “HITCHING” OF LARRY HOPE

Larry Hope was an inmate assigned to a chain gang at the Limestone Correctional Facility in Alabama.¹⁵⁵ Twice in 1995 he was handcuffed to a “hitching post”¹⁵⁶ as punishment for disruptive behavior.¹⁵⁷

Hope was cuffed . . . with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope’s feet.¹⁵⁸

Hope sued his tormentors under § 1983 and the Eighth Amendment only to have his case—like so many other civil rights cases in the Eleventh Circuit—dismissed because of qualified immunity.¹⁵⁹

On appeal, the Eleventh Circuit concluded that while “cuffing an inmate to a hitching post . . . is a violation of the Eighth Amendment,”¹⁶⁰ “a factfinder [could] conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious,”¹⁶¹ and the hitching post’s illegality “could be inferred from . . . [prior] opinions,”¹⁶² the defendants were still entitled to qualified immunity.¹⁶³ “Despite the unconstitutionality of the prison practice and, therefore, the guards’ actions, there was no clear, bright-line test established in 1995 that would survive our circuit’s qualified immunity analysis.”¹⁶⁴ In distinguishing a prior, binding Fifth Circuit opinion that held unlawful the handcuffing of prisoners to *fences*, rather than *posts*, the Eleventh Circuit explained that “it is important to analyze the facts in . . . [prior] cases, and determine if they are ‘materially similar’ to the facts in the case in front of us.”¹⁶⁵ “[A]nalogous” facts, the Court concluded, like using a fence instead of a post, are not enough.¹⁶⁶

The Supreme Court granted certiorari¹⁶⁷ and reversed in no uncertain terms: “[T]he Court of Appeals required that the facts of previous cases be “materially similar” to Hope’s situation.’ This rigid gloss on the qualified immunity standard . . . is not consistent with our cases.”¹⁶⁸ It continued:

¹⁵⁵ Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).

¹⁵⁶ The hitching post is a horizontal bar “made of sturdy, non-flexible material” placed either forty-five or fifty-seven inches above the ground. Austin v. Hopper, 15 F. Supp. 2d 1210, 1241 (M.D. Ala. 1998). According to the Alabama Department of Corrections (DOC) policy, it is to be used to “eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct.” Hope, 240 F.3d at 977-78.

¹⁵⁷ Hope, 240 F.3d at 977

¹⁵⁸ Id. at 978.

¹⁵⁹ Id. at 977.

¹⁶⁰ Id. at 980.

¹⁶¹ Id. at 978 (citing Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

¹⁶² Id. at 981.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id. at 979, 981 (emphasis added) (citing Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974); Suissa v. Fulton County, Ga., 74 F.3d 266, 270 (11th Cir. 1996)).

¹⁶⁶ Id. at 981 (emphasis added).

¹⁶⁷ Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001), cert. granted, 70 U.S.L.W. 3426 (U.S. Jan. 4, 2002) (No. 01-309).

¹⁶⁸ Hope v. Pelzer, 536 U.S. 730, 739 (2002).

[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . Although earlier cases involving “fundamentally similar” facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with “materially similar” facts. . . . [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.¹⁶⁹

The Eleventh Circuit’s error in *Hope* and earlier cases, like *Jenkins v. Talladega City Board of Education*,¹⁷⁰ and *Lassiter v. Alabama A & M University*,¹⁷¹ rested in its myopic focus on factual identity. The Supreme Court made clear in *Hope*—as it did previously in *Lanier*—that factual similarity is not the touchstone of qualified immunity.¹⁷² The “salient question” is “fair warn-

¹⁶⁹ *Id.* at 741.

¹⁷⁰ *Jenkins ex rel. Hall v. Talladega City Bd. Of Educ.*, 115 F.3d 821 (11th Cir. 1997) (en banc). In the years leading up to *Hope v. Pelzer*, lower courts throughout the United States had (because of the Court’s holding in *Lanier*) abandoned both their quests for “similar” cases and their limited visions of acceptable authority. The Eleventh Circuit was the lone holdout. *Jenkins* was one of the first Eleventh Circuit cases to arise post-*Lanier*. The Eleventh Circuit (sitting en banc) addressed whether teachers who twice strip-searched two elementary students in a vain quest for allegedly stolen money were entitled to qualified immunity. *Id.* at 822-23. The court concluded they were. *Id.* at 828. Although its analysis, which demanded a previously decided, “materially similar” case—one that “dictate[s], that is, truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*,” *id.* at 823, 826,—was strikingly similar to the Sixth Circuit’s “fundamentally similar” approach in *Lanier*, holding the Eleventh Circuit found *Lanier* rejection “entirely consistent with both the reasoning and result reached by our court in this case.” *Id.* at 825 n.3.

¹⁷¹ *Lassiter v. Ala. A & M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc), *overruling in part* *Lassiter v. Ala. A & M Univ.*, 3 F.3d 1482 (11th Cir. 1993). In *Lassiter*, the en banc court awarded qualified immunity to university officials who dismissed a teacher without affording him due process. *Id.* at 1148-49, 1152. The teacher, Lassiter, claimed that under *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court’s then-twenty-year-old precedent that helped reshape the procedural rights of public-sector workers, he was entitled to hearing before being discharged. *Lassiter*, 28 F.3d at 1148. Lassiter argued that a written contract and personnel manual created a “legitimate expectation of continued employment,” which required that university officials hold a hearing. *Id.* at 1149. The district court dismissed Lassiter’s claims against the officials based on qualified immunity. *Id.* The Eleventh Circuit initially reversed, concluding “the law was clear that an employee with a contractual expectation of continued employment had a property interest in that employment.” *Lassiter*, 3 F.3d at 1486. “Because the law was clearly established,” the panel explained, “the [defendants’] . . . assertion that the contract is unclear is relevant only to Lassiter’s ability to prove his claim. An uncertainty in the facts does not give rise to qualified immunity.” *Id.* The en banc court, however, overturned the panel’s decision. *Lassiter*, 28 F.3d at 1152. Even though it found that “[n]o new rules need to be announced to decide this case,” *id.* at 1149, the court still concluded the defendants were entitled to immunity. *Id.* at 1152. “For the law to be clearly established . . . the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that ‘what he is doing’ violates federal law.” *Id.* at 1149. “Because . . . it was not clearly established as a matter of law in Alabama that either the contract’s words or the manual’s words or both would support a property right for Lassiter, the law was also not clearly established that Lassiter was, when defendants acted, due a hearing.” *Id.* at 1151-52.

¹⁷² *Hope*, 536 U.S. at 741; *United States v. Lanier*, 520 U.S. 259, 267, 269-70 (1997).

ing.”¹⁷³ This “fair warning,” moreover, is judged under the same minimal standards applied to criminal defendants under the due process clause.¹⁷⁴ It “give[s] officials . . . the same protection from civil liability . . . that individuals have traditionally possessed in the face of vague criminal statutes.”¹⁷⁵

VI. HOPE IN THE ELEVENTH CIRCUIT

Several circuits immediately employed *Hope*'s reasoning to reject qualified immunity.¹⁷⁶ This did not prove true, however, in the Eleventh Circuit; at least not at first.

In the aftermath of *Hope*, the Supreme Court vacated and remanded three Eleventh Circuit opinions for reconsideration.¹⁷⁷ In all three, the Eleventh Circuit on remand, while offering lip-service to *Hope*, awarded the defendants qualified immunity.¹⁷⁸ All three cases involved egregious violations and would have come out differently in any other circuit. In *Willingham v. Loughnan*,¹⁷⁹ police officers shot an unarmed woman (*Willingham*) eight times after she threw a knife and glass at a police dog that was attacking her brother.¹⁸⁰ Rejecting the jury's findings that this force was unnecessary and excessive, as well as the conclusion of the district court and a prior appellate panel that the police should have known better, the court found that the officers were entitled to qualified immunity.¹⁸¹ Not only did *Hope* not change the specific outcome

¹⁷³ *Hope*, 536 U.S. at 741.

¹⁷⁴ See *Armacost*, *supra* note 117, at 666-67.

¹⁷⁵ *Hope*, 536 U.S. 730, 740 n.10.

¹⁷⁶ See, e.g., *Atkinson v. Taylor*, 316 F.3d 257, 264 (3d Cir. 2003) (denying qualified immunity to prison guards who subjected prisoner to environmental tobacco smoke); *Hawkins v. Holloway*, 316 F.3d 777, 787-88 (8th Cir. 2003) (denying qualified immunity where sheriff pointed loaded gun at deputies); *Burchett v. Kiefer*, 310 F.3d 937, 942, 945-46 (6th Cir. 2002) (denying qualified immunity where police detained suspect in police car for three hours with closed windows in ninety-degree heat); *Bell v. Johnson*, 308 F.3d 594, 613 (6th Cir. 2002) (denying qualified immunity where guard seized prisoners legal papers and medical dietary supplements); *Loria v. Gorman*, 306 F.3d 1271-87 (2d Cir. 2002) (denying qualified immunity where police unlawfully entered home and arrested resident); *Roska v. Peterson*, 304 F.3d 982, 1000-01 (10th Cir. 2002) (denying qualified immunity where police summarily seized child); *Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 97-98 (1st Cir. 2002) (denying qualified immunity where custody was unlawfully transferred to grandparents who fled with child).

¹⁷⁷ *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001), *vacated*, 537 U.S. 801, 802 (2002), *aff'd on remand*, 321 F.3d 1299, 1304 (11th Cir. 2003); *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953, 953 (2002), *aff'd on remand*, 323 F.3d 950, 956 (11th Cir. 2003); *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001), *vacated*, 536 U.S. 953, 953 (2002), *aff'd on remand*, 316 F.3d 1210, 1214 (11th Cir. 2003).

¹⁷⁸ *Willingham v. Loughnan*, 321 F.3d 1299, 1304 (11th Cir. 2003); *Thomas v. Roberts*, 323 F.3d 950, 956 (11th Cir. 2003); *Vaughan v. Cox*, 316 F.3d 1210, 1214 (11th Cir. 2003).

¹⁷⁹ *Willingham*, 261 F.3d 1178.

¹⁸⁰ *Id.* at 1181-82.

¹⁸¹ *Id.* at 1183-84, 1188. Before the case rose to the Eleventh Circuit following final judgment, the police in *Willingham* had taken an unsuccessful interlocutory appeal from the district court's denial of a motion for summary judgment. See *Willingham v. Loughnan*, 124 F.3d 1299 (11th Cir. 1997).

in *Willingham*, Judge Edmondson on remand went so far as to claim that *Hope* “did not change the preexisting law of the Eleventh Circuit much.”¹⁸²

*Thomas v. Roberts*¹⁸³ involved schoolchildren who were strip-searched by school officials in a vain quest to recover twenty-six dollars.¹⁸⁴ Although the Eleventh Circuit had “little trouble in concluding” that the searches were unconstitutional and “clearly represented a ‘serious intrusion upon the student’s personal rights,’”¹⁸⁵ it still awarded the officials qualified immunity.¹⁸⁶ The Eleventh Circuit ignored a decade’s worth of precedent invalidating strip searches in the absence of particularized suspicion.¹⁸⁷

In *Vaughan v. Cox*,¹⁸⁸ police shot into a truck without warning and seriously wounded a passenger when the truck’s driver failed to immediately pull over.¹⁸⁹ Even though a jury could have found the victim was not a threat of any kind and deadly force was unnecessary and excessive, Judge Cox (both before and after *Hope*) concluded the officers were entitled to qualified immunity.¹⁹⁰ Judge Noonan, visiting from the Ninth Circuit, dissented: “[I]t is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned.”¹⁹¹

Nine months after deciding *Vaughan*, the panel granted rehearing sua sponte and inexplicably reversed itself: “Taking the facts as alleged by [the plaintiff], an objectively reasonable officer . . . could not have believed that he was entitled to use deadly force to apprehend [the plaintiffs].”¹⁹² Contrary to Judge Edmondson’s admonition in *Willingham*,¹⁹³ *Vaughan*’s remarkable about-face foreshadowed change in the trenches of the Eleventh Circuit.

Between June 28, 2002 (when *Hope* was handed down) and the end of the 2006 calendar year (when the Supreme Court granted review in *Scott v. Harris*),¹⁹⁴ the Eleventh Circuit awarded qualified immunity only about half the

¹⁸² *Willingham*, 321 F.3d at 1300.

¹⁸³ *Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001), *vacated*, 536 U.S. 953, 953 (2002), *aff’d on remand*, 323 F.3d 950, 956 (11th Cir. 2003).

¹⁸⁴ *Id.* at 1162-63.

¹⁸⁵ *Id.* at 1167-68.

¹⁸⁶ *Id.* at 1177.

¹⁸⁷ *See id.*; *see also* *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (en banc) (concluding that officials who strip-searched elementary students were immune), *rev’g*, 95 F.3d 1036 (11th Cir. 1996). Courts have ruled for well over a decade that strip searches in schools, absent particularized suspicion, violate the Fourth Amendment. *See Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 888 (N.D. Ill. 2001); *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1205 (D.S.D. 1998); *Oliver v. McClung*, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995); *Burnham v. West*, 681 F. Supp. 1160, 1165 (E.D. Va. 1987).

¹⁸⁸ *Vaughan v. Cox*, 264 F.3d 1027 (11th Cir. 2001), *vacated*, 536 U.S. 953, 953 (2002), *aff’d on remand*, 316 F.3d 1210, 1214 (11th Cir. 2003).

¹⁸⁹ *Id.* at 1031-32.

¹⁹⁰ *Id.* at 1037; *Vaughan v. Cox*, 316 F.3d 1210, 1213-14 (11th Cir. 2003).

¹⁹¹ *Vaughan*, 316 F.3d at 1215 (Noonan, J., dissenting).

¹⁹² *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003).

¹⁹³ *Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir. 2003).

¹⁹⁴ *Harris v. Coweta County, Ga.*, 433 F.3d 807 (11th Cir. 2005), *cert. granted*, 127 S. Ct. 468 (Oct. 27, 2006) (No. 05-1631).

time.¹⁹⁵ This reflects a significant deviation from the pre-*Hope* landscape, where the denial of qualified immunity was “exceptional” and § 1983 plaintiffs seldom succeeded against non-institutional governmental actors.¹⁹⁶ Indeed, during this interval the Eleventh Circuit only reversed a final judgment in favor of a § 1983 plaintiff *once* because of qualified immunity.¹⁹⁷ On at least seventeen occasions, in contrast, it overturned final judgments in favor of § 1983 defendants who were awarded qualified immunity.¹⁹⁸

The Eleventh Circuit’s change cuts across a large array of constitutional violations. Though the frequency of awarding qualified immunity varies with constitutional rights,¹⁹⁹ the Eleventh Circuit began allowing constitutional claims to proceed that prior to *Hope* would not have survived summary judgment.²⁰⁰ This is not to say that the Eleventh Circuit became plaintiff-friendly—its qualified immunity rates, for example, still far exceeded those in

¹⁹⁵ Using Westlaw’s database of reported and unreported opinions, I uncovered more than 200 Eleventh Circuit opinions that mentioned qualified immunity between June 28, 2002 and the end of the 2006 calendar year (when the Supreme Court granted review in *Scott v. Harris*). After filtering the cases through three criteria—*i.e.*, they either (1) awarded judgment to the defendant on interlocutory appeal (meaning that qualified immunity was pivotal); (2) awarded judgment because of qualified immunity; or (3) rejected qualified immunity—122 decisions remained. Qualified immunity was awarded in sixty-three of these cases.

¹⁹⁶ See Norman & Daly, *supra* note 105, at 1556 (observing that the Eleventh Circuit “has earned a reputation as being the circuit of ‘unqualified immunity’”).

¹⁹⁷ See *Willingham*, 321 F.3d at 1300 (awarding qualified immunity to police in excessive force case following jury verdict for plaintiff), *aff’g* 261 F.3d 1178 (11th Cir. 2001). The Eleventh Circuit also affirmed a judgment as a matter of law awarded to a defendant by the district court following a jury verdict for the plaintiff in *Lafavors v. Jenne*, No. 03-62153, slip op. (11th Cir. Feb. 2, 2006).

¹⁹⁸ See *Gary v. Modena*, No. 05-16973, slip op. at 2 (11th Cir. Dec. 21, 2006) (reversing summary judgment in Eighth Amendment case); *McReynolds v. Ala. Dep’t of Youth Servs.*, 204 F. App’x 819, 823 (11th Cir. 2006) (reversing dismissal in excessive force setting); *Jones v. City of Atlanta*, 192 F. App’x 894, 897-98 (11th Cir. 2006) (reversing summary judgment in excessive force case); *Davis v. Williams*, 451 F.3d 759, 768 (11th Cir. 2006) (reversing summary judgment in excessive force/unlawful arrest case); *Bashir v. Rockdale County, Ga.*, 445 F.3d 1323, 1324 (11th Cir. 2006) (reversing summary judgment in unlawful arrest case); *Hyland v. Kolhage*, 158 F. App’x 194, 197 (11th Cir. 2005) (reversing summary judgment in procedural due process case); *Few v. Cobb County, Ga.*, 147 F. App’x 69, 70-71 (11th Cir. 2005) (reversing summary judgment in excessive force case); *Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1308 (11th Cir. 2005) (reversing summary judgment for defendant based on qualified immunity in speech setting); *Snow v. City of Citronelle, Ala.*, 420 F.3d 1262, 1265 (11th Cir. 2005) (reversing summary judgment in Eighth Amendment case); *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir. 2005) (reversing summary judgment in excessive force case); *Magluta v. Samples*, 375 F.3d 1269, 1283 (11th Cir. 2004) (reversing summary judgment in due process case); *Kingsland v. City of Miami*, 369 F.3d 1210, 1229 (11th Cir. 2004) (reversing summary judgment in unlawful arrest case); *Vaughan v. Cox*, 343 F.3d 1323, 1333 (11th Cir. 2003) (reversing summary judgment in excessive force case), *rev’g* 264 F.3d 1027 (11th Cir. 2001) (awarding qualified immunity); *McCray v. City of Dothan*, No. 01-15756-DD, 2003 WL 23518420, at *8 (11th Cir. Apr. 24, 2003) (reversing award of qualified immunity in unlawful arrest case); *Holmes v. Kucynda*, 321 F.3d 1069, 1084 (11th Cir. 2003) (reversing summary judgment in unlawful arrest case); *Vinyard v. Wilson*, 311 F.3d 1340, 1357 (11th Cir. 2002) (reversing summary judgment in excessive force case); *Grady v. Haley*, 304 F.3d 1329, 1331 (11th Cir. 2002) (reversing summary judgment in Eighth Amendment case).

¹⁹⁹ See *infra* notes 203–10 and accompanying text.

²⁰⁰ See *supra* notes 105-16 and accompanying text.

the Sixth Circuit during a comparable time period, as seen below²⁰¹—but qualified immunity was much less common in the Eleventh Circuit than it was before *Hope*.

The qualified immunity rates for the most common § 1983 claims in the Eleventh Circuit—those based on the First Amendment speech clause (1st Am.),²⁰² the Fourth Amendment's ban on excessive force (4th Am. force),²⁰³

²⁰¹ See *infra* notes 211–18 and accompanying text.

²⁰² In the sixteen cases involving speech, the court awarded immunity ten times and denied it seven times (one of the cases involved two separate claims that presented contrary results). See *Fry v. Hillsborough County Sch. Bd.*, Fla., 190 F. App'x 810, 820 (11th Cir. 2006) (affirming qualified immunity); *Gardner v. City of Camilla, Ga.*, 186 F. App'x 860, 861 (11th Cir. 2006) (reversing denial of qualified immunity); *Jolivet v. Arrowood*, 180 F. App'x 883, 887 (11th Cir. 2006) (vacating denial of qualified immunity for retaliation claim); *Kadalie v. Bd. of Regents of the Univ. of Ga.*, 171 F. App'x 770, 771-72 (11th Cir. 2006) (affirming denial of qualified immunity in *Pickering-Connick*-type case); *Tucker v. Talladega City Schs.*, 171 F. App'x 289, 300 (11th Cir. 2006) (affirming denial of qualified immunity); *Morris v. Jackson*, 167 F. App'x 750, 751-52 (11th Cir. 2006) (affirming qualified immunity); *Calvert v. Fulton County, Ga.*, 152 F. App'x 820, 822 (11th Cir. 2005) (affirming denial of qualified immunity in patronage case); *Bennett v. Hendrix*, 423 F.3d 1247, 1256 (11th Cir. 2005) (affirming denial of qualified immunity in speech retaliation action); *Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1307-08 (11th Cir. 2005) (reversing and affirming qualified immunity in *Pickering-Connick*-type case); *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005) (affirming denial of qualified immunity in adverse employment action); *Clark v. Alabama*, 141 F. App'x 777, 789 (11th Cir. 2005) (affirming qualified immunity in speech case); *Cooper v. Dillon*, 403 F.3d 1208, 1223 (11th Cir. 2005) (affirming qualified immunity for police officer who made arrest based on speech); *Holloman v. Harland*, 370 F.3d 1252, 1294-95 (11th Cir. 2004) (reversing grant of qualified immunity in speech case); *Stavropoulos v. Firestone*, 361 F.3d 610, 621 (11th Cir. 2004) (awarding qualified immunity in context of speech); *Travers v. Jones*, 323 F.3d 1294, 1297 (11th Cir. 2003) (awarding qualified immunity in context of speech); *Weaver v. Bonner*, 309 F.3d 1312, 1325 (11th Cir. 2002) (awarding qualified immunity in the context of speech in judicial elections).

²⁰³ Fifteen of the twenty-eight cases reported resulted in immunity. See *Walker v. City of Riviera Beach*, 212 F. App'x 835, 839 (11th Cir. 2006) (affirming denial of qualified immunity); *Johnson v. Olgilvie*, 200 F. App'x 948, 949 (11th Cir. 2006) (affirming denial of qualified immunity); *Jones v. City of Atlanta*, 192 F. App'x 894, 895, 898 (11th Cir. 2006) (reversing award of qualified immunity); *Baltimore v. City of Albany, Ga.*, 183 F. App'x 891, 892-93, 899-900 (11th Cir. 2006) (reversing denial of qualified immunity); *Bashir v. Rockdale County, Ga.*, 445 F.3d 1323, 1331 (11th Cir. 2006) (reverses award of qualified immunity); *Bryant v. Witkowski*, 175 F. App'x 297, 299 (11th Cir. 2006) (affirming denial of qualified immunity); *Lafavors v. Jenne*, No. 05-14410, slip op. at 4-5 (11th Cir. Feb. 2, 2006) (affirming award of qualified immunity); *Lavender v. Bunn*, 164 F. App'x 962, 963 (11th Cir. 2006) (affirming denial of qualified immunity); *Sullivan v. City of Pembroke Pines*, 161 F. App'x 906, 911 (11th Cir. 2006) (affirming award of qualified immunity); *Mesadieu v. Llorca*, 153 F. App'x 669, 669 (11th Cir. 2005) (affirming award of qualified immunity); *Sharpley v. Raley*, 153 F. App'x 624, 628 (11th Cir. 2005) (affirming denial of qualified immunity); *Bozeman v. Orum*, 422 F.3d 1265, 1274 (11th Cir. 2005) (affirming denial of qualified immunity); *Few v. Cobb County, Ga.*, 147 F. App'x 69, 71 (11th Cir. 2005) (reversing award of qualified immunity); *Troupe v. Sarasota County, Fla.*, 419 F.3d 1160, 1169 (11th Cir. 2005) (affirming award of qualified immunity in deadly force case); *Robinson v. Arrugueta*, 415 F.3d 1252, 1254, 1257 (11th Cir. 2005) (affirming qualified immunity in excessive force case); *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir. 2005) (reversing award of qualified immunity); *Harris v. Coweta County, Ga.*, 406 F.3d 1307, 1321 (11th Cir. 2005) (affirming denial of qualified immunity); *Crosby v. Monroe County*, 394 F.3d 1328, 1335 (11th Cir. 2004) (affirming award of qualified immunity);

the Fourth Amendment's search and seizure requirements (4th Am. S&S),²⁰⁴

Kesinger *ex rel.* Kesinger v. Herrington, 381 F.3d 1243, 1250 (11th Cir. 2004) (finding that law of excessive force was not clearly established); Garrett v. Athens-Clarke County, Ga., 378 F.3d 1274, 1281 (11th Cir. 2004) (reversing denial of qualified immunity); Durruthy v. Pastor, 351 F.3d 1080, 1095 (11th Cir. 2003) (reversing denial of qualified immunity); Vaughan v. Cox, 343 F.3d 1323, 1333-34 (11th Cir. 2003) (vacating award of qualified immunity), *rev'g* 264 F.3d 1027, 1037 (2001) (awarding qualified immunity); Carr v. Tatangelo, 338 F.3d 1259, 1275 (11th Cir. 2003) (affirming award of qualified immunity); Dalrymple v. Reno, 334 F.3d 991, 997 (11th Cir. 2003) (reversing denial of qualified immunity); McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1245 n.16 (11th Cir. 2003) (alternatively using qualified immunity to affirm summary judgment for police officer); Gonzalez v. Reno, 325 F.3d 1228, 1236 (11th Cir. 2003) (reversing denial of qualified immunity); Willingham v. Loughnan, 321 F.3d 1299, 1304 (11th Cir. 2003) (awarding qualified immunity), *aff'g* 261 F.3d 1178, 1188 (2001) (awarding qualified immunity); Vinyard v. Wilson, 311 F.3d 1340, 1357 (11th Cir. 2002) (reversing qualified immunity in pepper-spray case).

²⁰⁴ In the twenty-eight cases involving searches and seizures, the court awarded immunity eighteen times and denied it eleven times (one of the cases involved two separate claims that presented contrary results). *See* Killmon v. City of Miami, 199 F. App'x 796, 799-800 (11th Cir. 2006) (affirming denial of qualified immunity); Noell v. White, 198 F. App'x 858, 861 (11th Cir. 2006) (affirming dismissal based on qualified immunity); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1307 (11th Cir. 2006) (affirming denial of qualified immunity); Davis v. Williams, 451 F.3d 759, 767-68 (11th Cir. 2006) (reversing award of qualified immunity); McRae v. Berger, 173 F. App'x 758, 759 (11th Cir. 2006) (affirming award of qualified immunity); Paullin v. City of Loxley, Ala., 171 F. App'x 773, 778 (11th Cir. 2006) (reversing denial of qualified immunity); Dominguez v. Metro. Miami-Dade County, 167 F. App'x 147, 151 (11th Cir. 2006) (affirming award of qualified immunity); Stovall v. Allums, 161 F. App'x 828, 829 (11th Cir. 2005) (affirming denial of qualified immunity); BURGEST v. Colquitt County, Ga., 177 F. App'x 852, 855 (11th Cir. 2005) (affirming award of qualified immunity); Whitner v. Moore, 160 F. App'x 918, 922 (11th Cir. 2005) (affirming dismissal based on qualified immunity); Lepone-Dempsey v. Carroll County Comm'rs, 159 F. App'x 916, 919-20 (11th Cir. 2005) (affirming denial of qualified immunity); Kingdom v. City of Riviera Beach, 154 F. App'x 131, 132 (11th Cir. 2005) (affirming denial of qualified immunity); Tague v. Fla. Fish and Wildlife Conservation Comm'n, 154 F. App'x 129, 131 (11th Cir. 2005) (affirming dismissal based on qualified immunity); Hicks v. Moore, 422 F.3d 1246, 1252-53 (11th Cir. 2005) (reversing denial of qualified immunity); Migut v. Flynn, 131 F. App'x 262, 267 (11th Cir. 2005) (affirming award of qualified immunity); Tropical Aviation Ground Servs., Inc., v. Jenne, 128 F. App'x 99, 99-100 (11th Cir. 2005) (affirming denial of qualified immunity); Crosby v. Monroe County, 394 F.3d 1328, 1335 (11th Cir. 2004) (affirming award of qualified immunity); O'Rourke v. Hayes, 378 F.3d 1201, 1210-11 (11th Cir. 2004) (affirming denial of qualified immunity); Kingsland v. City of Miami, 369 F.3d 1210, 1228-29 (11th Cir. 2004) (reversing award of qualified immunity), *on reh'g*, 382 F.3d 1220, 1236 (2004) (same); Storck v. City of Coral Springs, 354 F.3d 1307, 1320 (11th Cir. 2003) (affirming award of qualified immunity); Durruthy v. Pastor, 351 F.3d 1080, 1095 (11th Cir. 2003) (reversing denial of qualified immunity); Evans v. City of Zebulon, Ga., 351 F.3d 485, 497 (11th Cir. 2003) (reversing denial of qualified immunity), *on reh'g*, 407 F.3d 1272, 1283 (2005) (affirming denial of qualified immunity for manner of search); McCray v. City of Dothan, No. 01-15756-DD, 2003 WL 23518420, at *8 (11th Cir. Apr. 24, 2003) (affirming denial of qualified immunity and reversing award of qualified immunity); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 955-56 (11th Cir. 2003) (awarding qualified immunity), *aff'g* 261 F.3d 1160, 1177 (2001); Wood v. Kesler, 323 F.3d 872, 881, 883-84 (11th Cir. 2003) (reversing denial of qualified immunity); Holmes v. Kucynda, 321 F.3d 1069, 1084 (11th Cir. 2003) (reversing award of qualified immunity); Dahl v. Holley, 312 F.3d 1228, 1235 (11th Cir. 2002) (affirming award of qualified immunity); Knight v. Jacobson, 300 F.3d 1272, 1278 (11th Cir. 2002) (reversing denial of qualified immunity).

the Eighth Amendment's prison condition requirements (8th Am.),²⁰⁵ the Fourteenth Amendment's procedural due process commands (PDP),²⁰⁶ the Fourteenth Amendment's requirement of substantive due process (SDP),²⁰⁷ the Fourteenth Amendment's prohibition on racial discrimination (Race),²⁰⁸ and

²⁰⁵ Seven out of sixteen reported cases resulted in immunity. *See* Gary v. Modena, No. 05-16973, slip op. at 40-41 (11th Cir. Dec. 21, 2006) (reversing award of qualified immunity); Nichols v. Maynard, 204 F. App'x 826, 829 (11th Cir. 2006) (reversing denial of qualified immunity); McReynolds v. Ala. Dep't of Youth Servs., 204 F. App'x 819, 820, 822-23 (11th Cir. 2006) (reversing dismissal based on qualified immunity); Mullis v. Cobb County Bd. of Comm'rs, 202 F. App'x 364, 367 (11th Cir. 2006) (reversing denial of qualified immunity); Brown v. Smith, 187 F. App'x 947, 950 (11th Cir. 2006) (affirming denial of qualified immunity); Valdes v. Crosby, 450 F.3d 1231, 1244 (11th Cir. 2006) (affirming denial of qualified immunity); Moore v. Cullman County Comm'n, No. 05-13297, slip op. at 6 (11th Cir. Apr. 13, 2006) (affirming award of qualified immunity); Kimbell *ex rel.* Liddell v. Clayton County, Ga., 170 F. App'x 663, 664 (11th Cir. 2006) (affirming denial of qualified immunity); Bozeman v. Orum, 422 F.3d 1265, 1274 (11th Cir. 2005) (affirming denial of qualified immunity); Snow *ex rel.* Snow v. City of Citronelle, Ala., 420 F.3d 1262, 1268, 1271 (11th Cir. 2005) (reversing award of qualified immunity); Purcell *ex rel.* Morgan v. Toombs County, Ga., 400 F.3d 1313, 1316 (11th Cir. 2005) (reversing denial of qualified immunity); Magluta v. Samples, 375 F.3d 1269, 1276, 1284 (11th Cir. 2004) (vacating dismissal based on qualified immunity); Cagle v. Sutherland, 334 F.3d 980, 989-90 (11th Cir. 2003) (vacating denial of qualified immunity); Carter v. Galloway, 352 F.3d 1346, 1350 n.10 (11th Cir. 2003) (affirming summary judgment because the right was not clear); Cotton v. Jenne, 326 F.3d 1352, 1362 (11th Cir. 2003) (affirming denial of qualified immunity for some defendants and awarding qualified immunity to others); Grady v. Haley, 304 F.3d 1329, 1330-31 (11th Cir. 2002) (reversing award of qualified immunity).

²⁰⁶ Five out of seven cases resulted in immunity. *See* Chasse v. McCraney, 174 F. App'x 473, 475 (11th Cir. 2006) (affirming denial of qualified immunity); Hyland v. Kolhage, 158 F. App'x 194, 197 (11th Cir. 2005) (vacating award of qualified immunity); Washington v. Bauer, 149 F. App'x 867, 872 (11th Cir. 2005) (affirming award of qualified immunity); Grayden v. Rhodes, 345 F.3d 1225, 1249 (11th Cir. 2003) (reversing denial of qualified immunity); Doe v. Kearney, 329 F.3d 1286, 1299 (11th Cir. 2003) (affirming award of qualified immunity); Smith *ex rel.* Smith v. Siegelman, 322 F.3d 1290, 1298 (11th Cir. 2003) (reversing denial of qualified immunity); Vinyard v. Wilson, 311 F.3d 1340, 1356 (11th Cir. 2002) (awarding qualified immunity).

²⁰⁷ Five out of seven cases resulted in qualified immunity. *See* Maldonado v. Snead, 168 F. App'x 373, 379, 387 (11th Cir. 2006) (affirming award of qualified immunity); Tinker v. Beasley, 429 F.3d 1324, 1329 (11th Cir. 2005) (reversing denial of qualified immunity); Ray v. Foltz, 370 F.3d 1079, 1080, 1085 (11th Cir. 2004) (reversing denial of qualified immunity); Kirkland *ex rel.* Jones v. Greene County Bd. of Educ., 347 F.3d 903, 905 (11th Cir. 2003) (affirming denial of qualified immunity); Omar v. Lindsey, 334 F.3d 1246 (11th Cir. 2003) (affirms denial of qualified immunity); Lumley v. City of Dade City, Fla., 327 F.3d 1186, 1197 (11th Cir. 2003) (reversing denial of qualified immunity); Dacosta v. Nwachukwa, 304 F.3d 1045, 1049 (11th Cir. 2002) (reversing denial of qualified immunity).

²⁰⁸ One out of five cases resulted in qualified immunity. *See* Gardner v. City of Camilla, Ga., 186 F. App'x 860, 864-65 (11th Cir. 2006) (affirming denial of qualified immunity); Jolivette v. Arrowood, 180 F. App'x 883, 887 (11th Cir. 2006) (affirming denial of qualified immunity); Rigdon v. Ga. Bd. of Regents, 173 F. App'x 756, 757 (11th Cir. 2006) (affirming denial of qualified immunity); Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1273 (11th Cir. 2003) (reversing denial of qualified immunity); Bogle v. McClure, 332 F.3d 1347, 1350, 1356 (11th Cir. 2003) (affirming denial of qualified immunity in reverse-discrimination case). *Cf.* Hartley v. Butler, 147 F. App'x 61, 62 (11th Cir. 2005) (reversing denial of qualified immunity in context of class-of-one claim).

the Fourteenth Amendment's prohibition on gender discrimination (Gender)²⁰⁹ (using the criteria described above) are set out in Table 1:

TABLE 1. QUALIFIED IMMUNITY RATES FOR THE MOST COMMON § 1983 CLAIMS IN THE ELEVENTH CIRCUIT²¹⁰

Constitutional Violation	Immunity Awarded	No Immunity	Immunity Rate
1st Am.	10	7	59%
4th Am. Force	15	13	54%
4th Am. S&S	18	11	62%
8th Am.	7	9	44%
PDP	5	2	71%
SDP	5	2	71%
Race	1	4	20%
Gender	2	1	67%

In the Sixth Circuit, by way of comparison,²¹¹ qualified immunity rates for the same constitutional violations—again labeled 1st Am.,²¹² 4th Am. force,²¹³

²⁰⁹ Two out of three cases resulted in qualified immunity. See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 441 F.3d 1287, 1303 (11th Cir. 2006) (affirming award of qualified immunity in context of sexual harassment); *Stuart v. Jefferson County Dep't of Human Res.*, 152 F. App'x 798, 803 n.6 (11th Cir. 2005) (concluding that right to be free from gender discrimination is clear and denying qualifying immunity); *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325, 1330 (11th Cir. 2003) (affirming award of qualified immunity in context of same-sex harassment).

²¹⁰ See *supra* notes 202–09 and accompanying text.

²¹¹ The Sixth Circuit survey was conducted using the same criteria described in note 195, *supra*, from October 1, 2005 to July 31, 2007. Different dates were used because the Sixth Circuit study was prepared for a separate presentation at the Ohio State Bar Association's 2007 Federal Bench and Bar Conference in Columbus, Ohio (Oct.4-5, 2007).

²¹² Six out of eighteen cases resulted in qualified immunity. See *Logsdon v. Hains*, 492 F.3d 334, 337-38, 346 (6th Cir. 2007) (reversing dismissal where plaintiff was arrested for protesting abortion; law of free speech is clear); *Cate v. City of Rockwood, Tenn.*, 241 F. App'x 231, 234, 236 (6th Cir. 2007) (no qualified immunity for retaliatory discharge); *Lane v. City of LaFollette, Tenn.*, 490 F.3d 410, 420, 424 (6th Cir. 2007) (same); *Ctr. for Bio-Ethical Reform, Inc., v. City of Springboro*, 477 F.3d 807, 824-25 (6th Cir. 2007) (reversing grant of qualified immunity because First Amendment principles are clear); *Leonard v. Robinson*, 477 F.3d 347, 352-53, 361, 363 (6th Cir. 2007) (reversing award of qualified immunity for police officer who arrested plaintiff for cursing in front of women; law is clear); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 365 (6th Cir. 2007) (reversing denial of qualified immunity because plaintiff did not satisfy *Garcetti*); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 263 (6th Cir. 2006) (reversing grant of qualified immunity because right of employee to speak on matter of public concern is clear); *Lustig v. Mondeau*, 211 F. App'x 364, 365 (6th Cir. 2006) (reversing grant of qualified immunity because of factual disputes); *Teri Lynn Enters., Inc. v. Pickell*, 203 F. App'x 687, 688 (6th Cir. 2006) (reversing denial of qualified immunity because of insufficient evidence); *Swiecicki v. Delgado*, 463 F.3d 489, 491, 500 (6th Cir. 2006) (reversing award of qualified immunity to police officer who arrested fan for heckling because factual matters were in dispute); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (reversing denial of qualified immunity because of *Hartman v. Moore*); *Akridge v. Wilkinson*, 178 F. App'x 474, 481 (6th Cir. 2006) (affirming grant of qualified immunity in *Pickering*-type case because law was not "clear enough"); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d

4th Am. S&S,²¹⁴ 8th Am.,²¹⁵ PDP,²¹⁶ SDP,²¹⁷ Race²¹⁸ and Gender²¹⁹—are described in Table 2:

410, 439-40 (6th Cir. 2006) (holding that high school athletic association officials are immune even though they violated the First Amendment because law not clear); Silberstein v. City of Dayton, 440 F.3d 306, 319-20 (6th Cir. 2006) (reversing denial of qualified immunity because no violation under *Pickering*); Caudill v. Hollan, 431 F.3d 900, 914-15 (6th Cir. 2005) (reversing grant of qualified immunity because prohibition on patronage dismissals is clear); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 232-33 (6th Cir. 2005) (affirming denial of qualified immunity in *Pickering*-type case because law is clear); Livingston v. Luken, 151 F. App'x 470, 476-78 (6th Cir. 2005) (affirming denial of qualified immunity because retaliation is clearly illegal); King v. Zamirara, 150 F. App'x 485, 490-91, 497 (6th Cir. 2005) (reversing award of qualified immunity against inmate who was retaliated against based on speech).

²¹³ Five out of nineteen cases resulted in qualified immunity. See *Roberts v. Manigold*, 240 F. App'x 675, 678 (6th Cir. 2007) (affirming denial of qualified immunity holding that taser could be excessive force); *Bougress v. Mattingly*, 482 F.3d 886, 891, 895 (6th Cir. 2007) (affirming denial of qualified immunity because law of excessive force is clear); *Harper v. Amweg*, 231 F. App'x 405, 406 (6th Cir. 2007) (finding that no genuine issue of fact was presented); *Humphrey v. Mabry*, 482 F.3d 840, 851 (6th Cir. 2007) (reversing denial of qualified immunity); *Ontha v. Rutherford County, Tenn.*, 222 F. App'x 498, 503, 508 (6th Cir. 2007) (reversing denial of qualified immunity to supervisory official); *Gill v. Locricchio*, No. 06-1659, slip op. at 2, 3 (6th Cir. Feb. 20, 2007) (affirming denial of qualified immunity and eschews fact-finding even though video was present); *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 400 (6th Cir. 2007) (reversing denial of qualified immunity because insufficient evidence); *Griffith v. Coburn*, 473 F.3d 650, 660 (6th Cir. 2007) (reversing grant of qualified immunity because of factual issues); *McKenna v. City of Royal Oak*, 469 F.3d 559, 561-62 (6th Cir. 2006) (affirming denial of qualified immunity by dismissing interlocutory appeal); *Pigram v. Chaudoin*, 199 F. App'x 509, 515 (6th Cir. 2006) (affirming denial of qualified immunity); *Smoak v. Hall*, 460 F.3d 768, 786 (6th Cir. 2006) (affirming denial of qualified immunity); *Bing ex rel. Bing v. City of Whitehall, Ohio*, 456 F.3d 555, 571-72 (6th Cir. 2006) (reversed denial of qualified immunity); *Alkhateeb v. Charter Twp. of Waterford*, 190 F. App'x 443, 453 (6th Cir. 2006) (affirming denial of qualified immunity); *Shreve v. Jessamine County Fiscal Court*, 453 F.3d 681, 683, 689 (6th Cir. 2006) (reversing grant of qualified immunity); *Sigley v. City of Parma Heights*, 437 F.3d 527, 537, 538 (6th Cir. 2006) (reversing award of qualified immunity); *Tallman v. Elizabethtown Police Dep't*, 167 F. App'x 459, 467 (6th Cir. 2006) (holding that police have qualified immunity even if excessive force was used); *Ciminillo v. Streicher*, 434 F.3d 461, 469 (6th Cir. 2006) (reversing award of qualified immunity holding that beanbag shot at victim could be excessive); *Smith v. Cupp*, 430 F.3d 766, 768 (6th Cir. 2005) (affirming denial of qualified immunity); *Howser v. Anderson*, 150 F. App'x 533, 540 (6th Cir. 2005) (affirming denial of qualified immunity by dismissing interlocutory appeal).

²¹⁴ Twelve out of twenty-two cases resulted in immunity. See *Logsdon v. Hains*, 492 F.3d 334, 343-44 (6th Cir. 2007) (reversing district court's dismissal and concluded both that Fourth Amendment law on arrest is clear and police did not have probable cause); *Srisavath v. City of Brentwood*, 243 F. App'x 909, 917, 919-20 (6th Cir. 2007) (affirming district court's denial of qualified immunity because facts were at issue and law was clear); *Duncan v. Jackson*, 243 F. App'x 890, 892, 894, 896-97 (6th Cir. 2007) (affirming denial of qualified immunity because of factual issues surrounding search and clarity of the law); *McGraw v. Madison Twp.*, 231 F. App'x 419, 424-25 (6th Cir. 2007) (affirming denial of qualified immunity because law of arrest is clear); *Harper v. Amweg*, 231 F. App'x 405, 406 (6th Cir. 2007) (affirming district court's finding that probable cause supported arrest); *Humphrey v. Mabry*, 482 F.3d 840, 841-42, 848 (6th Cir. 2007) (reversing district Court and awarding qualified immunity to officers who relied on communications with other officers to make stop—even though they had no probable cause); *Revis v. Meldrum*, 489 F.3d 273, 286 (6th Cir. 2007) (affirming dismissal based on qualified immunity); *Keeton v. Metro. Gov't of Nashville and Davidson County*, 228 F. App'x 522, 523, 525 (6th Cir. 2007) (affirming

district court's denial of qualified immunity because law of warrantless entry is clear); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 831-32 (6th Cir. 2007) (reversing award of qualified immunity because law of arrest is clear); *Nelson v. Riddle*, 217 F. App'x 456, 460-61 (6th Cir. 2007) (reversing district court's denial of qualified immunity because court of appeals found probable cause for arrest); *Franklin v. Miami Univ.*, 214 F. App'x 509, 510 (6th Cir. 2007) (same); *Jernigan v. City of Royal Oak*, 202 F. App'x 892, 893, 897 (6th Cir. 2006) (affirming denial of qualified immunity because factual issues surrounded probable cause); *Swiecicki v. Delgado*, 463 F.3d 489, 503 (6th Cir. 2006) (reversing award of qualified immunity because factual issues existed); *Smoak v. Hall*, 460 F.3d 768, 782, 786 (6th Cir. 2006) (same); *Nails v. Riggs*, 195 F. App'x 303, 311-12 (6th Cir. 2006) (holding that even though police officer violated Fourth Amendment he could reasonably have believed he had probable cause); *Bing ex rel. Bing v. City of Whitehall, Ohio*, 456 F.3d 555, 571-72 (6th Cir. 2006) (reversing denial of qualified immunity by district court and held that police had probable cause); *Baranski v. Fifteen Unknown Agents of the ATF*, 452 F.3d 433, 447, 450 (6th Cir. 2006) (holding that reliance on warrant that did not comply with particularity requirement entitled agents to qualified immunity); *Barnes v. Wright*, 449 F.3d 709, 716-17 (6th Cir. 2006) (holding that indictment is conclusive proof of probable cause and thus arresting officer is entitled to qualified immunity); *Gregory v. City of Louisville*, 444 F.3d 725, 759-60 (6th Cir. 2006) (affirming denial of qualified immunity because factual issues surrounded probable cause); *Causey v. City of Bay City*, 442 F.3d 524, 531 (6th Cir. 2006) (reversing denial of qualified immunity because court of appeals finds exigent circumstances justifying warrantless search); *Armstrong v. City of Melvindale*, 432 F.3d 695, 701-02 (6th Cir. 2006) (reversing denial of qualified immunity because of reliance on defective warrant); *Livingston v. Luken* 151 F. App'x 470, 472 (6th Cir. 2005) (affirming denial of qualified immunity).

²¹⁵ In the eight cases that involved Eighth Amendment claims, the court awarded immunity four times and denied it seven times (three of the cases involved multiple claims that resulted in different results). *See Williams v. McLemore*, 247 F. App'x 1, 12-13 (6th Cir. 2007) (holding that law is clear on failure to protect inmate and factual issues precluded qualified immunity); *Cooper v. County of Washtenaw*, 222 F. App'x 459, 469, 473 (6th Cir. 2007) (reversing award of qualified immunity because law on suicide is clear); *Hollenbaugh v. Maurer*, 221 F. App'x 409, 411, 420 (6th Cir. 2007) (Eighth Amendment (and Fourteenth Amendment) right to medical assistance is clear; qualified immunity denied); *Perez v. Oakland County*, 466 F.3d 416, 425-28 (6th Cir. 2006) (notwithstanding factual issues and assumed constitutional violation, court holds that defendant could not have reasonably known that victim was suicide risk); *Speers v. County of Berrien*, 196 F. App'x 390, 392, 400-01 (6th Cir. 2006) (reversing denial of qualified immunity by district court because facts do not support charge); *Carlton v. Turner*, No. 05-1009, slip op. at 3, 4, 9 (6th Cir. Apr. 12, 2006) (reversing award of qualified immunity; prohibition on infliction of wanton pain on inmate is clearly established); *Clark-Murphy v. Foreback*, 439 F.3d 280, 293 (6th Cir. 2006) (reversing denial of qualified immunity); *Linden v. Washtenaw County*, 167 F. App'x 410, 414, 429 (6th Cir. 2006) (reversing award of qualified immunity in case of inmate suicide).

²¹⁶ Five out of eight cases resulted in qualified immunity. *See, Thomas v. Cohen*, 453 F.3d 657, 663 (6th Cir. 2006) (affirming award of qualified immunity because tenants had no protected property interest); *Hall v. City of Cookeville, Tenn.*, 157 F. App'x 809, 810, 812-13 (6th Cir. 2005) (reversing denial of qualified immunity because plaintiff voluntarily released information to public); *Corbett v. Garland*, 228 F. App'x 525, 526 (6th Cir. 2007) (reversing denial of qualified immunity because property interest in job not clear); *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 896-97, 899 (6th Cir. 2006) (affirming qualified immunity because tenure was not clear); *Revis v. Meldrum*, 489 F.3d 273, 285-86, 293 (6th Cir. 2007) (affirming award of qualified immunity because sheriff could not reasonably know that summary eviction violated due process); *Stringfield v. Graham*, 212 F. App'x 530, 539 (6th Cir. 2007) (reversing award of qualified immunity because factual issues surrounded property interest); *Silberstein v. City of Dayton*, 440 F.3d 306, 316, 320 (affirming denial of qualified immunity because law clear); *Smith v. Williams-Ash*, 173 F. App'x 363, 367 (6th Cir. 2005) (affirming denial of qualified immunity where social worker takes child).

TABLE 2. QUALIFIED IMMUNITY RATES FOR THE MOST COMMON § 1983 CLAIMS IN THE SIXTH CIRCUIT²²⁰

Constitutional Violation	Immunity Awarded	No Immunity	Immunity Rate
1st Am.	6	12	33%
4th Am. Force	5	14	26%
4th Am. S&S	12	10	55%
8th Am.	4	7	36%
PDP	5	3	63%
SDP	6	0	100%
Race	0	0	—
Gender	0	0	—

The change in the Eleventh Circuit cannot be attributed to changes in its heightened pleading requirement, nor its limited view of precedent, because post-*Hope* it continued to abide by these doctrines.²²¹ The only change in the Eleventh Circuit was *Hope*. As a by-product, *Hope* forced the Eleventh Circuit to squarely face the problem of factual challenges on interlocutory appeal. Prior to *Hope*, facts were relatively unimportant in the Eleventh Circuit; regardless of what the plaintiff alleged, he likely could not point to a “materially similar” case sufficient to satisfy the Eleventh Circuit’s demanding standard.²²² After *Hope*, however, qualified immunity could not be meted out based on the lack of materially similar reported cases; factual allegations became impor-

²¹⁷ All six cases resulted in qualified immunity. See *Meals v. City of Memphis, Tenn.*, 493 F.3d 720, 723, 731 (6th Cir. 2007) (reversing denial of qualified immunity because high speed chase did not shock the conscience); *Draw v. City of Lincoln Park*, 491 F.3d 550, 553, 557 (6th Cir. 2007) (holding that failure to stop drag race is not actionable under Fourteenth Amendment); *Mitchell v. McNeil*, 487 F.3d 374, 375 (6th Cir. 2007) (holding that plaintiff had no right to be free from police loaning squad car to informant); *Koulta v. Merciez*, 477 F.3d 442, 443, 445, 448 (6th Cir. 2007) (reversing denial of qualified immunity because no right to be free from police conduct releasing drunk driver); *Smith v. Williams-Ash*, 173 F. App’x 363, 367 (6th Cir. 2005) (reversing denial of qualified immunity because social worker’s conduct did not shock the conscience); *Jackson v. Schultz*, 429 F.3d 586, 591-92 (6th Cir. 2005) (reversing denial of qualified immunity because no state-created danger).

²¹⁸ There were no relevant racial or gender discrimination claims that raised or resulted in qualified immunity, suggesting that in these contexts qualified immunity remains rare in the Sixth Circuit. See *Armacost, supra* note 116, at 636-37 (observing that qualified immunity is rare in the context of race-based and gender-based discrimination). Cf. *Brooks v. Knapp*, 221 F. App’x 402, 408-09 (6th Cir. 2007) (affirming award of qualified immunity in domestic violence context because plaintiff made no specific claim of intentional gender discrimination against the arresting officers); *Ruffin v. Nicely*, 183 F. App’x 505, 514 (6th Cir. 2006) (reversing summary judgment for government in context of racial discrimination).

²¹⁹ *Armacost, supra* note 117, at 636-37.

²²⁰ See *supra* notes 211-19 and accompanying text.

²²¹ See, e.g., *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007) (stating that only decisions of Supreme Court, Eleventh Circuit and state supreme court are relevant to qualified immunity); *Jorge T. ex rel. Carcano v. Fla. Dep’t of Children and Families*, 250 F. App’x 954, 955 (11th Cir. 2007) (applying heightened pleading standard to qualified immunity).

²²² See *supra* notes 122-35 and accompanying text.

tant.²²³ The fact that almost two-thirds (thirty-eight of fifty-nine) of the Eleventh Circuit's post-*Hope* cases rejecting qualified immunity were handed down at an interlocutory stage²²⁴ demonstrates the power of *Johnson v. Jones*. When forced to accept the plaintiff's version of events, an appellate court is more likely to reject qualified immunity.²²⁵ This is so because a plaintiff can ordinarily cast his or her case to mirror established precedents—at least close enough to satisfy *Hope*'s demands.

Unfortunately for civil rights plaintiffs, not all of the active judges on the Eleventh Circuit following *Hope* accepted *Johnson v. Jones*. As a result, qualified-immunity rates in the Eleventh Circuit varied widely among active judges.²²⁶ Those judges who deferred to plaintiffs' factual allegations tended to reject qualified immunity on interlocutory appeal. Those willing to engage in *de novo* fact-finding proved more eager to award qualified immunity. Ignoring *Johnson v. Jones* allows judges on interlocutory appeal to either reject plaintiffs' factual claims outright—and thereby deny that any constitutional violation occurred—or bend the facts sufficiently to spoil the plaintiff's analogy to established precedents. Either way, qualified immunity is the result.

Table 3 describes the qualified-immunity-rates among judges on the Eleventh Circuit who addressed qualified immunity between *Hope* and the Supreme Court's grant of review in *Harris*:

²²³ See *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002).

²²⁴ See *supra* notes 202-09 and accompanying text.

²²⁵ See, e.g., *Killmon v. City of Miami*, 199 F. App'x 796, 798-99 (11th Cir. 2006) (holding that appellate court on interlocutory review has no jurisdiction to address facts); *Arrington v. Jenkins*, 188 F. App'x 971 (11th Cir. 2006) (same); *Jolivet v. Arrowood*, 180 F. App'x 883, 885-86 (11th Cir. 2006) (same); *Tepper v. Canizaro*, 175 F. App'x 275 (11th Cir. 2006) (affirming denial of qualified immunity because of genuine issues of material fact); *Chasse v. McCraney*, 174 F. App'x 473, 474-75 (11th Cir. 2006) (same); *Kadale v. Bd. Of Regents of the Univ. of Ga.*, 171 F. App'x 770, 771 (11th Cir. 2006) (stating that *Johnson v. Jones* precludes appellate court from addressing factual issues); *Tucker v. Talladega City Schs.*, 171 F. App'x 289, 293 (11th Cir. 2006) (holding that appellate court on interlocutory review has no jurisdiction to address facts).

²²⁶ See *infra* Table 3 and accompanying text.

TABLE 3. QUALIFIED IMMUNITY RATES AMONG JUDGES ON THE ELEVENTH CIRCUIT²²⁷

Judge	Voted for Immunity	Voted Against Immunity	Immunity Rate
Anderson	6	13	39%
Barkett	3	16	16%
Birch	11	13	46%
Black	7	11	39%
Carnes	15	16	48%
Cox	11	6	65%
Dubina	6	14	30%
Edmondson	14	4	78%
Fay	1	9	10%
Hill	3	3	50%
Hull	12	9	57%
Kravitch	7	4	64%
Marcus	12	12	50%
Pryor	9	8	53%
Roney	2	2	50%
Tjoflat	20	9	69%
Wilson	11	17	39%

Judge Barkett's qualified-immunity-rate of 16% and Judge Fay's rate of 10% are markedly lower than Judge Edmondson's rate of 78%, Judge Tjoflat's rate of 69%, and Judge Cox's rate of 65%. Though I confess that my conclusion is not scientifically defensible, my reading of the underlying opinions suggests to me that these differences can be explained, in large part, by Judges Edmondson's, Cox's and Tjoflat's eagerness to decide facts *de novo* on interlocutory appeal. Judge Barkett, in contrast, has generally deferred to plaintiffs' factual allegations on interlocutory appeal. For civil rights plaintiffs, then, the single most important factor in terms of qualified immunity in the Eleventh Circuit following *Hope* was the make-up of the appellate panel on interlocutory appeal.²²⁸

²²⁷ The underlying data is that reported in the footnotes to the text describing the Eleventh Circuit's qualified-immunity-rates for particular constitutional rights. *See supra* notes 202-10 and accompanying text.

²²⁸ Of course, appellate panels ordinarily consist of three judges. In the Eleventh Circuit during the time-frame and under the conditions studied, *see supra* notes 202-10 and accompanying text, panels generally consisted of two Eleventh Circuit judges and one visiting judge either from another circuit or a district court. Thus, the vote of a single judge, like Judge Barkett, would not necessarily control the outcome on appeal. As would be expected, however, having two Eleventh Circuit judges with high qualified-immunity-rates on the same panel led to a greater likelihood of qualified immunity being awarded. When Judges Cox and Edmondson sat on the same panel, for example, qualified immunity was awarded 66% of the time (two out of three cases). *See, e.g.,* Stavropoulos v. Firestone, 361 F.3d 610, 621 (11th Cir. 2004) (awarding immunity). Judges Cox and Tjoflat joined to award immunity in four out of five cases. *See, e.g.,* Moore v. Cullman County Comm'n, No. 05-13297,

VII. CHASING HARRIS

Harris v. Coweta County,²²⁹ which rejected qualified immunity on interlocutory appeal, demonstrates the importance of appellate fact-finding. In *Harris*, county deputies chased a motorist (Harris) who was clocked doing 73 mph in a 55-mph-zone. Because Harris refused to stop, a deputy (Scott) eventually decided to ram him and force him off the road.²³⁰ The resulting crash caused serious injuries to Harris and left him a quadriplegic.²³¹

Harris sued Scott (and the county) under § 1983 for excessive force.²³² Because Scott purposely rammed Harris, his action was clearly a Fourth Amendment event. The claim raised by Harris was whether the deputy's actions were excessive under the Fourth Amendment.²³³ Scott moved for summary judgment based on qualified immunity.²³⁴ The district court refused to award summary judgment because of genuine issues of material fact²³⁵ and Scott took his interlocutory appeal.²³⁶ The Eleventh Circuit, "view[ing] the facts in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in his favor," concluded that summary judgment was not warranted.²³⁷

The Supreme Court reversed in *Scott v. Harris*.²³⁸ After viewing videos of the chase and ramming—which were produced by deputies whose cameras automatically filmed the events—Justice Scalia concluded for the Court, the

slip op. at 2 (11th Cir. Apr. 13, 2006) (awarding immunity); *but see* *Jones v. City of Atlanta*, 192 F. App'x 894, 898 (11th Cir. 2006) (holding that officers were not entitled to immunity). Judges Edmondson and Tjoflat joined to award qualified immunity in two of three cases they heard together. *See, e.g.,* *Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir. 2006); *cf.* *Baltimore v. City of Albany, Ga.*, 183 F. App'x 891, 900 (11th Cir. 2006) (Judge Edmondson dissents from panel's denial of immunity to one police officer). In contrast, Judges Barkett and Anderson joined to deny qualified immunity in all three cases they heard together. *See, e.g.,* *Sparado v. Boone*, 212 F. App'x 831, 832 (11th Cir. 2006). Judges Barkett and Birch joined to deny immunity in six of the seven cases they heard together. *See, e.g.,* *Harris v. Coweta County, Ga.*, 433 F.3d 807, 821 (11th Cir. 2005); *contra* *Fry v. Hillsborough County Sch. Bd., Fla.*, 190 F. App'x 810, 820 (11th Cir. 2006) (awarding qualified immunity). Interestingly, when Judge Barkett sat with Judge Cox—five times during the time-frame studied—the Eleventh Circuit panel *always* rejected qualified immunity. *See, e.g.,* *Harris v. Coweta County, Ga.*, 433 F.3d 807, 821 (11th Cir. 2005). Judge Barkett apparently had no similar influence over Judges Edmondson and Tjoflat.

²²⁹ *Harris v. Coweta County, Ga.*, 406 F.3d 1307 (11th Cir. 2005), *aff'd on reh'g.* *Harris v. Coweta County, Ga.*, 433 F.3d 807 (11th Cir. 2005), *rev'd*, *Scott v. Harris*, 127 S. Ct. 1769 (2007).

²³⁰ *Id.* at 1311.

²³¹ *Id.* at 1312. If the reader has fifteen minutes or so, she may want to view the digital video of the chase and resulting crash; the video is attached to the Supreme Court's opinion in *Scott v. Harris*, 127 S. Ct. 1769 (2007). Video: *Scott v. Harris* (2007), available at <http://www.supremecourtus.gov/opinions/06slipopinion.html>. As a matter of trivia, this marks the first time the Supreme Court attached a video to an opinion.

²³² *Harris*, 406 F.3d at 1311.

²³³ *Id.* at 1313.

²³⁴ *Id.* at 1310-11.

²³⁵ *Id.* at 1316-17.

²³⁶ *Id.* at 1310-11.

²³⁷ *Id.* at 1312.

²³⁸ *Scott v. Harris*, 127 S. Ct. 1769 (2007).

deputies' force was not excessive within the meaning of the Fourth Amendment.²³⁹ In reaching this conclusion, Justice Scalia implicitly modified the holding in *Johnson v. Jones*:

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment .

....

[Harris'] version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.²⁴⁰

Only Justice Stevens dissented: "If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."²⁴¹ Regarding Justice Scalia's interpretation of the video, Justice Stevens observed that "three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence and described a very different version of events"²⁴²

What does *Harris* do to *Johnson v. Jones*? Is *Johnson v. Jones*, as recently stated by the Tenth Circuit, a "dead letter in light of *Scott v. Harris*"?²⁴³ Does "logic dictate[]," as the Sixth Circuit has stated, "that [*Harris*] must have modified *Johnson*'s language about jurisdiction to reach the result it did [?]"²⁴⁴ *Harris* argued before the Supreme Court that it lacked appellate jurisdiction to address factual issues—like the reasonableness of the force used against him. Neither the majority nor the dissent mentioned the matter or cited *Johnson v. Jones*. Hence, the Supreme Court obviously felt it had jurisdiction regardless of the interlocutory nature of the appeal.

The circuits following *Johnson* had uniformly eschewed fact-finding on interlocutory appeal because jurisdiction was lacking.²⁴⁵ In *Hulen v. Yates*, for example, where a district court had denied summary judgment to a defendant who allegedly violated the First Amendment by transferring a public-sector employee, the Tenth Circuit stated that it could "not resolve Defendants' claims

²³⁹ *Id.* at 1776.

²⁴⁰ *Id.* at 1776.

²⁴¹ *Id.* at 1785 (Stevens, J., dissenting).

²⁴² *Id.*

²⁴³ *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1119, n.1 (10th Cir. 2008). The Tenth Circuit in *Brooks* also stated that "it appears we would have jurisdiction to review a district court's conclusion that the evidence is sufficient to survive summary judgment in the qualified immunity context, if the issue was properly raised." *Id. Contra York v. City of Las Cruces*, 523 F.3d 1205, 1211 (10th Cir. 2008) (applying *Johnson v. Jones* and refusing to address evidentiary sufficiency on interlocutory appeal in excessive force case).

²⁴⁴ *Wysong v. City of Heath*, 260 F. App'x 848, 853 (6th Cir. 2008).

²⁴⁵ See *White v. Gerardot*, 509 F.3d 829, 834 (7th Cir. 2007); *Bearden v. Lemon*, 475 F.3d 926, 930 (8th Cir. 2007); *Gobert v. Caldwell*, 463 F.3d 339, 345 (5th Cir. 2006); *Britt v. Garcia*, 457 F.3d 264, 270 (2d Cir. 2006); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059-60 (9th Cir. 2006); *Smith v. Cupp*, 430 F.3d 766, 771 (6th Cir. 2005); *Washington v. Wilmore*, 407 F.3d 274, 281 (4th Cir. 2005); *Rivera-Jiménez v. Pierluisi*, 362 F.3d 87, 92 (1st Cir. 2004); *Farmer v. Moritsugu*, 163 F.3d 610, 613-14 (D.C. Cir. 1998).

that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal.”²⁴⁶ Similarly, in *Hamilton v. Leavy*, a case involving deliberate indifference to a prisoner’s Eighth Amendment rights, the Third Circuit refused to review “the District Court’s ‘identification of the facts that are subject to genuine dispute,’ but instead . . . review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes.”²⁴⁷

Of course, one might attempt to distinguish *Scott v. Harris*. For example, one might first claim that the Supreme Court is different from the lower appellate courts. Even though the lower federal courts do not have interlocutory appellate jurisdiction to engage in fact-finding, the Supreme Court can take matters up immediately under its more sweeping appellate powers.²⁴⁸

Most appeals are lodged in the Supreme Court under 28 U.S.C. § 1254(1), which authorizes the Court to take cases from the United States Courts of Appeals “before or after rendition of judgment.”²⁴⁹ Still, even though § 1254(1) authorizes the Supreme Court to take cases before judgment, these appeals must still be properly lodged “in” the court of appeals first.²⁵⁰ “A case is properly ‘in’ the court of appeals if the judgment of the district court is an appealable order or otherwise falls within the jurisdiction of the courts of appeals.”²⁵¹ Thus, the Supreme Court’s appellate jurisdiction under § 1254(1) derives from the court of appeals’ jurisdiction; if the latter has no jurisdiction, then neither does the former.²⁵² “If there was a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, which defect likewise, would prevent the Supreme Court from resolving the merits upon the grant of certiorari before judgment.”²⁵³

A better jurisdictional argument rests with 28 U.S.C. § 1651, the All Writs Act.²⁵⁴ This statute has been used on rare occasions to take cases from district courts when appeals are not otherwise proper.²⁵⁵ For example, in *United States v. Nixon* the government argued that its interlocutory appeal to the Supreme Court was proper either under § 1254(1)—because an interlocutory appeal was properly lodged in the Court of Appeals—or § 1651—regardless of whether a

²⁴⁶ *Hulen v. Yates*, 322 F.3d 1229, 1240 (10th Cir. 2003).

²⁴⁷ *Hamilton v. Leavy*, 322 F.3d 776, 782 (3d Cir. 2002).

²⁴⁸ See, e.g., 28 U.S.C. § 1651 (2000). See *infra* notes 249-58 and accompanying text.

²⁴⁹ 28 U.S.C. § 1254(1) (2000).

²⁵⁰ *Id.* See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 76 (8th ed. 2002) (“[I]t is also necessary that the appeal, even though docketed in the court of appeals, be properly ‘in’ that court at the time when the petition for certiorari before judgment is filed.”).

²⁵¹ STERN, *supra* note 250, at 76 (citing *United States v. Nixon*, 418 U.S. 683, 690-92 (1974)).

²⁵² See *id.* at 76. (“Put differently, what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered.”).

²⁵³ *Id.*

²⁵⁴ 28 U.S.C. § 1651 (2000).

²⁵⁵ See, e.g., *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 216 (1945); *U.S. Alkali Exp. Ass’n v. United States*, 325 U.S. 196, 201-02 (1945); *House v. Mayo*, 324 U.S. 42, 44 (1945); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24, 26 (1936).

proper appeal was pending below.²⁵⁶ According to the government in *Nixon*, “the All Writs Act . . . authorizes the Court to issue extraordinary writs like the ‘common law writ of certiorari’ to a lower court, and this power has been used when cases were found not to be pending ‘in’ a court of appeals.”²⁵⁷ The Supreme Court noted that because jurisdiction was proper under § 1254(1), it did not have to “decide whether other jurisdictional vehicles are available.”²⁵⁸

Arguing that the Supreme Court in *Scott v. Harris* took appellate jurisdiction even though the matter was not properly “in” the Eleventh Circuit would seem largely hypothetical, because the petition sought review under § 1254 and the Court granted certiorari without ever mentioning § 1651.²⁵⁹ Harris argued in his response that the Court lacked jurisdiction under *Johnson v. Jones* and § 1254,²⁶⁰ and Scott failed to reference § 1651 in his reply.²⁶¹ Coupled with the fact that “orders that are not appealable by reason of their interlocutory nature . . . may not ordinarily be reviewed through any of the extraordinary writs,”²⁶² Harris probably cannot be distinguished as a Supreme Court case taken up under the All Writs Act.

Second, *Harris* might be limited to interlocutory appeals that have the benefit of videos.²⁶³ For instance, in *Mecham v. Frazier*, which involved a successful interlocutory appeal following a district court’s denial of qualified immunity to two police officers who had allegedly used excessive force, the Tenth Circuit cited *Harris* in noting that “[t]he facts are in little doubt since [the] squad car was equipped with a dashboard camera which recorded the incident.”²⁶⁴ Similarly, in *Marvin v. City of Taylor*, which came to the court on interlocutory appeal, the Sixth Circuit used police video footage that accompanied an arrest to independently judge the reasonableness of the officers’ force.²⁶⁵

In contrast, where there is no video, *Harris* may not apply.²⁶⁶ The Third Circuit so held in *Blaylock v. City of Philadelphia*, which involved an allegedly false arrest and excessive use of force by several police officers.²⁶⁷ Following

²⁵⁶ *United States v. Nixon*, 418 U.S. 683, 690-92 (1974).

²⁵⁷ Supplemental Brief for the United States on Appellate Jurisdiction at 15, *U.S. v. Nixon*, 418 U.S. 683 (1973) (Nos. 73-1766, 73-1834).

²⁵⁸ *Nixon*, 418 U.S. at 692 n.7.

²⁵⁹ *Harris v. Coweta County, Ga.*, 433 F.3d 807 (11th Cir. 2005), *cert. granted*, 127 S. Ct. 468 (Oct. 27, 2006) (No. 05-1631).

²⁶⁰ Brief of Respondent at 1-3, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631).

²⁶¹ See Reply Brief of Petitioner, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631).

²⁶² STERN, *supra* note 250, at 586.

²⁶³ See *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007).

²⁶⁴ *Mecham v. Frazier*, 500 F.3d 1200, 1202 n.2 (10th Cir. 2007).

²⁶⁵ *Marvin v. City of Taylor*, 509 F.3d 234, 240 (6th Cir. 2007) (stating that “we exercise *de novo* review, and considering that all parties . . . agree that the video files before this Court should have been before the District Court, this Court will assess the officers’ entitlement to qualified immunity based upon the videos . . .”). See also *Davenport v. Causey*, 521 F.3d 544, 547 (6th Cir. 2008) (using video to identify facts in excessive force case on interlocutory appeal).

²⁶⁶ See, e.g., *Floyd v. City of Detroit*, 518 F.3d 398, 403-04 (6th Cir. 2008) (applying *Johnson v. Jones* to excessive force case on interlocutory appeal notwithstanding *Harris*); *Arnold v. Curtis*, 243 F. App’x 408, 412 (10th Cir. 2007) (same).

²⁶⁷ *Blaylock*, 504 F.3d at 414.

a district court's denial of summary judgment, the Third Circuit on interlocutory appeal observed "*Scott [v. Harris]* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court's determination" ²⁶⁸ However, the Third Circuit also observed:

[T]he Court [in *Harris*] had before it a videotape of undisputed authenticity depicting all of the defendant's conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct. . . . Such a scenario may represent the outer limit of the principle of *Johnson v. Jones*—where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review. ²⁶⁹

Because it did not "have a situation in which 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it,'" ²⁷⁰ the court found that it lacked appellate jurisdiction. ²⁷¹

Third, one might argue that *Harris* should be limited to mixed questions of law and fact that are reviewed independently by courts of appeals. ²⁷² In *Ornelas v. United States*, for example, the Supreme Court ruled that the ultimate question of whether probable cause supported a search was to be addressed independently on appeal: "We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination." ²⁷³

The Supreme Court applied *Ornelas* to a jury's verdict in favor of a civil rights plaintiff in *Muehler v. Mena*. ²⁷⁴ There, local authorities acting pursuant to a search warrant detained the occupant (Mena) of the searched premises in handcuffs for several hours during the course of the search. ²⁷⁵ Mena sued under § 1983 claiming, among other things, that the use of handcuffs amounted to excessive force under the Fourth Amendment. ²⁷⁶ A jury agreed and awarded

²⁶⁸ *Id.* at 414.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* See also *Green v. N.J. State Police*, 246 F. App'x 158, 159 n.1 (3d Cir. 2007) (noting that unlike in *Harris*, the videos were "inconclusive on several of the key disputed facts"); *Marvin v. City of Taylor*, 509 F.3d 234, 237-40 (6th Cir. 2007) (relying on videos to develop facts on interlocutory appeal in excessive force case); *Wysong v. City of Heath*, 260 F. App'x 848, 853-54 (6th Cir. 2008) (holding that *Harris* allows interlocutory fact-finding when the record "blatantly" contradicts the plaintiff's allegations).

²⁷² This was the government's response in *Scott v. Harris*. When asked whether the Supreme Court was bound by lower courts' version of the facts, the government responded at oral argument that "the answer to that question was provided in . . . *Ornelas versus United States*, a decision by this Court in 1996 that came up in the context of . . . a direct criminal appeal involving the question of probable cause. And this Court set forth very clearly that . . . [the] legal question about whether those facts reasonably give rise to probable cause is an independent [question subject to] de novo review." Transcript of Oral Argument at 54-55, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631).

²⁷³ *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

²⁷⁴ *Muehler v. Mena*, 544 U.S. 93 (2005).

²⁷⁵ *Id.* at 96.

²⁷⁶ *Id.* at 102.

her \$60,000.²⁷⁷ The Supreme Court (per the Chief Justice) disagreed, finding that no Fourth Amendment violation occurred.²⁷⁸ The Court noted that although it was bound to respect the jury's factual findings, "we do not defer to the jury's legal conclusion that those facts violate the Constitution."²⁷⁹ The Court stopped short of saying, however, that a jury's finding of excessive force is always subject to *de novo* review on appeal. Rather, the unique circumstances of the case—police had the authority to search the premises and to detain Mena—made such a broad finding unnecessary. The Court simply concluded that the authority to detain categorically includes the authority to use handcuffs for the length of the detention.²⁸⁰

Justice Kennedy, whose fifth vote was necessary to support outright reversal under the Fourth Amendment, concurred stating that he thought "on this record it does not appear the restraints were excessive."²⁸¹ Speaking for himself and three additional concurring Justices (Souter, Ginsburg and Breyer, JJ.), Justice Stevens argued that the case should be returned to the court of appeals to address the excessive force issue on an ad hoc basis: "I think it clear that the jury could properly have found that this 5-foot-2 inch young lady posed no threat . . . and that [the officers] used excessive force in keeping her in handcuffs . . ." ²⁸²

One can certainly argue that *Mena* means excessive force verdicts present mixed questions of law and fact that are subject to *de novo* review on appeal. Even if true, however, this need not mean that appellate courts are free to engage in *interlocutory* fact-finding. As demonstrated by a consensus of lower court opinions that have applied *Johnson v. Jones* in both the probable cause context²⁸³ and that involving excessive force,²⁸⁴ the fact that an issue presents a mixed question of law and fact does not mean that *Johnson v. Jones* can be abandoned.²⁸⁵ It only means that final judgments involving these mixed questions are subject to more searching judicial scrutiny.

²⁷⁷ *Id.* at 97.

²⁷⁸ *Id.* at 102.

²⁷⁹ *Id.* at 98 n.1.

²⁸⁰ *Id.* at 99-100.

²⁸¹ *Id.* at 104 (Kennedy, J., concurring).

²⁸² *Id.* at 105 (Stevens, J., concurring).

²⁸³ *See, e.g.,* *Jewett v. Anders*, 521 F.3d 818, 819-23 (7th Cir. 2008); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 530-33 (6th Cir. 2002).

²⁸⁴ *See, e.g.,* *Cowan v. Breen*, 352 F.3d 756, 757-60 (2d Cir. 2003); *Rivas v. City of Passaic*, 365 F.3d 181, 189-92 (3d Cir. 2004).

²⁸⁵ In *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003), for example, the estate of a motorist who was fatally shot by police brought suit for excessive force. *Id.* at 757-58. The police officer unsuccessfully moved for qualified immunity in the district court and then took an interlocutory appeal to the Second Circuit. *Id.* at 759-60. Finding that qualified immunity—"whether it was reasonable for [the police officer] to believe that his life or person was in danger"—constituted the "very question upon which [it and the district court] found there are genuine issues of material fact," the Second Circuit affirmed. *Id.* at 764. Although it had jurisdiction to address the interlocutory appeal, it had no authority to revisit the district court's assessment of the facts. The Third Circuit reached this same conclusion in *Rivas v. City of Passaic*, 365 F.3d 181 (3d Cir. 2004), another excessive force case. *Id.* at 189. Following the district court's denial of summary judgment based on qualified immunity, police charged with excessive force took an interlocutory appeal to the Third Circuit. *Id.* at 191. The court stated that "if a defendant in a constitutional tort case moves for summary

Whether force is reasonable within the constitutional meaning of the term would thus, given the precedent at the time *Harris* was decided, clearly present a matter subject to the usual standards of review on interlocutory appeal, including application of *Johnson v. Jones*.²⁸⁶ If *Harris* were designed to upset this settled approach, one would expect some sort of explanation. Instead, the Supreme Court's silence suggests that it believed its holding fit neatly into the established order.²⁸⁷

judgment based on qualified immunity and the district court denies the motion, we lack jurisdiction to consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove; . . ." *Id.* at 192 (quoting *Ziccardi v. City of Phila.*, 288 F.3d 57, 61 (3d Cir. 2002)). Because a "reasonable jury could find from these facts that [the victim] did not present a threat to anyone's safety," *id.* at 200, the Third Circuit affirmed the lower court's denial of summary judgment. *Id.* at 201. *See also* *Beier v. City of Lewiston*, 354 F.3d 1058, 1063-64 (9th Cir. 2004) (suggesting that interlocutory appeal does not even lie in excessive force case).

²⁸⁶ In *Kent v. Katz*, 312 F.3d 568 (2d Cir. 2002), for example, the Second Circuit affirmed a district court's refusal to award summary judgment and refused to resolve factual issues that surrounded the reasonableness of an arrest. *Id.* at 570. Likewise, in *Gray-Hopkins v. Prince George's County*, 309 F.3d 224 (4th Cir. 2002) (quoting *Winfield v. Bass*, 106 F.3d 529, 529-30 (4th Cir. 1997)), an excessive force case arising under the Fourth Amendment, the Fourth Circuit stated that:

to the extent that the appealing official seeks to argue the insufficiency of the evidence to raise a genuine issue of material fact—for example, that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged—we do not possess jurisdiction under § 1291 to consider the claim.

Id. at 229. *See also* *Cavalieri v. Shepard*, 321 F.3d 616, 618 (7th Cir. 2003) ("[W]e have no appellate jurisdiction to the extent disputed facts are central to the case."); *Hulen v. Yates*, 322 F.3d 1229, 1240 (10th Cir. 2003) (stating that appellate court could "not resolve Defendants' claims that [the plaintiff] cannot show any personal participation by these Defendants in the alleged retaliatory transfer because of his motivation. This is an issue of evidentiary sufficiency, over which we lack jurisdiction in a qualified immunity interlocutory appeal."); *Hamilton v. Leavy*, 322 F.3d 776, 782 (3d Cir. 2002) (stating that appellate court could not review "the District Court's 'identification of the facts that are subject to genuine dispute,' but instead . . . review[ed] the legal issues in light of the facts that the District Court determined had sufficient evidentiary support for summary judgment purposes."); *Atkinson v. Taylor*, 316 F.3d 257, 261 (3d Cir. 2003) (same).

²⁸⁷ This does not mean that district courts have blank checks to deny summary judgments to government officials just because there are genuine issues of material fact as to constitutional issues. Qualified immunity doctrine still requires that where the controlling law was unsettled at the time of the wrong, summary judgment is in order. And even when the underlying law is clear, an official might still reasonably (though mistakenly) believe that his actions are lawful. This can hold true, moreover, even though the ultimate factual conclusion (reasonableness of force, for example) is genuinely at issue. The Supreme Court explained this latter possibility in the context of excessive force in *Saucier v. Katz*, 533 U.S. 194, 197 (2001). There, in the course of removing a demonstrator from a military base, the officer allegedly delivered the demonstrator a "gratuitously violent shove." *Id.* at 208. Observing that the ultimate reasonableness of this shove was genuinely at issue, the district court denied the officer's motion for summary judgment based on qualified immunity. *Id.* at 199. The Ninth Circuit affirmed on the ground that the questions of ultimate reasonableness for Fourth Amendment and qualified immunity purposes were one and the same (and both for the jury). *Id.* at 199-200. The Supreme Court reversed, concluding that there was room between the questions. *Id.* at 197. Even if the officer had shoved the demonstrator in a constitutionally unreasonable fashion, he could have still reasonably believed it to be necessary for purposes of qualified immunity. *Id.* at 209. Notwithstanding that a jury would have had sufficient evidence to return a verdict for the plaintiff, the district court still could have

The most plausible explanation for *Harris* may be a combination of the second and third distinctions. The presence of a conclusive video in the context of an ultimate issue (such as the reasonableness of a police officer's force under the Fourth Amendment) justifies *de novo* review by an interlocutory appellate court. This preserves *Johnson v. Jones* for all other historical facts (and even ultimate facts in the absence of videos) and recognizes existing standards of review in the context of final judgments.

VIII. CONCLUSION

Following *Hope*, the Eleventh Circuit was no longer able to rely on minor distinctions between pleaded facts and reported findings in other cases to justify qualified immunity. Appellate judges on the Eleventh Circuit who were interested in awarding qualified immunity as soon as possible began resolving facts on interlocutory appeal. Many of the judges on the Eleventh Circuit thus expressed an eagerness to ignore or distinguish *Johnson v. Jones*.²⁸⁸ Armed with the authority to resolve factual controversies on interlocutory appeal, these judges on the Eleventh Circuit continued to award qualified immunity at a relatively high rate even after *Hope*. To be sure, the frequency of qualified immunity awards decreased in the Eleventh Circuit following *Hope*. But it still remained quite high when compared with, say, the Sixth Circuit.

awarded the officer qualified immunity. *Id.* at 207. Because the Court in *Saucier* went on to determine that the agents' conduct was not unreasonable for purposes of qualified immunity, *id.* at 209, one might argue that it offers support for the power of appellate courts to entertain ultimate factual questions on interlocutory appeal—at least where the factual matter is one of ultimate reasonableness for purposes of qualified immunity. Such a reading, however, is not compelled, and would seem to be a bit of a stretch. The Court, after all, granted certiorari on the purely legal question of whether “reasonableness” is necessarily coterminous under the Fourth Amendment and qualified immunity. *Id.* Neither party raised *Johnson v. Jones* as a potential problem, nor did the Court ever mention it during argument or in its opinion. The facts, according to the Court, were largely “uncontested.” *Id.* at 209. Rather than engage in any fact-finding, the Court simply accepted the plaintiff's facts and ruled that on these uncontested facts the defendants could have believed they were entitled to use minimal force. A better reading of *Saucier*, therefore, is simply that the officers' uncontested use of de minimus force was reasonable within the meaning of qualified immunity. Read in this fashion, *Saucier* says little about interlocutory jurisdiction over “ultimate” factual disputes.²⁸⁸ See, e.g., *Mullis v. Cobb County Bd. of Comm'rs*, 202 F. App'x 364, 367 (11th Cir. 2006) (addressing facts to reverse denial of qualified immunity); *Paullin v. City of Loxley, Ala.*, 171 F. App'x 773, 777-78 (11th Cir. 2006) (perusing record to address denial of summary judgment independently); *Kimbell v. Clayton County, Ga.*, 170 F. App'x 663, 664 (11th Cir. 2006) (holding that whether genuine issue of facts exists is a legal question that can be addressed on interlocutory appeal); *Purcell ex rel. Morgan v. Toombs County*, 400 F.3d 1313, 1321-24 (11th Cir. 2005) (using factual matters to reverse denial of qualified immunity in prison condition case); *Kesinger v. Herrington*, 381 F.3d 1243, 1248-50 (11th Cir. 2004) (weighing evidence in excessive force case); *Garrett v. Athens-Clarke County, Ga.*, 378 F.3d 1274, 1279-81 (11th Cir. 2004) (same); *Cagle v. Sutherland*, 334 F.3d 980, 988-90 (11th Cir. 2003) (engaging in fact-finding to reverse denial of qualified immunity); *Wood v. Kesler*, 323 F.3d 872, 878-84 (11th Cir. 2003) (engaging in fact-finding to reverse denial of qualified immunity); *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196-97 (11th Cir. 2003) (delving into factual record to refute plaintiff's allegation on interlocutory appeal).

Some judges on the Eleventh Circuit, like those who wrote for the Eleventh Circuit in *Harris*, adhered to *Johnson v. Jones*. By holding that factual issues could not be addressed on interlocutory appeal, these judges greatly reduced the frequency of qualified immunity. The overturning of *Harris* by the Supreme Court, however, is sure to encourage more intense factual review on interlocutory appeal in the future—both in the Eleventh Circuit²⁸⁹ and elsewhere. Qualified immunity will then rise again as the rule, rather than the exception.

²⁸⁹ See, e.g., *Long v. Slaton*, 508 F.3d 576, 585-86 (11th Cir. 2007) (court engages in interlocutory fact-finding to reverse district court's denial of summary judgment in excessive force case).