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Article

***563 SECTION 1983 QUALIFIED IMMUNITY DEFENSE: HOPE'S LEGACY, NEITHER CLEAR NOR ESTABLISHED**

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Abstract

In this Article, the author examines the impact of the Supreme Court decision in *Hope v. Pelzer* and explains the circumstances under which a government official is entitled to qualified immunity.

I. Introduction

Although the qualified immunity defense has, for almost forty years, provided government officials protection from liability under [42 U.S.C. § 1983](#), [FN1] the Supreme Court's decision in *Hope v. Pelzer* [FN2] created confusion that has distracted lower courts in their qualified immunity analysis. Since *Hope's* interpretation of the qualified immunity defense in 2002, a palpable uncertainty has taken root throughout the circuits about how, when, and why a government official is entitled to qualified immunity.

Prior to *Hope*, the standard for qualified immunity was relatively straightforward, even if its practical application had proven difficult to administer. To establish qualified immunity, a court needed to first define with precision the constitutional right violated by the actions of a municipal official, and second, show that a reasonable official could have believed such conduct to be lawful under clearly established constitutional law and the circumstances present. [FN3] In 2002, however, the United States *564 Supreme Court in *Hope* appeared to significantly alter the qualified immunity analysis. [FN4] In that case, the Court held that prison guards were considered to be on notice, for purposes of qualified immunity, when precedent gave them "fair warning" that certain conduct would violate a prisoner's constitutional right to be free from cruel and unusual punishment. [FN5] There was fair warning even when there was no precedent or law substantially on point to notify prison guards that handcuffing a prisoner to a hitching post for hours in the sun without rest or water would violate the prisoner's Eighth Amendment rights. [FN6]

This Article examines the impact of *Hope* with regard to qualified immunity—that is, did *Hope* alter qualified immunity jurisprudence in any material way? The Article begins with a general discussion of the qualified immunity defense in [Section 1983](#) litigation, and examines the standards established by the pre-*Hope* precedent necessary to obtain qualified immunity. The Article then turns to the effect that *Hope* has had on the legal and practical defense of qualified immunity, including a look at the Eleventh Circuit as a microcosm of federal cases interpreting *Hope*. Next, the Article turns to the Supreme Court's apparent limitation of *Hope* in *Brosseau v. Haugen*, [FN7] and how

various circuits have interpreted the apparent tension between Brosseau and Hope. Finally, the Article concludes with noting the practical consequence of Hope and Brosseau in litigating the defense of qualified immunity.

II. The Qualified Immunity Defense

A. [Section 1983](#) and the Qualified Immunity Defense

In 1871, Congress passed the Civil Rights Act to address concerns that certain states were depriving its minority citizens of their rights. [\[FN8\]](#) The Civil Rights Act contained a provision that created a private cause of [*565](#) action against a government official who, “under color of [state] law,” deprived any citizen of the “rights, privileges, or immunities secured by the [Federal] Constitution and laws.” [\[FN9\]](#) This provision, presently codified in [42 U.S.C. § 1983](#) created a tort-like, private cause of action that allowed a plaintiff to prove liability and collect damages from a government official who violated the plaintiff’s constitutional rights. [\[FN10\]](#) Initially, this provision of the Civil Rights Act was used relatively sparingly. [\[FN11\]](#) In the mid-twentieth century, however, [Section 1983](#) began to serve as the basis for civil causes of action against government officials more frequently. [\[FN12\]](#)

In 1961, the Supreme Court decided *Monroe v. Pape*, where it analyzed the [Section 1983](#) private cause of action in detail. [\[FN13\]](#) In *Monroe*, the Supreme Court interpreted [Section 1983](#) broadly [\[FN14\]](#) to provide a civil remedy against Chicago police officers for the misuse of the power granted [*566](#) to them under city and state law. [\[FN15\]](#) The *Monroe* decision strengthened [Section 1983](#) as a powerful remedy against local constitutional violations committed “under color of [state] law” and opened the door more widely to litigation under the cause of action provided in the Civil Rights Act. Following *Monroe*, federal courts began to recognize a broader interpretation of [Section 1983](#) as a private cause of action against government officials for deprivations of constitutional rights under color of state law. [\[FN16\]](#) However, after *Monroe* opened the door more widely to governmental actors’ liability for the deprivation of an individual’s constitutional rights, the courts began to limit the cause of action under [Section 1983](#) by protecting governmental officials in certain circumstances. The most significant limitation of [Section 1983](#) liability came with the development of the qualified immunity defense.

Soon after *Monroe*, the Supreme Court, in addition to recognizing certain limited classes of officials deserving of absolute immunity from [Section 1983](#) liability, [\[FN17\]](#) recognized that rank-and-file government officials sued under [Section 1983](#) may be entitled to a qualified immunity defense in certain circumstances. “The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law.” [\[FN18\]](#)

In *Pierson v. Ray*, local police officers in Jackson, Mississippi arrested a group of Caucasian and African-American clergymen who were using segregated bathroom facilities at a bus terminal. [\[FN19\]](#) The clergymen were charged with a section of the Mississippi Code that made it an offense for anyone to congregate in a public place in a way that might incite a breach of the peace. [\[FN20\]](#) Four years after the arrests, the statute under which [*567](#) the clergymen were arrested was declared unconstitutional, as applied to political demonstrations, [\[FN21\]](#) and the clergymen sued the police officers under [Section 1983](#) for violating their constitutional right to freedom of association. [\[FN22\]](#) The Court held that police officers could assert such a “good faith and probable cause” defense to the lawsuit when the unconstitutional arrests were made in reliance on a state statute that had not yet been declared unconstitutional. [\[FN23\]](#) The Court’s holding in *Pierson* reflected the reasoning that, where a government official may be held liable for conduct that violates a citizen’s constitutional rights, that official should be able to assert a defense to that liability when such conduct was reasonable under the circumstances. *Pierson* established a form of immunity from suit under [Section 1983](#) and laid the groundwork for the qualified immunity defense. However, the Court was careful to note that *Pierson*’s exception to liability under [Section 1983](#) was not an unlimited one.

In *Scheuer v. Rhodes* the Court made clear that qualified immunity under [Section 1983](#) had its limits. [\[FN24\]](#) In *Scheuer*, the governor of Ohio deployed the National Guard to Kent State University where students were protesting the Vietnam War, and several students were killed by federal troops when the National Guard tried to disperse the student protest. [\[FN25\]](#) The plaintiffs alleged that the governor unnecessarily ordered the National Guard to act in such a way that deprived the protesting students of their lives and of their constitutional right to due process of law. [\[FN26\]](#) The Supreme Court held that, though the governor of Ohio could not be absolutely immune from [Section 1983](#) liability, he could be entitled to limited immunity if he had “reasonable grounds for the belief [upon which he acted] in light of all the circumstances” and the belief was *568 a “good-faith belief.” [\[FN27\]](#) The Court's decision in *Scheuer* built upon *Pierson's* “good faith and probable cause” defense but added a reasonableness element. [\[FN28\]](#) It is this reasonableness element that guided the development of the qualified immunity defense, and the element continues to define the doctrine today.

B. Pre-*Hope* Jurisprudence

As the qualified immunity defense developed, the reasonableness element announced in *Scheuer* formed the backbone of qualified immunity jurisprudence. Courts began expanding and delineating the reasonableness element into a standard for determining whether a government official reasonably had knowledge of the constitutional right that he was alleged to have violated. The courts used the official's knowledge of the right as a way to determine whether the official's conduct was reasonable under the circumstances. In other words, the courts made an objective determination of the reasonableness of the conduct, examining whether the official knew or should have known that such conduct violated a federally protected right. Initially, the courts also permitted a subjective determination of the reasonableness of the official's conduct, examining whether the official intended to violate the plaintiff's constitutional right. In the early stages of qualified immunity, the Supreme Court struggled to determine whether the reasonableness factor should be subjectively determined, [\[FN29\]](#) objectively determined, [\[FN30\]](#) or a combination thereof. [\[FN31\]](#)

*569 1. Defining the Standard

In *Harlow v. Fitzgerald*, [\[FN32\]](#) the Court established the definitive standard for determining whether a government official had knowledge that the official's conduct would violate a constitutional right. In *Harlow*, the plaintiff's position as a management analyst with the Department of the Air Force was terminated a year after the plaintiff testified in Congress about substantial budget overruns and other technical difficulties that resulted from the development of an aircraft. [\[FN33\]](#) The plaintiff brought an action, similar to a [Section 1983](#) action, against President Nixon, members of the Defense Department, and other named and unnamed Whitehouse aides. [\[FN34\]](#) The plaintiff alleged that officials of the Executive Branch terminated him in retaliation for his congressional testimony the year before. [\[FN35\]](#) *Harlow*, a defendant and presidential aid, claimed that he “took all his actions in good faith.” [\[FN36\]](#) Pursuant to his good faith defense, *Harlow* moved for summary judgment and the district court denied the motion, stating that the plaintiff had a valid claim against *Harlow* under *Bivens v. Six Unknown Federal Narcotics Agents*. [\[FN37\]](#) A *Bivens* claim against a *570 federal official, under Section 1331, is parallel to a claim against a state official, under [Section 1983](#), and includes all the same tests and defenses. [\[FN38\]](#) Accordingly, the Court's analysis of *Harlow's* good faith defense was subsequently used to analyze the qualified immunity defense under a [Section 1983](#) claim.

In *Harlow*, the Court began its analysis by citing *Scheuer* for the proposition that a governor and his aides could receive protection from [Section 1983](#) liability under “qualified or good-faith immunity.” [\[FN39\]](#) Even though the Court refused to extend absolute immunity to presidential aides, [\[FN40\]](#) it concluded that *Harlow* was entitled to the same qualified immunity that a state official could have asserted. [\[FN41\]](#) The Court noted that in past cases it had recognized both “an ‘objective’ and a ‘subjective’ aspect” to the determination of qualified immunity. [\[FN42\]](#) The Court concluded, however, that a subjective determination of qualified immunity “has prove[n] incompatible with our admonition [that] insubstantial claims should not proceed to trial.” [\[FN43\]](#) The Court also noted that, under [Rule 56 of the Federal Rules of Civil Procedure](#), questions of fact are not to be decided by the court on a motion for

summary judgment, but are reserved for later determination by the trier of fact. [FN44] Because an official's subjective good faith when engaging in official conduct is usually a question of fact for the jury, the Court found that such a subjective determination of qualified immunity was not appropriate in a motion for summary judgment. [FN45] Because qualified immunity is a question of law that should be *571 decided by a court, prior to the case proceeding to trial, qualified immunity ought to be determined in a way that permits the issue to be resolved on summary judgment. [FN46] Accordingly, the Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." [FN47]

In other words, Harlow eliminated the subjective determination of the qualified immunity defense, which had been previously recognized by the Court in *Wood v. Strickland*, [FN48] as a valid method for deciding whether a government official had knowledge of the constitutional right. Accordingly, the only remaining approach to the reasonableness of the official's conduct was the objective determination of whether the official had knowledge of the appropriate contours of the constitutional right at issue. Harlow further established how the objective determination was to be implemented. The Court stated that, in determining whether an official is entitled to qualified immunity, the judge must consider whether the official's conduct violated "clearly established" law. [FN49] If the law was not clearly established at the time of the action in question, the Court reasoned that "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." [FN50] However, if the law was clearly established at the time of the conduct, the official should not be entitled to the qualified immunity defense because "a reasonably competent public official should know the law governing his conduct." [FN51] In applying these standards to Harlow, the Court found that the plaintiff's showings were insufficient to survive Harlow's motion for summary judgment, and remanded the case back to the district court to reconsider the motion for summary judgment. [FN52]

*572 2. Defining the Test

Having established the objective standard in Harlow to determine whether a government official's conduct was reasonable under the circumstances, the Supreme Court then developed a test for the application of the objective standard. In *Anderson v. Creighton*, the Court announced the "objective legal reasonableness" test. [FN53] This test, unlike the previous good faith tests of *Pierson v. Ray* [FN54] and *Scheuer v. Rhodes*, [FN55] was an attempt to eliminate ambiguity in determining whether a government official is entitled to qualified immunity. The Court did not entirely eliminate the subjective nature of the inquiry with its objective legal reasonableness test. [FN56] However, Anderson did establish a clear test that applies the objective standard set out in Harlow. [FN57] After Anderson, qualified immunity analysis was easier for the courts to determine, and more predictable for government officials.

In *Anderson*, the plaintiffs brought an action based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* [FN58] against a federal narcotics agent who, along with other state and federal law enforcement officers, conducted a warrantless search of the plaintiff's home. [FN59] The plaintiff was alone in his home with his wife and three young daughters when the officers arrived. [FN60] After entering his home, the officers punched Creighton in the face and harassed his wife and children. [FN61] The officers said that they were searching to find a bank *573 robbery suspect whom allegedly had entered the Creighton house. [FN62] Even though the officers did not find the bank robbery suspect, the officers handcuffed and arrested Creighton. [FN63] Creighton alleged that the officers violated his Fourth Amendment right to be free from unlawful search and seizure. [FN64] In response, Anderson, a federal narcotics officer involved, alleged that he was entitled to qualified immunity. [FN65] Anderson moved for summary judgment on the basis of qualified immunity, and the district court granted the motion. [FN66] The Eighth Circuit reversed, holding that the lawfulness of the search could not be determined on summary judgment. [FN67] The Supreme Court vacated the judgment of the court of appeals and remanded the case back to the district court for further findings. [FN68] The Supreme Court held that if "the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful then Anderson is entitled to dismissal." [FN69]

In *Anderson*, the Court began its analysis by stating the standard established in *Harlow*: “[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action [as indicated by] the legal rules that were ‘clearly established’ at the time [the action] was taken.” [FN70] The Court noted that the application of this objective standard “depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.” [FN71] In other words, the broader the legal rule is defined, the less likely it is that the official will be entitled to qualified immunity. The Court defined the legal rule in *Anderson* as “whether a reasonable officer could have believed *574 *Anderson’s* warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.” [FN72] The Court recognized that a determination of this legal rule in a particular case “will often require examination of the information possessed by the searching officials [and is an] objective (albeit fact-specific) question.” [FN73] Because such a fact-specific inquiry into the “information possessed by the searching officials” is necessary to determine the qualified immunity issue, the Court held that “*Anderson* [should] be permitted to argue that he is entitled to summary judgment on the ground that he could, as a matter of law, reasonably have believed that the search of the *Creighton’s* home was lawful” in light of the clearly established law governing warrantless searches. [FN74]

The *Anderson* Court established a two-prong test to determine whether a government official is entitled to qualified immunity in a suit under Section 1983. [FN75] The first part of the test is for a court to define with particularity the “relevant ‘legal rule.’” [FN76] Once a court defines the legal rule that rendered the official’s action unlawful, the plaintiff’s constitutional right that was allegedly violated becomes clear. The second step in the *Anderson* test is to determine whether an official’s violation of the plaintiff’s constitutional right was objectively reasonable, in light of the clearly established legal rule and the facts and circumstances, as reasonably perceived by the official. [FN77] However, the Court was careful to note: “This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” [FN78] If either the legal rule was not clearly established or the official’s conduct was objectively reasonable in light of the facts of the circumstance, the official is entitled to qualified immunity under *Anderson*. *575 [FN79] If, however, both the legal rule was clearly established and the official’s conduct was objectively unreasonable in light of the facts and circumstances, then the official is subject to liability under Section 1983 for the plaintiff’s injuries. The objective legal reasonableness test, as announced by *Anderson*, remains the basic test for determining whether a government official is entitled to qualified immunity. [FN80]

3. Refining the Application

In 2001, in *Saucier v. Katz*, [FN81] the Supreme Court reaffirmed *Anderson’s* two-prong test, and in the process, reiterated the fact-specific nature of the qualified immunity determination. The Court further added that in the qualified immunity determination, the constitutional question must be resolved before the qualified immunity question. [FN82] Though *Saucier* did not materially alter the *Anderson* test, it clarified the intent behind the qualified immunity determination, and redefined the fact-specific nature of the test. Consequently, *Saucier’s* interpretation of *Anderson’s* two-prong test is now often cited as the basic test for determining qualified immunity.

The plaintiff in *Saucier* alleged that a military police officer used excessive force when he arrested the plaintiff for demonstrating on a military base where the Vice President was speaking. [FN83] The plaintiff alleged that officers picked him up by his arms, so that his feet dragged on the ground, and shoved him into a van, despite a visible brace on the plaintiff’s knee. [FN84] The Court began its analysis by noting that *Anderson’s* two-prong test applied to the determination of qualified immunity. [FN85] However, the Court stated that a court determining the qualified immunity issue must, as its “threshold question,” evaluate the constitutionality of *576 the official’s action, and only after that question is resolved can the court move on to determine the qualified immunity issue. [FN86]

After reestablishing *Anderson’s* two-prong test, *Saucier* turned to the application of that test. The Court began by noting that prior case law “clearly establishe[d] the general proposition that use of force is contrary to the Fourth

Amendment if it is excessive under objective standards of reasonableness.” [FN87] However, the Court went on to state that “the right the official is alleged to have violated must have been ‘clearly established’ [so] that a reasonable official would understand that what he is doing violates that right.” [FN88] The Court recognized the existing precedent that established the “general proposition that use of force is contrary to the Fourth Amendment,” [FN89] but determined that the Ninth Circuit applied that general proposition too broadly because an officer can act “reasonably, but mistakenly.” [FN90] The qualified immunity test then serves to determine, as Anderson suggests, whether the officer’s conduct was objectively reasonable, “in light of the specific context of the case, not as a broad general proposition.” [FN91] The Court reasoned, “Qualified immunity operates to protect officers from the sometimes ‘hazy border between excessive and acceptable force.’” [FN92] Because the law was not clearly established in light of the circumstances, the Court held that qualified immunity was appropriate as a “reasonable officer in petitioner’s position could have believed that hurrying [the plaintiff] away from the scene was within the bounds of appropriate police responses.” [FN93] After the Supreme Court’s interpretation and application of Anderson’s two-prong test in Saucier, that test became the standard inquiry in the qualified immunity analysis.

*577 III. Hope v. Pelzer

One year after Lanier, the Supreme Court noted in Hope v. Pelzer that the objective legal reasonableness test found in Anderson and Saucier remains the standard analysis for determining the availability of qualified immunity to a government official. [FN94] The Court reiterated the Anderson’s two-prong test as the test to determine whether the officials are entitled to qualified immunity, but the Court chose to refine further Anderson’s requirement that the clearly established constitutional right be reasonably apparent to the municipal officer. The Court essentially created a new class of qualified immunity whereby official conduct may violate clearly established law “even in novel factual circumstances.” [FN95] In Hope, a government official was said to have had fair warning that he violated the plaintiff’s constitutional right when that right was clearly established in the case law as a general principal of law, even when the legal rule had not been set forth in prior cases with “materially similar” facts as the case sub judice. [FN96]

A. Statement of the Case

In Hope, a former inmate brought a Section 1983 action against guards of an Alabama prison for violation of his Eighth Amendment rights when they chained him to a hitching post on two separate occasions. [FN97] In 1995, Larry Hope was an inmate at the Limestone Prison in Alabama. [FN98] At that time, Alabama was the only state that utilized chain gangs, [FN99] and it was the only state that handcuffed prisoners to hitching posts [FN100] to reprimand *578 them for either refusing to work the chain-gang or being disruptive on the chain gang. [FN101] Hope was handcuffed to a hitching post on two separate occasions. On the first occasion, he was being punished for getting into an argument with another inmate on his chain gang. [FN102] On the second occasion, Hope was handcuffed to the hitching post because he had taken a nap on the bus that took his chain gang to the work site, and he delayed in getting off the bus when ordered to do so. [FN103] An exchange of words led to a physical confrontation with the guard, and Hope was taken back to the prison to be put on the hitching post. [FN104]

Hope alleged that the pain and suffering he endured while shackled to the hitching post amounted to cruel and unusual punishment, and he brought an action under Section 1983 against the guards in their individual capacity for violation of his Eighth Amendment rights. [FN105] The magistrate judge found that the guards were entitled to qualified immunity, and the district court agreed, entering summary judgment for the guards. [FN106] The Court of Appeals for the Eleventh Circuit found that shackling Hope *579 to the hitching post did violate his Eighth Amendment rights, but the court concluded that the guards were entitled to qualified immunity. The court held that the applicable clearly established law had facts that were “‘analogous,’ [but] were not ‘materially similar to Hope’s situation.’” [FN107] The Supreme Court granted certiorari and reversed on the ground that the facts of prior cases objectively gave the guards fair warning that they were violating Hope’s constitutional rights, even if the facts of those prior cases were not “materially similar.” [FN108]

B. Rationale and Holding

1. Anderson's Two-Prong Test and the Fair Warning Standard

Pursuant to the two-prong test established in *Anderson v. Creighton*, and followed later in *Saucier*, the Supreme Court began its analysis of the qualified immunity issue by determining whether the guards' actions violated Hope's constitutional rights. [FN109] The Court agreed with the Eleventh Circuit that the guards' conduct violated Hope's Eighth Amendment rights, stating that the “use of the hitching post under these circumstances violated the ‘basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man’ [and] amounts to gratuitous infliction of ‘wanton and unnecessary’ pain that our precedent clearly prohibits.” [FN110] Moving to the second prong of the *Anderson* test, the Court looked at whether reasonable guards in the defendants' position would have known that their conduct violated Hope's constitutional rights. The Court began by noting that, before an official is subject to suit, the official must be “on notice [that] their conduct is unlawful,” [FN111] and as *Anderson* established, such notice must be viewed “in the light of pre-existing law [that] the unlawfulness must be apparent.” [FN112]

*580 The apparent nature of the unlawfulness of the conduct amounts to “fair warning that [the official's] conduct deprived his victim of a constitutional right.” [FN113] The Court noted that it had previously held that “the standard for determining the adequacy of that warning [in the criminal context] was the same as the standard for determining whether a constitutional right was ‘clearly established’ in civil litigation under § 1983.” [FN114] In that case, *United States v. Lanier*, the Court held that “despite notable factual distinctions between the precedents relied on and the cases then before the Court,” the Court had upheld convictions, under 18 U.S.C. §§ 241 and 242, for the deprivation of constitutional rights under the color of law, “so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.” [FN115] The *Lanier* Court clarified that in some cases “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful.’” [FN116] Hope notes that, under *Lanier*, “officials can still be on notice that their conduct violates established law even in novel factual circumstances [if] the state of the law [at the time of the conduct] gave [the officials] fair warning that their [conduct] was unconstitutional.” [FN117]

It is important to note that the fair warning standard of *Lanier*, applied by the Supreme Court in *Hope*, appears clearly to diverge from the general standard and test that the Court applied in *Anderson*. In *Anderson*, the Court noted that, although qualified immunity would not always attach “unless the very action in question [had] previously been held unlawful,” it would attach unless the violation was “apparent” under pre-existing law. [FN118] It appeared reasonable under such a standard, as the Eleventh Circuit held in *Hope*, that in order to be apparent that a violation of rights occurred, such an issue must have been addressed under prior cases that *581 were materially similar. However, the Supreme Court in *Hope* held that a municipal official had fair warning that conduct would violate a plaintiff's constitutional rights, even in novel factual circumstances.

2. Applying *Lanier's* Fair Warning Principles

In light of *Lanier's* fair warning principles, the Supreme Court in *Hope* determined whether the “state of the law in 1995 gave [the guards] fair warning that their alleged treatment of Hope was unconstitutional,” and ultimately, whether the guards were entitled to qualified immunity. [FN119] In applying the fair warning standard of *Lanier*, the Court turned to the Eleventh Circuit precedent at the time of the incident. First, the Court looked at *Gates v. Collier*, a Fifth Circuit case from Mississippi. [FN120] In *Gates*, it was the policy of the Mississippi prisons to “handcuff[] inmates to the fence and to cells for long periods of time and forc[e] inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.” [FN121] The *Gates* court held that “those ‘forms of corporal punishment run afoul of the Eighth Amendment [and] offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.’” [FN122] The Supreme Court in *Hope* concluded that no prison guard could reasonably conclude that the unconstitutionality of the practices in *Gates* “turned on the

fact that inmates were handcuffed to fences or the bars of cells, rather than a specially designed metal bar designated for shackling.” [\[FN123\]](#) As a result, the unlawfulness of the guards' conduct “should have been apparent” at the time of the incident. [\[FN124\]](#)

According to the Supreme Court, however, Gates was not the only Eleventh Circuit precedent to give fair warning to the guards that they *582 were violating Hope's constitutional rights. The Court also discussed *Ort v. White*, an Eleventh Circuit case from 1987, as fair warning precedent. [\[FN125\]](#) In *Ort*, an Alabama prison guard denied an inmate drinking water when he refused to do his share of the work on the chain gang. [\[FN126\]](#) The *Ort* court held that the guard's conduct “should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, i.e. the requirement that all inmates perform their assigned farm squad duties.” [\[FN127\]](#) However, the *Hope* Court noted that *Ort* “cautioned that a constitutional violation might have been present ‘if later, once back at the prison, officials had decided to deny [*Ort*] water as punishment for his refusal to work.’” [\[FN128\]](#) *Hope* stated that, “[a]lthough the facts of the case are not identical” to the facts of *Hope*, “*Ort*'s premise is that ‘physical abuse directed at [a] prisoner after he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation.’” [\[FN129\]](#) Like *Gates*, the precedent in *Ort* provided the guards with fair warning that their treatment of *Hope* was a violation of his constitutional rights. [\[FN130\]](#)

The Court further suggested that the guards in *Hope* had warning beyond the case precedent of *Gates* and *Ort*. The Court cited Alabama Department of Corrections (ADOC) regulations, [\[FN131\]](#) as well as Department *583 of Justice memorandums to the ADOC, [\[FN132\]](#) as notice that the use of the hitching post violated *Hope*'s Eighth Amendment rights. *Hope* concluded that, in light of the Department of Justice (DOJ) report and the existing Eleventh Circuit precedent in *Gates* and *Ort*, the officers had a “fair and clear warning sufficient to preclude the defense of qualified immunity at the summary judgment stage.” [\[FN133\]](#) It is clear that the Court's holding in *Hope* ultimately created a new and substantially different analysis for determining qualified immunity than the analysis espoused in *Anderson* and its progeny, at least under certain factual circumstances.

C. The Hope Doctrine

This new *Hope* Doctrine appears to have evolved out of the Court's visceral reaction to the practice of punishment by way of a hitching post, and the Court's attempt to ensure that qualified immunity would not attach simply because of the “novel” facts involved. However, by doing so, *Hope* ultimately introduced a much more expansive analysis into the qualified immunity equation, rendering the outcome less predictable and more ambiguous. In *Hope*, the Court eliminated any requirement that the facts of the case law precedent be “fundamentally similar” or “materially similar” to the conduct in question in order to provide a government official with notice that such actions would violate clearly established law. [\[FN134\]](#) In fact, the *Hope* Court criticized the Eleventh Circuit for “requir[ing] that the facts of previous cases be ‘materially similar’ to *Hope*'s situation.” [\[FN135\]](#) The Supreme Court went on to state that the Eleventh *584 Circuit's “rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases.” [\[FN136\]](#)

Hope's holding added another layer to the qualified immunity analysis. Clearly, if prior, applicable precedent of unconstitutional conduct involved materially similar conduct to the circumstances at issue, then qualified immunity would be denied because the violation would be apparent under *Anderson*. However, under *Hope*, if the state of the law at the time of the conduct was sufficiently clear to give officials “fair warning that their alleged [conduct] was unconstitutional,” they are not entitled to qualified immunity, even if there were no prior, materially similar cases. [\[FN137\]](#)

Although *Hope* explicitly rejected the materially similar test for determining qualified immunity, at least under the unique facts present in *Hope*, the Court set forth no practical alternative test for municipal officials to determine when the state of the law is sufficiently clear to identify a constitutional violation that would preclude qualified immunity. Instead, *Hope* applied a hopelessly ambiguous fair warning standard to the facts of the case and held that,

in light of the Eleventh Circuit precedent and the DOJ report, the state of the law was sufficiently clear to give the guards “fair and clear warning” that they were violating Hope's constitutional rights by chaining him to a hitching post. [FN138] Although the Court's fair warning standard sounds reasonable in the abstract, the Court left little in the way of a practical test to apply for the implementation of that standard. In fact, the Court's reasoning under Lanier amounts to the equivalent of Justice Stewart's “I know it when I see it” analysis of obscenity in *Jacobellis v. Ohio*. [FN139] Without a more clearly objective test to apply, courts are left to determine whether an official's conduct is obvious enough that they should have known that such conduct would violate a person's constitutional rights, even in the absence of any factually similar precedent to indicate the unlawfulness *585 of the conduct. In other words, a municipal official will only know such conduct is unconstitutional when the Court sees it. [FN140]

By introducing the fair warning principles of Lanier into the qualified immunity analysis, the Court implicitly moved the qualified immunity determination away from the time-tested standards of Anderson and its progeny towards an alternative approach to immunity when there are no materially similar cases to guide the conduct of a municipal official. [FN141] Hope effectively added a new category of municipal official conduct that can be denied qualified immunity, conduct that is determined in hindsight to violate a more generalized constitutional rule, not previously identified in cases materially similar to the one at hand. Because Hope effectively created a category of notice that is independent of fact-specific case law, the qualified immunity determination became significantly unclear. Hope essentially mandated that notice no longer always depends on the particularized facts of case law; instead, notice may depend on more generalized notions of constitutional rights that are not tied to specific circumstances but that emanate from the text of the Constitution itself. [FN142] This new category of notice, stemming from Hope, was even recognized by the Eleventh Circuit. [FN143] And so the question remains: precisely where does the fair warning standard of the Hope Doctrine fit into the qualified immunity analysis?

IV. Finding a Place for the Hope Doctrine

Since 2002, federal judges have struggled to determine how the Hope Doctrine fits into the qualified immunity analysis. Courts struggled to *586 determine whether Hope created a new category of notice, or whether Hope merely reiterated the old Anderson standard, only stated differently. The Eleventh Circuit, the circuit that took the brunt of the criticism in Hope, [FN144] provides an excellent example of how the federal courts struggle to interpret Hope. Some judges on the Eleventh Circuit believe that the Hope Doctrine should be applied as its own autonomous standard for determining qualified immunity, separate from Anderson's objective legal reasonableness standard. Other judges on the Eleventh Circuit are quick to point out that the Hope Doctrine merely applied the same standard as previous qualified immunity determinations and was incorporated in those determinations. This divergence of opinion in the Eleventh Circuit represents the variety of interpretations of how the Hope Doctrine affects the qualified immunity analysis.

A. As a New Category of Notice

In *Vinyard v. Wilson*, the Eleventh Circuit Court of Appeals had its first opportunity to interpret the effect that Hope had on the qualified immunity determination. [FN145] *Vinyard* involved a verbal confrontation between the plaintiff and a police officer that resulted in the plaintiff's arrest. [FN146] *Vinyard* claimed that the deputy grabbed her arm and forcefully pulled her out of the chair, handcuffed her, put her in his patrol car, and drove her to the county jail. [FN147] *Vinyard* alleged that, during the ride to the jail, the deputy verbally and physically abused her. [FN148] When *Vinyard* *587 arrived at the jail, the deputy dragged her inside by her shirt, arm, or hair and charged her with disorderly conduct and obstructing an officer. [FN149] Following her release from jail, *Vinyard* filed a complaint with the Sheriff's Office, [FN150] and Sheriff Wilson assured *Vinyard* that an investigation would take place. [FN151] Soon thereafter, *Vinyard* filed a civil action, under Section 1983, against the deputy for excessive force and Wilson for failure to investigate her claim. [FN152] The district court found that both the deputy and Wilson were entitled to qualified immunity and granted them summary judgment. [FN153] *Vinyard* appealed to the Eleventh Circuit, and the court held that summary judgment was appropriate for Wilson because he was entitled to qualified immunity, but reversed summary judgment for the deputy. [FN154]

The Eleventh Circuit began its analysis by recognizing that Anderson's "objectively reasonable" test was the inquiry in a qualified immunity determination. [FN155] The court then cited Anderson's two-prong test, as reiterated by Hope and Saucier v. Katz, and proceeded to analyze the facts of the case under that test. [FN156] The court first turned to the constitutionality of the deputy's conduct and found that "during the jail ride [the deputy] 'used force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate.'" [FN157] The court then turned to the question of whether Vinyard's "constitutional right [to be free from excessive force] *588 was 'clearly established' at the time of the violation." [FN158] The court recognized Saucier's requirement that the clearly established determination "must be undertaken in light of the specific context of the case, not as a broad general proposition," [FN159] and went on to recognize Hope's fair warning standard as a method for determining whether an official had "fair and clear notice" that her conduct was illegal. [FN160] In its analysis of the deputy's notice, the court categorized fair warning into three different levels of notice or warning.

The first category the court recognized were cases where "the words of the pertinent federal statute or federal constitutional provision will be specific enough to establish clearly the law applicable to particular conduct even in the total absence of case law." [FN161] This category certainly applies the Hope Doctrine. The court classified this type of case as an "obvious clarity" case. [FN162] The second category of notice Vinyard recognized was a case where the official's "conduct is not so egregious as to violate [any constitutional right] on its face," and in such cases, the court should "turn to case law" to determine whether the official had sufficient notice of the unlawfulness of his conduct. [FN163] The final category of notice the court recognized was a situation where there "is no precedent with a broad holding that is not tied to particularized facts," and in such a circumstance, the court is to "look at precedent that is tied to the facts." [FN164] The court recognized that in this final category, where the court *589 must look to precedent that is tied to particularized facts, the cases are not "obvious clarity" cases, but instead are "fairly distinguishable" cases. [FN165] The court ultimately determined that the circumstances of Vinyard fell within the first category of notice, concluding that, "[a]lthough the 'obvious clarity' standard is often difficult to meet the law in 1998 was clearly established that [the deputy's] conduct violated an arrestee's constitutional rights." [FN166]

Vinyard's categorical approach to qualified immunity and notice consolidated and interpreted all available precedent establishing a standard or test for the qualified immunity analysis. Because the first category of notice recognized by Vinyard was created entirely out of the Hope Doctrine, the Eleventh Circuit implicitly declared that Hope's fair warning standard was categorically different from other types of notice. Although Vinyard stated that Hope did not change the qualified immunity analysis, [FN167] the court's differentiation between notice under Hope and other varieties of notice suggests that cases falling within Vinyard's first category of notice require the application of a different standard to determine whether the official is entitled to qualified immunity. However, by recognizing the Hope Doctrine as an autonomous analysis from other standards of qualified immunity, the Eleventh Circuit exposed itself to the same question the Supreme Court left unanswered in Hope: When does the Hope Doctrine, including the obvious clarity category, apply in a qualified immunity analysis?

B. The Anderson Standard, Stated Differently

Not all judges on the Eleventh Circuit view Hope as creating a new category of notice. In fact, the court in Williams v. Jacksonville [FN168] distinguished the case before it from the Hope Doctrine and the obvious clarity category by focusing on factual dissimilarities between Williams *590 and then-existing case law. In Williams, the Eleventh Circuit concluded that an official was entitled to qualified immunity, where the existing case law at the time of the conduct did not give notice that her specific conduct violated constitutional rights, even where the case law made clear that such conduct was generally unconstitutional. In Williams, the majority held that a fire chief was entitled to qualified immunity, when his refusal to create four high level positions was based upon racial discrimination, because no existing case law held that refusal to create employment positions on the basis of racial discrimination was unconstitutional. [FN169] In so holding, the court narrowed the scope of the Hope Doctrine, and the obvious clarity category, to cases where the constitutional provision or case law prohibiting the official's conduct

explicitly addresses the specific circumstances of the official's conduct.

Though the court did not offer an opinion to explain its reasoning behind the determination that the fire chief, Ray Alfred, was entitled to qualified immunity, Judge Wilson included a brief concurrence, explaining the court's rationale. Judge Wilson stated that Alfred was entitled to qualified immunity because no available precedent "would have established that [Alfred] could not hold up on creating new jobs until there was a more diverse applicant pool." [FN170] Judge Wilson began his analysis by stating that he agreed with the dissenters, that "Alfred's conduct violated the constitutional rights of the plaintiffs [because] a decision not to create new jobs, based solely on the race and gender of the next eligible applicant violates the Equal Protection Clause." [FN171] Judge Wilson then turned to whether the unconstitutionality of Alfred's conduct was clearly established at the time of his conduct. [FN172] In determining that the law was not clearly established at the time to give *591 Alfred notice of his misconduct, Judge Wilson stated that the Williams court was "unable to determine that the 'contours of [the] right [were so clearly established] that a reasonable official would have understood his acts were unlawful.'" [FN173] Judge Wilson clarified, "No Eleventh Circuit or Supreme Court authority would have established that [Alfred] could not hold up on creating new jobs until there was a more diverse applicant pool." [FN174] Because the constitutionality of the exact circumstances of Alfred's conduct was unclear at the time of his actions, the court determined that Alfred was entitled to qualified immunity.

It is interesting to note that, in Judge Wilson's concurrence, he makes no mention of the Hope Doctrine in his qualified immunity analysis. Moreover, Judge Wilson did not even recognize Vinyard's obvious clarity category of notice, where "the words of the pertinent federal statute or federal constitutional provision in some cases" are "enough to establish clearly the law applicable to particular conduct even in the total absence of case law." [FN175] Instead, Judge Wilson applied Anderson's two-prong test, distinguishing the facts of Williams from the facts of the precedent pursuant to the specificity requirement of Anderson's second prong. To the contrary of both the Hope Doctrine and Vinyard's obvious clarity category, Judge Wilson declared that "[i]f case law, in factual terms, has not staked out a bright line [between permissible and impermissible conduct], qualified immunity almost always protects the defendant." [FN176] Not surprisingly, the Eleventh Circuit case that Judge Wilson cited for his factual "bright line" rule predated Hope by almost a decade. [FN177]

From Judge Wilson's concurrence, it is hard to determine whether the Eleventh Circuit declined to apply the Hope Doctrine in Williams because they distinguished the case from Vinyard, or whether the court simply ignored Hope and Vinyard altogether. Either way, Williams suggests that the Hope Doctrine, when it is considered in the qualified immunity *592 analysis, is not considered an autonomous standard for determining qualified immunity, as was implied in Vinyard. However, in his dissent, Judge Tjoflat indicates that Williams may have narrowed the Hope Doctrine more severely than Judge Wilson's concurrence suggested.

Judge Tjoflat suggested in his dissent that the Eleventh Circuit was narrowing the Hope Doctrine to circumstances where the constitutional provision explicitly prohibits the official's conduct. [FN178] Judge Tjoflat's contention was that "[m]odern constitutional law's prohibition against racial discrimination is sufficiently broad and well-established that [the majority's] specificity in precedent is unnecessary." [FN179] In other words, the text of the Fourteenth Amendment, as interpreted by the constitutional law precedents, makes clear that a "government official may not base decisions, particularly employment decisions, on racial grounds at all." [FN180] Instead, as Judge Tjoflat advocates, Alfred's conduct should have been characterized more broadly as an "employment decision [made] on [the basis of] racial grounds." [FN181] If Alfred's conduct had been characterized simply as a discriminatory employment decision, then the Hope Doctrine and Vinyard's obvious clarity category would have governed the case. Accordingly, Alfred would not have been entitled to qualified immunity because the law was clearly established that a "government official may not base decisions, particularly employment decisions, on racial grounds at all." [FN182] Both Judge Tjoflat and Judge Barkett argued in their dissents that Alfred's conduct should not have been narrowly construed to the specifics of failing to create a new employment position. [FN183] As Judge Tjoflat indicated, such a requirement of specificity is *593 contrary to the Hope Doctrine and is merely an excuse to avoid applying the doctrine. Judge Tjoflat instead suggested that the Hope Doctrine and Vinyard's obvious clarity

category should apply separately from Anderson's two-prong test, which requires an analysis of specific facts.

Admittedly, it is difficult to determine from the text of Williams exactly how the Eleventh Circuit considered Hope to have affected the qualified immunity analysis. The circuit's opinion in Vinyard would suggest that Hope survives as an autonomous standard for determining qualified immunity. However, in Williams, the court declined to discuss the issue when it extended Alfred qualified immunity, and the concurrence mentioned neither Hope nor Vinyard. Because both Judge Tjoflat and Judge Barkett relied heavily on Hope and Vinyard, it is clear that the majority simply declined to apply either standard. The disparity between the overlooking or distinguishing of the Hope Doctrine by the majority and the dissenter's unwavering reliance on Hope suggests a diverse spectrum of thought on when and how the Hope Doctrine should apply in the qualified immunity analysis.

V. The Supreme Court: Recasting the Hope Doctrine?

Arguably, the Hope Doctrine is merely an extension of the existing objective test for a qualified immunity determination, as the Eleventh Circuit suggested in Williams. The division in the Eleventh Circuit as to how Hope affects the qualified immunity analysis, at minimum, makes clear that some federal courts are uncertain exactly how and when to apply the Hope Doctrine. Because Hope left no definitive test to apply, it is unclear whether Hope is a different standard from Anderson and its progeny, or whether it is the same standard, worded differently. More importantly, the Hope Doctrine does not indicate when its standard should apply, as opposed to the test announced in Anderson. Federal courts have struggled to answer these questions since the Supreme Court *594 released its decision in Hope in 2002. Since Hope, the Supreme Court has taken few opportunities to comment on the fair warning standard, as applied to [Section 1983](#) cases. Though the Court has mentioned Hope in passing since 2002, [\[FN184\]](#) the only time the Court has revisited that fair warning standard was two years after Hope, in *Brosseau v. Haugen*. [\[FN185\]](#)

A. *Brosseau v. Haugen*

Officer Brosseau responded to a call from a neighbor who reported that Kenneth Haugen was fighting other people in his mother's front yard. [\[FN186\]](#) Upon Brosseau's arrival, Haugen ran through the yard and hid in the neighborhood. [\[FN187\]](#) During the chase, Haugen ran across his mother's yard, got into his Jeep which was parked in the driveway, and locked the door. [\[FN188\]](#) Haugen started the Jeep and began to drive off. [\[FN189\]](#) Brosseau then fired a shot at Haugen, through the window, striking him in the back. [\[FN190\]](#) Haugen brought an action under [Section 1983](#) against Brosseau for violation of his Fourth Amendment right to be free from excessive *595 force. [\[FN191\]](#) The district court granted Brosseau summary judgment on the basis that she was entitled to qualified immunity. [\[FN192\]](#) However, the Ninth Circuit reversed, holding that Brosseau violated Haugen's Fourth Amendment right to be free from excessive force, and that such a right was clearly established. [\[FN193\]](#) The Supreme Court granted certiorari and reversed, holding that the state of the law at the time of the incident did not “‘clearly establish’ that Brosseau's conduct violated the Fourth Amendment,” and that she was therefore entitled to qualified immunity. [\[FN194\]](#)

In a per curiam opinion, the Court began its analysis by recognizing Anderson's two-prong test and then questioned whether Brosseau's conduct violated any constitutional right. [\[FN195\]](#) The Court noted that the constitutional right in question was freedom from excessive force, but expressly made no finding as to whether that constitutional right was violated. [\[FN196\]](#) The Court went on to acknowledge the second prong of the Anderson test, stating that, even if the official's conduct violated the plaintiff's constitutional rights, the official is entitled to qualified immunity if she “reasonably misapprehend[ed] the law governing the circumstances she confronted.” [\[FN197\]](#) Appearing to at minimum give a nod to Hope, the Court stated that the official must have “fair notice that her conduct was unlawful.” The Court made clear, however, that “this inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” [\[FN198\]](#) The Supreme Court cited Hope for the “fair notice” proposition, but the Court's reliance on Hope ended there.

Instead, the Court looked to the Fourth Amendment and its jurisprudence to determine whether it was clearly established that Brosseau's conduct was unconstitutional. [FN199] The Court began by stating that the prior *596 Fourth Amendment precedent was “cast at a high level of generality” and the “test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” [FN200] However, the Court, citing Hope, stated that, “in an obvious case, these standards can ‘clearly establish’ the answer, even without a body of relevant case law.” [FN201] This dicta, redefined and narrowed Hope's relevance to “obvious cases,” but unfortunately the Court failed to identify how obvious such a constitutional violation must be to satisfy the Hope Doctrine.

Because the Fourth Amendment was not textually specific enough to expressly prohibit the officer's precise conduct, [FN202] the Court concluded that Brosseau “is far from the obvious [case] where [the prior precedent] alone offers a basis for decision.” [FN203] The Court proceeded to determine whether, in light of the circumstances, it was clearly established that Brosseau's conduct violated Haugen's Fourth Amendment rights. [FN204] Citing a string of cases from different circuits, the Supreme Court stated that “courts [have] found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others.” [FN205] After an analysis of different excessive force precedents, the Court concluded that “[n]one of [the precedents] squarely govern the case here [but] they do suggest that Brosseau's actions fell in the ‘hazy border between excessive and acceptable force.’” [FN206]

By focusing its inquiry on the question of “whether, at the time of Brosseau's actions, it was ‘clearly established’ in this more ‘particularized’*597 sense that she was violating Haugen's Fourth Amendment right,” the Court limited the applicable qualified immunity tests to the objective legal reasonableness standard. [FN207] Under this standard, the Court concluded that, although Brosseau's conduct violated Haugen's constitutional right to be free from excessive force, she was entitled to qualified immunity because she “reasonably misapprehend[ed] the law governing the circumstances she confronted.” [FN208] Accordingly, the Court determined that it was not clearly established, under the objective legal reasonableness standard as applied to the particularized facts of the case, that Brosseau's conduct was a violation of Haugen's constitutional rights. As a result, Brosseau was entitled to qualified immunity. [FN209]

B. Brosseau's Effect on the Hope Doctrine

By its limiting reference to Hope, the Court may have signaled a restriction of Hope to obvious clarity cases. In Brosseau, the Court first looked at the Fourth Amendment's prohibition against excessive force, in light of the precedent interpreting that prohibition, and noted that the determination of whether an officer's conduct is reasonable under the Fourth Amendment is a fact-specific inquiry. [FN210] The Court stated, in stark contrast to Hope, that the qualified immunity determination “is one in which the result depends very much on the facts of each case.” [FN211] Though *598 noting the broad scope of the precedent that prohibits excessive force, the Court went on to state that such precedent's “high level of generality” precludes it from providing Brosseau with “fair warning.” [FN212] However, in the very next sentence the Court, citing Hope, stated that, “in an obvious case, these standards can clearly establish the answer, even without a body of relevant case law.” [FN213] The Court gave no instructions as to what type of cases fall within this obvious case category. Nor did the Court indicate when this obvious case category should apply to preclude qualified immunity. Instead, the Court merely cited Hope as evidence that there exists, somewhere in qualified immunity jurisprudence, the principle that certain conduct is so egregious that the actor has fair notice of a constitutional violation “even without a body of relevant case law.” [FN214]

It appears that despite the broadness of the principles prohibiting excessive force, Brosseau's facts precluded it from falling in the obvious case category because those facts were not materially similar enough to give the officer fair warning that her conduct was unlawful. [FN215] Despite Hope's admonition that, in cases where “prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights” materially similar facts are not required, [FN216] Brosseau concluded that prior Fourth Amendment precedent could not “squarely

govern the case” because the facts of those cases were not materially similar enough to the present circumstances. [\[FN217\]](#) The Court ultimately held that, because the Fourth Amendment precedent could be factually distinguished, Brosseau could not possibly have had fair warning that her conduct was unlawful, and she was entitled to qualified immunity. [\[FN218\]](#)

Although the Court distinguished Brosseau from Hope, it is clear that the Court's obvious case criteria potentially limit the Hope Doctrine to cases involving obvious constitutional violations concerning egregious and unique facts. Under Brosseau, where “[t]he contours of the [federal] *599 right” are not “sufficiently clear that a reasonable official would understand that what he is doing violates that right,” the official is entitled to qualified immunity. [\[FN219\]](#) However, Brosseau made clear that the text of the Eighth Amendment itself, combined with broad precedent prohibiting excessive force, was not sufficient to provide the officer with fair notice that she could not constitutionally shoot a fleeing suspect in the back. In so doing, Brosseau likely limited the Hope Doctrine to cases where the constitutional text itself, or the available precedent, prohibits the official's actions with obvious clarity. Additionally, because Hope only set a standard for fair notice and failed to establish a separate test, a future court may determine that the constitutional violation in question, so long as it is not an obvious Eighth Amendment violation, [\[FN220\]](#) occurred in factual circumstances dissimilar enough from the available precedent to remove the case from Brosseau's obvious case category. [\[FN221\]](#) As a result, even in factual circumstances that are casebook examples of when the Hope Doctrine should apply, as Brosseau arguably was, the official will be entitled to qualified immunity because the case had distinguishable facts from the available precedent. [\[FN222\]](#)

VI. Qualified Immunity in the Wake of Brosseau

Because Brosseau is only recently decided, relatively few courts have had the opportunity to interpret the Supreme Court's implicit limitation of Hope's abolition of the materially similar standard. Of all the appellate courts to apply Brosseau in a qualified immunity analysis to date, a handful of appellate courts have recognized the inherent conflict between Brosseau and the Hope Doctrine. These courts have either tried to reconcile Brosseau and Hope, or have simply ignored the implicit *600 limitations that Brosseau placed on the Hope Doctrine. Other appellate courts have simply concluded that the determination of whether an official violated a clearly established constitutional right is not appropriate for summary judgment, where there are “genuine issues of material fact” for the jury. [\[FN223\]](#) Such responses to Brosseau in these circuits illustrate the inherent dichotomy between Hope, Anderson and their progeny.

A. Reconciling Brosseau and Hope

In *Lyons v. City of Xenia*, [\[FN224\]](#) the Sixth Circuit Court of Appeals addressed the very issue of how Brosseau affects the qualified immunity determination. In *Lyons*, the Sixth Circuit addressed the issue of whether two officers were entitled to qualified immunity from the plaintiff's [Section 1983](#) claims for an arrest without probable cause and for excessive force. [\[FN225\]](#) In *Lyons*, Officer Keith arrived at the plaintiff's residence to investigate an assault allegedly committed by the plaintiff's daughter. [\[FN226\]](#) The plaintiff instructed her daughter not to respond to Keith's inquiries, to which the officer responded that she would take the plaintiff's daughter to the police station for questioning. [\[FN227\]](#) Soon thereafter, the plaintiff and Keith exchanged heated words, and Keith grabbed the plaintiff's wrist and attempted to handcuff the plaintiff. [\[FN228\]](#) After Keith called for backup, a second officer, Officer Foubert, arrived on the scene and tackled the plaintiff using a “balance displacement technique,” after which he handcuffed*601 the plaintiff. [\[FN229\]](#) The plaintiff brought suit under [Section 1983](#) against officers Keith and Foubert for violation of her Fourth Amendment rights to be free from wrongful arrest and the use of excessive force. [\[FN230\]](#) The district court denied the officers' motion for summary judgment, finding that they were not entitled to qualified immunity, and the officers filed an interlocutory appeal to the Sixth Circuit Court of Appeals. [\[FN231\]](#)

The *Lyons* court began its analysis by discussing the effect that Brosseau had on qualified immunity determination. The *Lyons* court stated that Brosseau is entirely consistent with the two-prong test in *Anderson* and

Saucier v. Katz, and went on to state that Brosseau “command[s] that qualified immunity is appropriate where ‘the result depends very much on the facts of each case.’” [FN232] After an extensive analysis of Fourth Amendment law with probable cause and excessive force, the court turned to the issue of whether, under Brosseau, the officers had fair notice of the constitutional violations. [FN233] The Lyons court concluded that Brosseau establishes two paths for determining whether an officer had fair notice that he was violating a clearly established constitutional right. The first path, Lyons holds, is “where the violation was sufficiently ‘obvious’ under the general standards of constitutional care that the plaintiff need not show ‘a body’ of ‘materially similar’ case law.” [FN234] The second path, on the other hand, is “where the violation is shown by the failure to adhere *602 to a ‘particularized’ body of precedent that ‘squarely govern[s] the case here.’” [FN235]

The court initially analyzed Foubert's qualified immunity claim under the first path, finding that “there [was] nothing ‘obvious’ about what Officer Foubert should have done” in those exact factual circumstances. [FN236] In fact, the court put the burden on the plaintiff to show “the obvious solution to the officer-safety problem faced by Officer Foubert,” instead of requiring the plaintiff to show that Foubert's violation of the plaintiff's constitutional rights was obvious. [FN237] The court then moved to the second path, stating that, under the available case law, “the standards governing the constitutionality of Lyons' excessive-force tackling claim ‘depend[] very much on the facts of each case.’ [So] Officer Foubert's actions, as in Brosseau, at best ‘fell in the ‘hazy border between excessive and acceptable force.’” [FN238] Accordingly, the Sixth Circuit held that the plaintiff failed to show a violation of a “clearly established right in this more ‘particularized’ sense,” so the plaintiff's excessive force claim against Foubert failed as a matter of law. [FN239]

What is interesting about Lyons is not the result of the case, but the way the Sixth Circuit attempted to clarify the case law on qualified immunity. The circuit's two-path approach to establishing fair notice within the qualified immunity analysis attempts to reconcile Hope's rejection of the materially similar standard and Brosseau's implementation of the materially similar standard. [FN240] In the first path, the Sixth Circuit preserved Hope's rejection of the materially similar standard by incorporating that element of the Hope Doctrine into Brosseau's obvious case standard, *603 though the Supreme Court never explicitly connected the two standards. [FN241] Recall that in Brosseau the Supreme Court simply cited Hope as a footnote to Brosseau's “particularized,” materially similar notice, transforming the Hope Doctrine into an ambiguous obvious case category that may or may not apply, depending a number of unspecified factors. [FN242] With no further mention of Hope, the Supreme Court may have effectively relegated the Hope Doctrine, in its entirety, to the confines of Brosseau's amorphous obvious case category. [FN243] However, in Lyons the Sixth Circuit defined Brosseau's obvious case category in terms of what the Hope Doctrine embodied, thereby reincorporating Hope into the qualified immunity analysis as the first path by which to establish fair notice. [FN244]

In so doing, the Sixth Circuit salvaged the Hope Doctrine as a viable form of notice in the qualified immunity analysis, reiterating a variation of the Eleventh Circuit's obvious clarity category of notice. [FN245] Lyon's revitalization of Hope as an alternative to Brosseau's particularized, materially similar category of notice created a precedent for other courts to follow. With the Hope Doctrine as an alternative to Brosseau, courts could follow the principles of Hope but invoke the language of Brosseau, finding that an official had fair notice that his actions violated a constitutional right, even in the absence of materially similar case law, where the circumstances constituted an “obvious case.” [FN246] This polarizing of *604 Brosseau and Hope, though subtle at first blush, actually brought about a profound result for qualified immunity jurisprudence; it reconciled the Hope Doctrine with the implicit limitations it suffered under Brosseau.

B. Looking Past Brosseau

Not all courts have attempted to reconcile Hope and Brosseau, as the Sixth Circuit did in Lyons. Some courts, like the Eighth Circuit, simply refused to recognize Brosseau's careless disregard of Hope's abolition of the materially similar standard and the implicit limitation that Brosseau placed on the Hope Doctrine. [FN247] In Craighead v. Lee, an armed gunman fled the scene of a drive-by shooting and attempted to highjack Craighead's car.

[FN248] In response, Craighead wrestled the suspect to the ground and managed to take the gun away from the suspect. [FN249] Officer Lee was nearby and, upon reaching the two men wrestling on the ground, got out of his car with a shotgun. [FN250] Although accounts of exactly what happened next diverge, Lee approached two men and, from a distance of thirty feet, fired the shotgun at Craighead, thinking he was the suspect. [FN251] Lee's *605 shotgun blast killed Craighead and wounded the suspect. [FN252] Craighead's heirs brought an action under [Section 1983](#) for violation of Craighead's right to be free from excessive force. [FN253] The district court denied Craighead's motion for summary judgment on qualified immunity grounds, and an interlocutory appeal to the Eighth Circuit followed. [FN254]

The Craighead court began its analysis with the two-prong test found in *Anderson* and *Saucier*, noting that the qualified immunity analysis required that a court determine whether a constitutional right was violated and, if so, whether that right was clearly established. [FN255] Noting that the second prong of the test is the more difficult to establish, the court stated that “[a] right is clearly established when that right is so clear that a reasonable official would understand that what he is doing violates that right.” [FN256] Citing *Brosseau*, the court stated that “the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established.” [FN257] Recognizing *Brosseau*'s partiality towards factual specificity, the court acknowledged that “[n]either party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one.” [FN258] However, the court goes on to quote *Hope*, stating that “officials can still be on notice that their conduct violates established law even in novel factual circumstances,” and as a result, prior case law containing “fundamentally similar” facts is “not necessary” to support a finding that the right was “clearly established.” [FN259] Accordingly, the court reasoned that the issue of whether the case law put a “reasonable officer on notice *606 that the use of deadly force in these circumstances would violate Craighead's [constitutional] right[s]” was an issue for the jury. [FN260]

Like the *Lyons* court, the Eighth Circuit juxtaposed *Brosseau*'s reasonableness standard, which is dependant on the “material similarity” of the facts in the case law, with *Hope*'s rejection of the material similarity standard. Unlike the Sixth Circuit, however, the court in *Craighead* did not attempt to reconcile the two doctrines as alternative methods for meeting the clearly established prong of the *Anderson* test, though that conclusion may be inferred from the court's opinion. [FN261] Instead, the *Craighead* court simply looked past *Brosseau*'s preference for factual specificity in the qualified immunity analysis and applied the *Hope* Doctrine as a legitimate method to determine whether a constitutional right was clearly established. [FN262] In so doing, the court recognized an inherent tension between *Brosseau* and *Hope* but noted the two doctrines are not mutually exclusive, nor does *Brosseau* relegate the *Hope* Doctrine to a footnote in qualified immunity jurisprudence.

C. Applying *Brosseau*'s Materially Similar Standard

Although some courts have followed the lead of the Sixth and Eighth Circuits in recognizing *Brosseau* and *Hope* as equally viable alternatives in determining whether a constitutional right was clearly established, [FN263]*607 other courts have simply chosen to follow the example set by the Supreme Court in *Brosseau*. These courts look to *Brosseau*'s materially similar standard as the prevailing method of analysis for qualified immunity. [FN264] By applying *Brosseau* on its face, without any analysis of how the standard corresponds with *Hope* in qualified immunity jurisprudence, these courts have further limited the applicability of the *Hope* Doctrine. Although the effect of these decisions weighs heavy on qualified immunity jurisprudence, the decisions themselves do not acknowledge their implicit impact. Instead, these cases proceed with a qualified immunity analysis identical to numerous other cases. They proceed with the standard application of the two-prong test, [FN265] determining whether there was a constitutional right that was violated, consistent with *Saucier*, and conclude with a finding of whether that constitutional right was clearly established. [FN266] However, the significance of these cases rests not in what *608 test they apply in the qualified immunity analysis, but rather in what test they do not consider. Not surprisingly, these cases do not even mention *Hope* while formulating their qualified immunity analysis. [FN267] Unlike *Craighead* and *Lyons*, these courts do not focus on any implicit tension between *Brosseau* and the *Hope* Doctrine, but simply apply *Brosseau*'s objective reasonableness test without regard to any possibility that the officers

had fair notice, even in the absence of factually specific case law.

Because Brosseau's limited recognition of Hope in its qualified immunity analysis effectively diminished the application of the Hope Doctrine, many courts that look to Brosseau as the preeminent authority on qualified immunity similarly overlook Hope's potential applicability. Just as Brosseau declined to distinguish its facts and law from Hope, [FN268] so do these courts fail to even consider if or how Hope would apply to their facts and law. [FN269] For these courts, the Hope Doctrine remains *609 relegated to an amorphous obvious case category to which the Supreme Court merely gave lip-service in Brosseau. [FN270] It is important to note that, although some circuit panels appear to follow Brosseau's objective reasonableness test to the exclusion of Hope, other panels reason otherwise. [FN271] Unless and until the Supreme Court brings further clarity to this issue, the circuit courts will continue to struggle to provide a coherent body of law for the qualified immunity defense.

VII. The Practical Implications

Qualified immunity issues affect both the strategy and outcome of [Section 1983](#) cases, from the initial pleading stage through summary judgment or a jury verdict. The lingering uncertainty of the remaining relevance of Hope only complicates the matter for litigators. [FN272]

In preparing a [Section 1983](#) complaint, plaintiff's counsel initially needs to analyze carefully, based upon the particular facts of the case, whether to allege a municipal entity policy or practice claim under Monell *610 v. N.Y.C. Department of Social Services, [FN273] a claim against an individual municipal official, or both. Care must be taken to allege all legal elements necessary to sustain a facial challenge to such claims. Too often a [Section 1983](#) complaint will be drafted with both a municipal entity and individuals named in the caption, but the body of the complaint, although very specific on the factual aspects of the constitutional violations, fails to allege the necessary elements of one or the other claims.

With regard to individual capacity claims, it is not enough to simply name an individual officer by name in the caption, with passing reference to this individual's factual participation in the alleged constitutional violations. The complaint must be specific, preferably in both the caption and the body of the complaint, that the plaintiff is claiming damages against those individuals "in their individual capacity," and that such individual had a personal involvement in the constitutional violations. [FN274] Otherwise, defendant's counsel may choose as a strategy to not even allege a qualified immunity defense, with an eye toward steering the course of the lawsuit to summary judgment on the individual capacity claim. In *Kentucky v. Graham*, the Supreme Court held that if the complaint does not "clearly specify" whether an official capacity claim or an individual capacity claim, or both, are stated in a particular action, then the Court must look to "the course of proceedings" to resolve the issue. [FN275] If the course of proceedings, through the complaint, answer, and depositions do not highlight the existence of an individual capacity claim, then such an individual claim may be lost, [FN276] and the plaintiff may be left with only the usually more difficult Monell claim.

Hope and its arguably new standard require even more care by counsel for both plaintiffs and defendants in the pleading stage, and further complicates the inevitable summary judgment motion on qualified immunity *611 grounds. Plaintiff's counsel must now decide, presumably after research of prior, similar cases prove of no value, whether there is enough obvious factual evidence to argue that the named individual defendants were fairly warned of some generalized constitutional violation. Defendants must be prepared to respond in turn, both in pleading the affirmative defense and in a summary judgment motion, and put forth the arguably limiting case law principles of Brosseau.

The most difficult practical battle in litigating qualified immunity is the battle over whether a factual issue precludes summary judgment that would otherwise grant qualified immunity to one or more defendants. Indeed, in Brosseau, Justice Stevens dissented on the ground that he believed that the issue of whether Officer Brosseau was

entitled to qualified immunity required a factual finding for the jury which would preclude a summary judgment decision on qualified immunity. [FN277] Hope intolerably complicates this factual battle. It is one level of complexity to ascertain if the facts in the litigated case are materially similar to prior Section 1983 cases, so as to deem qualified immunity appropriate. It is quite another level of complexity to try to survey all cases relevant to a determination of whether a defendant's conduct so obviously violates some generalized constitutional law principle that the defendant supposedly had fair warning that his conduct was constitutionally inappropriate. Inevitably, the plaintiff will argue that all generalized statements of the constitutional principle at issue gave fair warning to the defendants. In response, the defendants will point to Brosseau arguing that such an inquiry ““must be undertaken in light of the specific context of the case, not as a broad general proposition.”” [FN278] Anecdotally, fewer summary judgment motions are granted as a result.

Many times, defendants will move to dismiss or move for summary judgment when little or no discovery has taken place. Indeed, in Anderson, no discovery had taken place at the time of the summary judgment motion, and the Supreme Court remanded the case back to district court with the possibility of further discovery being conducted. [FN279] One New York district court judge requires an immediate joining of the qualified immunity issue.

***612** In keeping with the United States Supreme Court's observation that the issue of qualified immunity should be decided before discovery is conducted, counsel representing any defendant who intends to claim qualified immunity must comply with the following procedure.

A motion for summary judgment on the ground of qualified immunity must be served and filed at the earliest possible opportunity....

....

As soon as a notice of motion raising the issue of qualified immunity is filed, all discovery is stayed, except for the plaintiff's deposition. Within thirty days after the filing of a notice of motion raising the issue of qualified immunity, the plaintiff's deposition shall be taken, and briefs and papers addressing the issue of qualified immunity shall be served and filed....

....

Failure to proceed in accordance with these rules constitutes a waiver of the right to move for judgment on the ground of qualified immunity prior to trial. [FN280]

Though this judge requires qualified immunity to be pled with the answer, analyzing a case under the Hope fair warning standard at such an early stage of litigation is, in practice, extremely problematic. More difficult, however, is the litigation dance that must be conducted when depositions are taken. Trying to elicit or avoid testimony that may bring a case, not presently within prior cases of materially similar facts, within the realm of facts obviously violating some generalized constitutional principle, is difficult at best.

VIII. Conclusion

In Hope, the Court established a standard for determining when qualified immunity attaches in obvious circumstances where Anderson's two-prong test arguably does not apply. In other words, Hope is applicable when a municipal official had fair warning that the official's conduct would violate the plaintiff's generalized constitutional rights, even in the absence of materially similar case law. However, Hope's approach to qualified immunity lacks direction as to when and how its fair warning ***613** standard can be applied. Without a test to determine how obvious the constitutional violation must be, lower courts, like the Williams court, are uncertain as to when Hope applies. As a result, those courts often avoid Hope and turn to the established tests of prior qualified immunity precedents, such

as Anderson's two-prong test. The Eleventh Circuit's disparate application of qualified immunity principles involving the Hope Doctrine is typical of the uncertainty throughout the federal courts.

Perhaps to marginalize Hope in the qualified immunity jurisprudence, the Supreme Court handed down *Brosseau*, a case that attempted to reinstate certainty into the qualified immunity determination. To that effect, *Brosseau* reiterated the importance of material similarity, or factual specificity, in determining qualified immunity. Hope's rejection of the material similarity standard, therefore, appears limited to the obvious constitutional violations such as those found in Hope. Now, in the wake of *Brosseau*, federal courts are left to reconcile the tension between the holding of Hope and the reassertion by *Brosseau* of material similarity into the qualified immunity analysis. Perhaps Hope ought to be significantly limited to those circumstances in which there exist such egregious and unique facts that it would be unlikely to find previous materially similar cases. Because different courts have implemented, and will continue to implement, different methods of reconciling the tension between *Brosseau* and Hope, qualified immunity jurisprudence will continue to be unsettled. Unless and until the Supreme Court clarifies this apparent tension between these two approaches to qualified immunity, the lower courts will continue to struggle with applying Hope. Such uncertainty unnecessarily complicates litigation strategy concerning qualified immunity for counsel to both plaintiffs and defendants.

Unless and until the Supreme Court more clearly articulates a reconciliation between Hope and *Brosseau*, litigators face real and practical decisions in the analysis and presentation of their respective [Section 1983](#) affirmative case and its defense. These decisions are especially difficult in those instances where there are no materially similar, factual precedents in binding circuit court or Supreme Court cases that existed at the time of the constitutional injury. These practical decisions will begin when the client walks into the attorney's office, and will continue through pleading and discovery, and finally through trial and the appeals. When there are no binding circuit court or Supreme Court materially similar, factual precedents, attorneys for plaintiffs will certainly allege in their ***614** pleadings and conduct their discovery, the trial, and appeals along a theme that the case defaults to the Hope Doctrine. In other words, the case involves novel factual circumstances that, even in light of an absence of materially similar precedent, nonetheless, provided the individually named defendants with fair warning that their conduct would violate a general, clearly established constitutional right of their plaintiff. [\[FN281\]](#)

In response, counsel for defendants will plead a qualified immunity affirmative defense, and conduct their discovery, trial and appeals, arguing that the Hope Doctrine does not apply. On the contrary, so the argument goes, the facts involved are not so "novel" or unique, as in Hope, so as to have given the defendant any fair warning of a clearly established constitutional violation at the time of the incident. Defendants will clearly argue that Hope's application is limited to the kind of unique and egregious factual circumstances that were present in Hope. Consequently, without such unique and egregious facts, the matter at hand necessarily falls within the traditional Anderson and *Brosseau* line of cases that require qualified immunity to attach to the defendant where there are no materially similar precedents.

Therefore, it will be up to the lower courts to develop from these competing arguments, adequate, if not concrete, guiding principles to clarify for each circuit as to how narrowly or broadly the Hope Doctrine will take root. Ultimately, it appears that no less than another Supreme Court decision is needed to put to rest the uncertainty in the qualified immunity jurisprudence that presently exists as a result of its Hope decision. In short, the Supreme Court needs to better define the contours of its fair warning test. At the very least, the Court must delineate a definition and boundaries for its obvious case category, which applies the Hope Doctrine to cases falling within its bounds. Until then, attorneys for both plaintiffs and defendants will have no choice in their role as advocates, but to exploit to their respective advantages the uncertainty that now exists.

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[FN1]. See [Pierson v. Ray, 386 U.S. 547 \(1967\)](#) (establishing a variation of immunity from [Section 1983](#) liability for government officials).

[FN2]. [536 U.S. 730 \(2002\)](#).

[FN3]. See [Anderson v. Creighton, 483 U.S. 635, 640 \(1987\)](#).

[FN4]. [536 U.S. 730](#).

[FN5]. [Id. at 745-46](#).

[FN6]. [Id.](#)

[FN7]. [543 U.S. 194 \(2004\)](#).

[FN8]. See [42 U.S.C. § 1983 \(2000\)](#).

[FN9]. [Id.](#)

[FN10]. See [id.](#)

[FN11]. See [Smith v. Allwright, 321 U.S. 649 \(1944\)](#) (holding that a state could not prevent a racial minority from registering to vote in a primary because that constitutes a state action; therefore, the Civil Rights Act provides a right for redress); [Douglas v. City of Jeannette, 319 U.S. 157 \(1943\)](#) (holding that federal courts will not interfere with state laws challenged under the Civil Rights Act when the wrong complained of does not state a ground for relief); [Lane v. Wilson, 307 U.S. 268 \(1939\)](#) (finding a racial minority in fact had a cause of action under the Civil Rights Act where the statute preventing his ability to register to vote was found unconstitutional); [Myers v. Anderson, 238 U.S. 368 \(1915\)](#) (holding that prevention of a racial minority from registering to vote did not state a cause of action under the Civil Rights Act); [Giles v. Harris, 189 U.S. 475 \(1903\)](#) (holding that the Civil Rights Act did not provide relief for a plaintiff seeking the right to register to vote when proscribed by the State).

[FN12]. See [Monroe v. Pape, 365 U.S. 167 \(1961\)](#), abrogated by [Monell v. Dep't of Soc. Servs., 436 U.S. 658 \(1978\)](#) (holding insofar as Monroe failed to extend civil liability to a municipality); [Harrison v. NAACP, 360 U.S. 167 \(1959\)](#) (holding that federal courts must abstain from an action, under [Section 1983](#), to enjoin enforcement of state statutes that inhibit the NAACP's activity because the state courts should have the first opportunity to declare the statutes unconstitutional where they had not yet decided the constitutionality of those statutes); [Stefanelli v. Minard, 342 U.S. 167 \(1961\)](#) (holding that where a plaintiff brings an action under [Section 1983](#) to enjoin the use of unlawfully obtained evidence in a criminal trial, federal courts are compelled to abstain from interfering in state criminal procedures).

[FN13]. [365 U.S. 167 \(1961\)](#).

[FN14]. It is important to note that Monroe did not interpret [Section 1983](#) as broadly as it would come to be interpreted. The Monroe Court declined to extend the scope of [Section 1983](#) liability to the municipality. [Monroe, 365 U.S. at 190-91](#). The Supreme Court later held that liability under [Section 1983](#) did extend to a municipality. See [Monell, 436 U.S. 658](#).

[FN15]. [Monroe, 365 U.S. at 190-91](#).

[FN16]. [42 U.S.C. § 1983](#).

[FN17]. See [Imbler v. Pachtman, 424 U.S. 409 \(1976\)](#) (establishing absolute immunity for prosecutors); [Pierson v. Ray, 386 U.S. 547 \(1967\)](#) (establishing absolute immunity for judges); [Tenney v. Brandhove, 341 U.S. 367 \(1951\)](#) (establishing absolute immunity for legislators).

[FN18]. [Lee v. Ferraro, 284 F.3d 1188, 1194 \(11th Cir. 2002\)](#).

[FN19]. [386 U.S. 547, 549 \(1967\)](#).

[FN20]. See [Pierson, 386 U.S. at 549](#). Section 2087.5 of the Mississippi Code made it a misdemeanor for anyone to “congregate with others in [any] public building” with the “intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby.” [Id. at 550 n.2](#).

[FN21]. See [Thomas v. Mississippi, 380 U.S. 524 \(1965\)](#).

[FN22]. [Pierson, 386 U.S. at 550](#).

[FN23]. [Id. at 557](#).

[FN24]. 416 U.S. 232 (1974), abrogated by [Harlow v. Fitzgerald, 457 U.S. 800 \(1982\)](#) (extending absolute immunity from a suit under [Section 1983](#) to certain federal officials carrying out functions of the Executive Branch where the officials can prove certain factors).

[FN25]. [Scheuer, 416 U.S. at 235-36](#).

[FN26]. [Id. at 235](#).

[FN27]. [Id. at 247-48](#).

[FN28]. See [id.](#); see also [Pierson, 386 U.S. at 557](#).

[FN29]. Early in the history of [Section 1983](#) cases, the trend was to allege malice in the complaints filed against a government official for a violation of federally protected rights. Even if the plaintiff could not objectively show that the official knew or should have known that her conduct would violate federal rights, the plaintiff could still prove that the official subjectively intended to violate the plaintiff’s rights or otherwise harm the plaintiff.

[FN30]. See [Scheuer, 416 U.S. at 247-48](#) (applying the objective standard for determining the knowledge of the government official: “reasonable grounds for the belief formed in light of all the circumstances”).

[FN31]. See, e.g., [Wood v. Strickland, 420 U.S. 308, 322 \(1975\)](#) (holding that the test for qualified immunity “necessarily contains elements of both [an] ‘objective’ [and] a ‘subjective’ test of good faith,” where liability may be proven by showing that the government official either “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate constitutional rights,” or “took the action with the malicious intention to cause a deprivation of constitutional rights”).

[FN32]. [457 U.S. 800 \(1982\)](#). The Court noted the facts of the case were set out in a companion case, [Nixon v.](#)

[Fitzgerald, 457 U.S. 731 \(1982\)](#). Government officials whose special functions and constitutional status requires complete protection from suits for damages, such as prosecutors or the President, are entitled to absolute immunity. [Nixon, 457 U.S. at 746](#). Executive officers, in general, are only entitled to qualified or good faith immunity. [Id. at 759 n.2](#) (Burger, C.J., concurring). Public policy does not require a blanket recognition of absolute immunity for presidential aides.

[FN33]. [Nixon, 457 U.S. at 734-35](#).

[FN34]. [Id. at 739-40](#). The action was a Bivens claim. See *infra* notes 36-37.

[FN35]. [Nixon, 457 U.S. at 736, 739](#).

[FN36]. [Harlow, 457 U.S. at 802, 804](#).

[FN37]. [Id. at 805-06](#); see [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 \(1971\)](#) (holding that, where a federal cause of action has been imputed against state officials for a Fourth Amendment violation under the Fourteenth Amendment, so should a federal cause of action be imputed against federal officials, under [28 U.S.C. § 1331](#), for violation of constitutional or federal rights).

[FN38]. The similarity between an action under [Section 1331](#) against a federal official and an action under [Section 1983](#) against a state official was pervasive throughout the opinions. Justice Brennan recognized in his opinion for the Court that other judges were drawing parallels between the two actions, and he never discounted their similarity. See [Bivens, 403 U.S. at 391 n.4](#). Justice Harlan's concurrence, likewise, openly compared the two actions. See [id. at 406-07](#) (Harlan, J., concurring).

[FN39]. [Harlow, 457 U.S. at 807 \(citing Scheuer, 416 U.S. at 247-48\)](#).

[FN40]. [Id. at 810-11](#).

[FN41]. [Id. at 813](#).

[FN42]. [Id. at 815](#) (citing [Wood v. Strickland, 420 U.S. 308, 322 \(1975\)](#)).

[FN43]. [Id. at 815-16](#).

[FN44]. [Id. at 816](#).

[FN45]. [Id.](#)

[FN46]. See [id. at 816-17](#).

[FN47]. [Id. at 817-18](#).

[FN48]. [420 U.S. 308 \(1975\)](#); see *supra* note 31 and accompanying text.

[FN49]. [Harlow, 457 U.S. at 818](#).

[FN50]. [Id.](#)

[\[FN51\]](#). *Id.* at 819.

[\[FN52\]](#). *Id.* at 820.

[\[FN53\]](#). [483 U.S. 635, 639 \(1987\)](#).

[\[FN54\]](#). [386 U.S. 547, 557 \(1967\)](#).

[\[FN55\]](#). [416 U.S. 232 \(1974\)](#), abrogated by [Harlow v. Fitzgerald, 457 U.S. 800 \(1982\)](#).

[\[FN56\]](#). See [Anderson, 483 U.S. at 639](#). The inquiry remained subjective, to some extent, in that it looked at particular actions in particular circumstances by particular municipal officers.

[\[FN57\]](#). *Id.*; see also [Harlow, 457 U.S. at 818](#).

[\[FN58\]](#). [403 U.S. 388 \(1971\)](#); see supra notes 37, 38 and accompanying text.

[\[FN59\]](#). [Anderson, 483 U.S. at 637](#).

[\[FN60\]](#). [Id. at 667 n.21](#) (Stevens, J., dissenting); [Creighton v. St. Paul, 766 F.2d 1269, 1270-71 \(8th Cir. 1985\)](#).

[\[FN61\]](#). [Anderson, 483 U.S. at 667](#). The officers rushed into the house with guns drawn, telling Creighton to keep his hands in sight and that they were going to search his house without a search warrant. [Id. at 667 n.21](#) (Stevens, J., dissenting).

[\[FN62\]](#). [Id. at 667](#) (Stevens, J., dissenting).

[\[FN63\]](#). [Id. at 637](#). Creighton was taken to the police station, where he was jailed overnight and released in the morning without charges. *Id.*

[\[FN64\]](#). *Id.*

[\[FN65\]](#). *Id.*

[\[FN66\]](#). *Id.*

[\[FN67\]](#). *Id.* at 637-38.

[\[FN68\]](#). *Id.* at 646.

[\[FN69\]](#). *Id.* at 646 n.6.

[\[FN70\]](#). *Id.* at 639 (quoting [Harlow, 457 U.S. at 818-19](#)).

[\[FN71\]](#). [Anderson, 483 U.S. at 639](#).

[\[FN72\]](#). [Id. at 641.](#)

[\[FN73\]](#). [Id.](#)

[\[FN74\]](#). [Id.](#)

[\[FN75\]](#). [See id. at 639.](#)

[\[FN76\]](#). [Id.](#)

[\[FN77\]](#). [Id. at 639, 641.](#)

[\[FN78\]](#). [Id. at 640.](#)

[\[FN79\]](#). [Id.](#)

[\[FN80\]](#). [Id. at 639.](#)

[\[FN81\]](#). [533 U.S. 194, 200 \(2001\).](#)

[\[FN82\]](#). [Saucier, 533 U.S. at 201.](#)

[\[FN83\]](#). [Id. at 198.](#)

[\[FN84\]](#). [Id. at 201.](#)

[\[FN85\]](#). [Id. at 201-02](#) (citing [Anderson, 483 U.S. at 640.](#)).

[\[FN86\]](#). [Id. at 201.](#)

[\[FN87\]](#). [Id. at 201-02.](#)

[\[FN88\]](#). [Id. \(quoting Anderson, 483 U.S. at 640\).](#)

[\[FN89\]](#). [Id. at 201-02](#) (citing [Graham v. Conner, 490 U.S. 386 \(1989\).](#)).

[\[FN90\]](#). [Id. at 205.](#)

[\[FN91\]](#). [Id. at 201.](#)

[\[FN92\]](#). [Saucier, 533 U.S. at 206](#) (quoting [Priester v. Riviera Beach, 208 F.3d 919, 926-27 \(11th Cir. 2000\).](#)).

[\[FN93\]](#). [Id. at 208.](#)

[\[FN94\]](#). [536 U.S. 730 \(2002\).](#)

[\[FN95\]](#). [Hope, 536 U.S. at 741.](#)

[\[FN96\]](#). [Id. at 741-46.](#)

[\[FN97\]](#). [Id. at 733-35.](#)

[\[FN98\]](#). [Id. at 733.](#)

[\[FN99\]](#). [Id.](#) A chain gang is a group of inmates handcuffed to each other in a “work squad” and forced to do manual labor. [Id.](#)

[\[FN100\]](#). [Id.](#) A hitching post is a “horizontal bar ‘made of sturdy, nonflexible material,’ placed between 45 and 57 inches from the ground.” [Id.](#) at 734 n.1 (quoting [Austin v. Hooper](#), 115 F. Supp. 2d 1210, 1241-42 (M.D. Ala. 1998)). When inmates were shackled to the hitching post, they were forced to remain standing with their hands handcuffed at face-level. [Id.](#)

[\[FN101\]](#). [Id.](#) at 733.

[\[FN102\]](#). [Id.](#) at 734. During the two hours he spent on the hitching post, Hope was offered drinks of water and bathroom breaks. [Id.](#) at 733. However, he complained that he was too short for the hitching post and that this caused him “pain and discomfort.” [Id.](#) As required by prison policy, Hope’s time spent on the hitching post was recorded in an activity log, as were Hope’s comments regarding his pain and discomfort. [Id.](#) at 734, 735 n.3.

[\[FN103\]](#). [Id.](#) at 734.

[\[FN104\]](#). [Hope](#), 536 U.S. at 734. When Hope was put on the hitching post, he was made to remove his shirt and was chained to the post for seven hours, where he suffered severe burns from his exposure to the sun. [Id.](#) at 734-35. On this occasion, Hope was given very little water and no bathroom breaks. [Id.](#) at 735. Hope claims that the guards taunted him about his thirst, stating that the guard “gave water to some dogs, then brought the water cooler closer to me and kicked the cooler over, spilling the water onto the ground.” [Id.](#) During his seven hours on the hitching post, Hope suffered from “sunburn, dehydration, and muscle aches [as well as] substantial pain when the sun heat[ed] the handcuffs that shackled him to the hitching posts or heat[ed] the hitching post itself.” [Id.](#) at 735 n.2. The handcuffs “burned and chafed [Hope’s] skin during [his] placement on the post.” [Id.](#) On this occasion, Hope’s time on the hitching post was not recorded in the prison activity log, despite the prison policy requiring such entries. [Id.](#) at 735 n.3.

[\[FN105\]](#). [Id.](#) at 735.

[\[FN106\]](#). [Id.](#)

[\[FN107\]](#). [Id.](#) at 736 (quoting [Hope v. Pelzer](#), 240 F.3d 975, 981 (11th Cir. 2001)).

[\[FN108\]](#). [Id.](#) at 740-41, 748.

[\[FN109\]](#). [Id.](#) at 736-37; see [Anderson v. Creighton](#), 483 U.S. 635 (1987).

[\[FN110\]](#). [Id.](#) at 738 (quoting [Trop v. Dulles](#), 356 U.S. 86, 100 (1958); [Whitley v. Abers](#), 475 U.S. 312, 319 (1986)).

[\[FN111\]](#). [Id.](#) at 739.

[FN112]. [Id.](#) (quoting [Anderson, 483 U.S. at 640](#)).

[FN113]. [Id.](#) at 740 (quoting [United States v. Lanier, 520 U.S. 259 \(1997\)](#)).

[FN114]. [Hope, 536 U.S. at 740](#).

[FN115]. [520 U.S. 259, 269 \(1997\)](#); see [Hope, 526 U.S. at 740](#).

[FN116]. [Lanier, 520 U.S. at 271](#); see [Hope, 536 U.S. at 741 \(quoting Anderson, 483 U.S. at 640\)](#).

[FN117]. [Hope, 536 U.S. at 741](#).

[FN118]. [Anderson, 483 U.S. at 640](#).

[FN119]. [Id.](#)

[FN120]. [501 F. 2d 1291 \(5th Cir. 1974\)](#). As [Hope](#) recognized, Fifth Circuit precedent is binding on the Eleventh Circuit. See [Hope, 536 U.S. at 742](#) (citing [Bonner v. Prichard, 661 F.2d 1206 \(11th Cir. 1981\)](#)).

[FN121]. [Hope, 536 U.S. at 742 \(quoting Gates, 501 F.2d at 1306\)](#).

[FN122]. [Id.](#)

[FN123]. [Id.](#)

[FN124]. [Id.](#)

[FN125]. [Id.](#) at 743 (citing [Ort v. White, 813 F.2d 318 \(11th Cir. 1987\)](#)).

[FN126]. [Ort, 813 F.2d at 320-21](#).

[FN127]. [Id. at 325](#).

[FN128]. [Hope, 536 U.S. at 743 \(quoting Ort, 813 F.2d at 326\)](#).

[FN129]. [Id.](#) (quoting [Ort, 813 F.2d at 324](#)).

[FN130]. [Id.](#)

[FN131]. [Id.](#) at 744. The Court stated that “a regulation promulgated by ADOC in 1993 authorizes the use of the hitching post when an inmate refuses to work or is otherwise disruptive to a work squad,” but the regulation imposes certain conditions on the use of the hitching post. [Id.](#) The regulation provided that, if an inmate was to be put on the hitching post, “an activity log should be completed for each such inmate, detailing his responses to offers of water and bathroom breaks every 15 minutes.” [Id.](#) The regulation also states that an “inmate ‘will be allowed to join his assigned squad’ whenever he tells an officer ‘that he is ready to go to work.’” [Id.](#) The Court noted that corrections officers did not frequently comply with the regulations provided by the ADOC and that the frequent failure of the guards to comply with the ADOC regulation “provides equally strong support for the conclusion that they were fully

aware of the wrongful character of their conduct.” Id. at 744 (citing [Austin v. Hooper](#), 115 F. Supp. 2d 1210, 1244-46 (M.D. Ala. 1998)).

[FN132]. Id. The Court recognized that the Department of Justice (DOJ) “advised the ADOC to cease use of the hitching post in order to meet constitutional standards.” Id. at 745. But when the ADOC responded that the use of the hitching post was necessary to preserve prison security, the DOJ responded that, “[a]lthough an emergency situation may warrant drastic action by corrections staff, our experts found that the “rail” is being used systematically as an improper punishment for relatively trivial offenses [and] is without penological justification.” Id. at 745 (quoting [Hope v. Pelzer](#), 240 F.3d 975, 979 (11th Cir. 2001)). However, remarkably, the Court noted that there was nothing to indicate that the guards ever received the opinions of the DOJ. Id.

[FN133]. Id. at 746.

[FN134]. Id. at 740-41.

[FN135]. Id. at 739.

[FN136]. Id. (citing [Suissa v. Fulton County](#), 74 F.3d 266, 270 (11th Cir. 1996); [Lassiter v. Ala. A & M Univ. Bd. of Trs.](#), 28 F.3d 1146, 1150 (11th Cir. 1994); [Hill v. Dekalb Reg'l Youth Det. Ctr.](#), 40 F.3d 1176, 1185 (11th Cir. 1994)).

[FN137]. Id. at 741.

[FN138]. Id. at 746-47.

[FN139]. [378 U.S. 184, 197 \(1964\)](#) (Stewart, J., concurring).

[FN140]. [Jacobellis](#), 378 U.S. at 197.

[FN141]. See [Anderson](#), 483 U.S. at 641.

[FN142]. [Hope](#), 536 U.S. at 740.

[FN143]. See [Vinyard v. Wilson](#), 311 F.3d 1340 (11th Cir. 2002). In Vinyard, the Eleventh Circuit stated that “fair notice” is present, for purposes of a qualified immunity determination, when there are “some broad statements of principle in case law [which] are not tied to particularized facts and [that] can clearly establish law applicable in the future to different sets of detailed facts.” Id. at 1351. The Eleventh Circuit further stated, “These judicial decisions can control ‘with obvious clarity’ a wide variety of later factual circumstances.” Id. (citing [Hope](#), 536 U.S. at 741). The Eleventh Circuit's decision in Vinyard illustrates that Hope has become part of the qualified immunity analysis, even though Hope did not announce a clearly defined test to apply its fair warning standard.

[FN144]. See [Hope](#), 536 U.S. at 739 (stating that the Eleventh Circuit's “rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases”).

[FN145]. [311 F.3d 1340 \(11th Cir. 2002\)](#).

[FN146]. Id. at 1343.

[FN147]. Id.

[FN148]. Id. Vinyard claimed that the deputy told her, “You’re a drunk, always have been, and always will be. You are one drunken, skanky whore.” Id. After further demeaning remarks, Vinyard admitted that she became upset and started screaming at the deputy. In response, alleged Vinyard, the deputy pulled his car to the side of the road, got out of the car, and opened the back door. Vinyard claimed that the deputy grabbed her by the arm, bruising her arm and breast, and then pulled her head back by her hair, spraying her three times in the face with pepper spray. Id. When Vinyard complained that she could not breathe, the deputy allegedly responded, “I hope you die, because when I get you to the jail I’m going to beat the shit out of you and there’s nothing you can do.” Id. at 1344 (citations omitted).

[FN149]. Id. at 1344.

[FN150]. Id.

[FN151]. Id. at 1344-45. Vinyard did not file any civil or criminal charges against the deputy. Id.

[FN152]. Id. at 1345.

[FN153]. Id. at 1345-46.

[FN154]. Id. at 1357.

[FN155]. [Vinyard, 311 F.3d at 1346](#) (citing [Anderson, 483 U.S. at 638-41](#)).

[FN156]. Id. (quoting [Hope, 536 U.S. at 736](#); [Saucier v. Katz, 533 U.S. 194, 201 \(2001\)](#)).

[FN157]. Id. at 1348. The Eleventh Circuit applied the factors set out in [Graham v. Conner](#): “[I]n determining if force was reasonable, courts must examine (1) the need for the application of force; (2) the relationship between the need and the amount of force used; and (3) the extent of the injury inflicted.” Id. at 1347 (quoting [Graham v. Conner, 490 U.S. 386, 396 \(1989\)](#)).

[FN158]. Id. at 1349 (citations omitted).

[FN159]. Id. at 1349-50 (quoting [Saucier, 533 U.S. at 201](#)).

[FN160]. Id. (quoting [Hope, 536 U.S. at 741](#); [Marsh v. Butler County, 268 F.3d 1014, 1031 \(11th Cir. 2001\)](#)).

[FN161]. Id. at 1350 n.17 (quoting [Lassiter v. Ala. A & M Univ. Bd. of Trs., 28 F.3d 1146, 1150, 1150 n.4 \(11th Cir. 1994\)](#)).

[FN162]. Id. at 1350. The words obvious clarity foreshadowed the precise language that the Supreme Court would use to limit [Hope](#) in [Brosseau v. Haugen, 543 U.S. 194, 199 \(2004\)](#) (per curiam). In [Brosseau](#), the Court referred to [Hope](#) as an “obvious case [that] can ‘clearly establish’ the [constitutionality of conduct], even without a body of relevant case law,” but distinguished [Brosseau](#) on the “particularized” facts. Id. (emphasis added).

[FN163]. [Vinyard, 311 F.3d at 1351](#).

[FN164]. Id. The precedent the court will consider is “cases in which the Supreme Court or [the Eleventh Circuit],

or the pertinent state supreme court has said that ‘Y Conduct’ is unconstitutional in ‘Z Circumstances.’” Id.

[\[FN165\]](#). Id. at 1352.

[\[FN166\]](#). Id. at 1355.

[\[FN167\]](#). Id. at 1353. The court stated that “Hope does not purport to overrule, modify, or even question anything the Supreme Court had earlier said about qualified immunity [; t]he Supreme Court decisions preceding Hope are still good law.” Id. at 1353 n.24.

[\[FN168\]](#). [381 F.3d 1298 \(11th Cir. 2004\)](#), cert. denied, [543 U.S. 1187 \(2005\)](#).

[\[FN169\]](#). [Id. at 1300](#) (Wilson, J., concurring). In Williams, the fire chief of Jacksonville, Florida was presented with an opportunity to create four new high-level positions within the fire department, but he declined to create them, stating that he “wanted to wait for a new [promotion] list, because he did not want to promote four white men to the new positions.” Id. (citations omitted).

[\[FN170\]](#). Id. at 1299.

[\[FN171\]](#). Id. Judge Wilson and the dissenters noted that an exception to the unconstitutionality of Alfred's failure to create new jobs would have been if Alfred had been acting within the confines of an affirmative action program. Id.

[\[FN172\]](#). Id.

[\[FN173\]](#). Id. at 1299 (quoting [Post v. Fort Lauderdale, 7 F.3d 1552, 1557 \(Fla. 1993\)](#)).

[\[FN174\]](#). Id.

[\[FN175\]](#). [Vinyard, 311 F.3d at 1350](#) (emphasis added).

[\[FN176\]](#). [Williams, 381 F.3d at 1299](#) (Wilson, J., concurring) (quoting [Post, 7 F.3d at 1557](#)).

[\[FN177\]](#). See id.; see also [Post, 7 F.3d at 1557](#).

[\[FN178\]](#). [Williams, 381 F.3d at 1304](#) (Tjoflat, J., dissenting). Judge Tjoflat recognized that Williams, like Brosseau, presented a casebook example of when the Hope Doctrine should apply. Judge Tjoflat stated that Williams was the “perfect vehicle for explaining the reach of the crucial holding in Vinyard,” that in an obvious clarity case specific factual similarity is not necessary to establish notice. [Id. at 1306](#). Judge Tjoflat further stated that the Eleventh Circuit “[has] not yet achieved a consensus on what [Hope's] elusive phrase ‘clearly established’ means.” Id.

[\[FN179\]](#). Id. at 1304 (Tjoflat, J., dissenting).

[\[FN180\]](#). Id. at 1305 (Tjoflat, J., dissenting).

[\[FN181\]](#). Id. (Tjoflat, J., dissenting).

[\[FN182\]](#). Id. (Tjoflat, J., dissenting).

[FN183]. *Id.* (Tjoflat, J., dissenting). Judge Barkett stated that “[i]n *Hope*, the Court found that our circuit’s ‘rigid gloss on the qualified immunity standard,’ which required that the facts of previous cases be ‘materially similar’ to those of the case under review, was ‘not consistent with [the Supreme Court’s] cases.’” *Id.* at 1308 (Barkett, J., dissenting) (quoting *Hope*, 536 U.S. at 739). Judge Barkett recognized that, by requiring specificity in precedent in *Williams*, the court intentionally or inadvertently side-stepped the *Hope* Doctrine.

[FN184]. See *Johnson v. California*, 543 U.S. 499, 511 (2005) (noting that *Hope* stands for the proposition that the Supreme Court “judge[es] violations of [the Eighth] Amendment under the ‘deliberate indifference’ standard, rather than [the] ‘reasonably related’ standard”); *Branch v. Smith*, 538 U.S. 254, 271 (2003) (citing *Hope* as standing for the proposition that the “by law” language of 2 U.S.C. § 2(c) “encompasses judicial decisions as well” as legislative decisions, where *Hope* considered judicial decisions “established law” in a qualified immunity determination).

[FN185]. *543 U.S. 194 (2004)*.

[FN186]. *Brosseau*, 543 U.S. at 195. The day of the incident, Glen Tamborello and a friend went to Haugen’s mother’s house to find Haugen and confront him about the alleged theft. Upon their arrival, the parties began fighting, and a neighbor dialed 911. *Id.*

[FN187]. *Id.* at 196. At that time, there was a “felony no-bail warrant” out for Haugen’s arrest for drug-related offenses. *Id.* at 195. Pursuant to Brosseau’s request, two other officers arrived and instructed all parties to the incident to remain in their respective vehicles. *Id.*

[FN188]. *Id.* At trial, Brosseau claimed that she thought Haugen was “running to the Jeep to retrieve a weapon.” *Id.*

[FN189]. *Id.*

[FN190]. *Id.* At trial, Brosseau claimed she shot Haugen because she was “‘fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen’s] path and for any other citizens who might be in the area.’” *Id.* (citations omitted) (quoting *Haugen v. Brosseau*, 339 F.3d 857, 865 (9th Cir. 2003)).

[FN191]. *Id.*

[FN192]. *Id.* at 194-95.

[FN193]. *Id.*

[FN194]. *Id.* at 195, 200.

[FN195]. *Id.* at 197 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

[FN196]. *Brosseau*, 543 U.S. at 197.

[FN197]. *Id.* at 198 (citing *Saucier*, 533 U.S. at 206).

[FN198]. *Id.* (quoting *Saucier*, 533 U.S. at 201).

[FN199]. *Id.* at 198-99.

[FN200]. [Id. at 199](#) (quoting [Graham v. Conner, 490 U.S. 386, 396 \(1989\)](#)).

[FN201]. [Id.](#) (citing [Hope, 536 U.S. at 738](#)) (emphasis added).

[FN202]. [Id.](#) The Court suggests that the text of the constitutional or statutory provision must explicitly prohibit the exact conduct alleged by the plaintiff for the Hope Doctrine to apply: “The contours of the [federal] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” [Id.](#) In other words, if there is no precedent that is factually material, the provision itself must define the “contours of the right” with enough clarity that the officer knows that his conduct is illegal. [Id.](#)

[FN203]. [Id.](#) (citing [Graham, 490 U.S. 386 \(1989\)](#); [Tennessee v. Garner, 471 U.S. 1 \(1985\)](#)).

[FN204]. [Id.](#)

[FN205]. [Id. at 200](#) (citing [Cole v. Bone, 993 F.2d 1328, 1333 \(8th Cir. 1993\)](#)).

[FN206]. [Brosseau, 543 U.S. at 201](#) (quoting [Saucier, 533 U.S. at 206](#)).

[FN207]. [Id. at 199](#). By focusing on the “material similarity” of the then-existing case law in its qualified immunity inquiry, the Brosseau Court left no room for Hope in its analysis. [Id. at 200](#).

[FN208]. [Id. at 198](#) (citing [Saucier, 533 U.S. at 206](#)).

[FN209]. [Id. at 201](#).

[FN210]. See [id.](#) The Court stated that under the Fourth Amendment, “it is unreasonable for an officer to seize an unarmed, nondangerous suspect by shooting him dead,” but “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” [Id. at 197-98](#) (quoting [Garner, 471 U.S. at 11](#)).

[FN211]. [Id. at 201](#). Cf. [Hope, 536 U.S. at 739](#) (holding that the Eleventh Circuit erred in requiring that the “facts of previous cases be ‘materially similar’ to Hope’s situation” before the court can decline an official the qualified immunity defense). Hope concluded that “[t]his rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases.” [Id.](#) (emphasis added).

[FN212]. [Brosseau, 543 U.S. at 200](#).

[FN213]. [Id.](#) (citing [Hope, 536 U.S. at 738](#)).

[FN214]. [Id.](#) (citing [Hope, 536 U.S. at 738](#)).

[FN215]. [Id.](#)

[FN216]. [Hope, 536 U.S. at 740](#).

[FN217]. [Brosseau, 543 U.S. at 201](#).

[\[FN218\]](#). Id.

[\[FN219\]](#). Id. at 199.

[\[FN220\]](#). Because Hope involved an Eighth Amendment violation, the court would have to recognize that the Hope Doctrine, at the very least, applies to cases involving Eighth Amendment violations, because Hope was never overturned.

[\[FN221\]](#). See [Hope, 536 U.S. at 746; Brosseau, 543 U.S. at 199](#).

[\[FN222\]](#). Brosseau's ultimate holding seems to fly in the face of the language in Hope that accused the Eleventh Circuit of placing a "rigid gloss on the qualified immunity standard [that] is not consistent with our cases." [Hope, 536 U.S. at 739](#).

[\[FN223\]](#). See [Howser v. Anderson, 150 F. App'x. 533, 538 \(6th Cir. 2005\)](#) (holding that "material facts [were] in dispute that preclude[d] this court from deciding whether a constitutional tort occurred, but when the facts are taken in the light most favorable to Plaintiff, the facts would establish a constitutional violation," and dismissed the interlocutory appeal). But cf., [Robinson v. Arrugueta, 415 F.3d 1252, 1257 \(11th Cir. 2005\)](#) (holding that "because material issues of disputed fact are not a factor in the court's analysis of qualified immunity and cannot foreclose the grant or denial of summary judgment based on qualified immunity; we decline to entertain Robinson's arguments concerning the allegedly disputed facts").

[\[FN224\]](#). [417 F.3d 565, 572 \(6th Cir. 2005\)](#).

[\[FN225\]](#). [Lyons, 417 F.3d at 572](#).

[\[FN226\]](#). Id. at 569.

[\[FN227\]](#). Id.

[\[FN228\]](#). Id. at 570.

[\[FN229\]](#). Id. at 570-71.

[\[FN230\]](#). Id. at 571.

[\[FN231\]](#). Id. After the Sixth Circuit's initial decision in Lyons, the Supreme Court charged the court to reevaluate the case in light of the Supreme Court's decision in Brosseau. See id. In the first Lyons decision, the Sixth Circuit held that the Officer Foubert was not entitled to qualified immunity with respect to the excessive force claim relating to the "alleged tackling incident," where "[a]n officer's act may violate a clearly established constitutional right even if that act has not previously and specifically been declared unlawful." [Lyons v. City of Xenia, 90 F. App'x. 835, 846 \(6th Cir. 2004\)](#), cert. granted, vacated, [Foubert v. Lyons, 543 U.S. 1033 \(2004\)](#). Relying on Graham v. Conner's analysis of qualified immunity for an excessive use of force claim, the majority determined that the issue of qualified immunity for the second officer "raises a genuine question of material fact" and is not appropriate on summary judgment. Id. at 850; see [Graham v. Conner, 490 U.S. 386 \(1989\)](#).

[\[FN232\]](#). [Lyons, 417 F.3d at 572 \(quoting Brosseau, 543 U.S. at 200\)](#); see [Saucier v. Katz, 533 U.S. 194 \(2001\)](#).

[\[FN233\]](#). See [Lyons, 417 F.3d at 578-79](#).

[FN234]. [Id. at 579](#) (quoting [Brosseau, 543 U.S. at 199](#)).

[FN235]. [Id.](#) (quoting [Brosseau, 543 U.S. at 199-200](#)).

[FN236]. [Id.](#)

[FN237]. [Id.](#) (emphasis added). Here, the court draws a distinction with *Hope*, noting that in *Hope* “a right was clearly established when the ‘violation was so obvious that [the Court’s] own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution.’” [Id.](#) (citing [Hope, 536 U.S. at 741](#)). However, the court’s citation of *Hope* accentuates the baselessness of its “obvious solution” burden.

[FN238]. [Id.](#) (quoting [Brosseau, 543 U.S. at 199, 200](#)).

[FN239]. [Id.](#) (citing [Randall v. City of Fairbanks, 352 F. Supp. 2d 1028, 1037 \(D. Alaska 2005\)](#) (noting that, under *Brosseau*, “the law is not clearly established when it is ‘heavily dependent on the specific facts of each case and no case squarely address[es] the facts of this case’”)).

[FN240]. See [Lyons, 417 F.3d at 579](#); [Brosseau, 543 U.S. at 199](#).

[FN241]. See [Lyons, 417 F.3d at 579](#); [Brosseau, 543 U.S. at 199](#).

[FN242]. See [Brosseau, 543 U.S. at 199](#). No court has ever enunciated the factors that constitute *Brosseau*’s obvious case category, nor has the Supreme given any guidance as to when the obvious case category applies or does not apply.

[FN243]. Compare [id. at 199](#), with [Brosseau, 543 U.S. at 205](#) (Stevens, J., dissenting) (citing [Hope, 536 U.S. at 739](#)) (arguing that where the Court has previously “recognized that ‘general statements of the law are not inherently incapable of giving fair and clear warning,’ and [has] firmly rejected the notion that ‘an official action is protected by qualified immunity unless the very action in question has previously been held unlawful’ the Court’s search for relevant case law applying the [pertinent law] to materially similar facts is both unnecessary and ill-advised”) (citations omitted).

[FN244]. [Lyons, 417 F.3d at 579](#). Note the second path for establishing notice is identical to the materially similar standard the Supreme Court adopted in *Brosseau*, elevating the *Hope* Doctrine from a footnote in *Brosseau* to an alternative form of notice. [Id.](#)

[FN245]. Compare [Lyons, 417 F.3d at 579](#), with [Vinyard, 311 F.3d at 1350](#).

[FN246]. See [Bennett v. Murphy, 120 F. App’x. 914, 918 \(3d Cir. 2005\)](#) (holding that “because the facts alleged by [the plaintiff] disclose no basis from which to conclude that [he] posed an immediate threat to anyone but himself, we conclude that this case is one in which the ‘general constitutional rule already identified in decisional law appl[ies] with obvious clarity to the specific conduct in question’”); [Motley v. Parks, 432 F.3d 1072, 1089 \(9th Cir. 2005\)](#) (holding that “[a]lthough there is no prior case prohibiting [the holding of a loaded gun to the head of a nine-year old child], that is insufficient to entitle [the officer] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established”).

[FN247]. See [Craighead v. Lee, 399 F.3d 954 \(8th Cir. 2005\)](#); see also [Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 968-69, 974-76 \(9th Cir. 2005\)](#) (citing [Hope, 536 U.S. at 739, 741](#)) (holding that neither the

deputy sheriff nor the officers were entitled to qualified immunity where it was clearly established that they could not take “truckloads” of personal property and shoot the plaintiffs' dogs, even in the absence of other “law in this case-specific context”).

[FN248]. [Craighead, 399 F.3d at 958](#) (noting that both Craighead and the suspect were black males).

[FN249]. [Id. at 958-59](#). Dispatch told responding officers the following: “Squads, we got a black male with a gun at 217 North Oxford across from Central High School. We have somebody on the phone reporting this. Unknown if it's one or two parties with guns.” [Id. at 958](#).

[FN250]. [Id. at 959](#).

[FN251]. [Id.](#) At trial, the plaintiff's experts testified that at the distance of some 30 feet, under the circumstances with the two men grappling, a trained shooter would have known that the shot would probably hit both men [and as a result] “[t]he shooter elected to shoot both the suspect and his victim, whomever either might be, without any discrimination whatsoever for who was going to be seriously injured and/or killed.” [Id. at 960](#).

[FN252]. [Id. at 958](#).

[FN253]. [Id.](#)

[FN254]. [Id. at 961](#).

[FN255]. [Id. at 962](#).

[FN256]. [Id.](#) (citing [Saucier, 533 U.S. at 202](#)).

[FN257]. [Id.](#) (citing [Brosseau, 543 U.S. at 199-200](#)).

[FN258]. [Craighead, 399 F.3d at 962](#).

[FN259]. [Id.](#) (quoting [Hope, 536 U.S. at 741](#)) (emphasis added).

[FN260]. [Id.](#)

[FN261]. Determining whether a court attempted to reconcile [Brosseau](#) and [Hope](#), as did [Lyons](#), or whether a court merely looked past [Brosseau](#) to apply the Hope Doctrine, may be an issue of semantics. It is important to note the diverging approaches with which courts have dealt with the tension between the two decisions. The courts' reactions are indicative of the inherent dichotomy between the two doctrines.

[FN262]. Compare [Craighead, 417 F.3d at 962](#), with [Brosseau, 543 U.S. at 200](#). Interestingly, it could be argued that [Craighead](#) looked past [Brosseau's](#) affinity for factual similarity in the same way the Supreme Court overlooked [Hope's](#) rejection of materially similar facts in [Brosseau](#).

[FN263]. See [Burke v. Town of Walpole, 405 F.3d 66, 88 \(1st Cir. 2005\)](#) (holding that, “[g]iven the clearly established prohibition on material omissions by officers central to an investigation from an arrest warrant application, and given [the defendant's] knowledge [that the plaintiff's DNA excluded him as a murder suspect],” the defendant was not entitled to qualified immunity from Fourth Amendment claims); [Smith v. Cupp, 430 F.3d 766, 776 \(6th Cir. 2005\)](#) (holding that “[Brosseau](#) does not preclude this court from finding the right at issue was

clearly established because Brosseau said that undisputed facts showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area,” and in the present case, “the plaintiff’s facts show there was no danger”); [Evans-Marshall v. Bd. of Educ.](#), 428 F.3d 223, 232 (6th Cir. 2005) (holding that a teacher’s right to not be terminated for presenting controversial material to her students was clearly established, where that First Amendment “claim dovetails with previous, meritorious claims in this circuit”); [Hells Angels Motorcycle Club v. City of San Jose](#), 402 F.3d 962, 968-69, 974-76 (9th Cir. 2005); [Lyons v. Baughman](#), 124 F. App’x. 549, 551 (9th Cir. 2005) (holding that where a prison official “allegedly fail[ed] to follow prison policy and report a known risk of harm to Lyons, [he] also violated clearly established law” and was not entitled to qualified immunity).

[FN264]. See [Blanford v. Sacramento County](#), 406 F.3d 1110, 1117, 1119 (9th Cir. 2005) (holding that it was objectively reasonable, under Brosseau, for deputies “to believe that [a suspect] posed a threat of serious physical harm to themselves, or to others” when he responded to their warnings by raising his two and a half foot sword and growling; and as a result, the deputies were entitled to qualified immunity for shooting the suspect with three separate volleys of bullets); [Robinson v. Arrugeta](#), 415 F.3d 1252 (11th Cir. 2005) (holding that, under Brosseau, “it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening escape and possible harm to others, it is also constitutionally reasonable for an officer to use deadly force when he has probable cause to believe that his own life is in peril”).

[FN265]. See [Blanford](#), 406 F.3d at 1114-15; [Robinson](#), 415 F.3d at 1255.

[FN266]. See [Blanford](#), 406 F.3d at 1114-15; [Robinson](#), 415 F.3d at 1258. [Robinson](#), unlike [Blanford](#), never reached the inquiry of whether the constitutional right was clearly established because the court mysteriously determined that no constitutional right was violated, where the officer shot a fleeing suspect because the “suspect [was] threatening escape and possible harm to others.” [Robinson](#), 415 F.3d at 1256. The court noted that “[e]ven though our inquiry ends at the first step of the analysis the district court was correct in finding that the law was not clearly established, and thus, [the officer] is entitled to qualified immunity under this step as well.” *Id.*

[FN267]. See generally [Blanford](#), 406 F.3d 1110; [Robinson](#), 415 F.3d 1252.

[FN268]. See [Brosseau](#), 543 U.S. at 199.

[FN269]. Because these courts decline to factor Hope into their qualified immunity analysis, there is no evidence that they even consider the applicability of the Hope Doctrine to the facts of their cases. See, e.g., [Benzman v. Whitman](#), No. 04-1888, 2006 WL 250527 (S.D.N.Y. Feb. 2, 2006). In [Benzman](#) a class of residents, workers, and school children in lower Manhattan and Brooklyn, New York, alleged damages resulting from public statements by then federal Environmental Protection Agency Administrator, Christine Todd Whitman. *Id.* at *1. In the days and weeks following the Al Qaeda terrorist attack on the World Trade Center buildings in lower Manhattan on September 11, 2001, Whitman “falsely represented that the air in and around Lower Manhattan was safe to breathe, and that there were no significant health risks,” but at the time Whitman “did not have sufficient data and analyses to substantiate these statements.” *Id.* at *5. The action, inter alia, alleges violations of Plaintiffs’ substantive due process rights under the “state created danger doctrine.” *Id.* at *15. In support of her qualified immunity claim, Whitman argued that there was no “settled precedent that public misrepresentations by a government official regarding potential dangers from environmental hazards” resulted in a finding of unconstitutional conduct. *Id.* at *19. Thus, her argument provided a classic example of truly unique facts that would have correctly invoked the Hope Doctrine to defeat a qualified immunity defense. Indeed, in the Memoranda of Law filed in connection with the motion to dismiss, the plaintiffs relied upon Hope, and Whitman relied upon Brosseau, as would be expected. Plaintiff’s Memo. in Opp. to Defendant’s Motion to Dismiss at 21 n.16, [Benzman v. Whitman](#), No. 04-01888 (S.D.N.Y. 2004); Defendant’s Reply to Plaintiff’s Memo. at 3, [Benzman v. Whitman](#), No. 04-01888 (S.D.N.Y. 2004). The Court cited Brosseau for its fact-specific approach to qualified immunity, but Brosseau was not the standard it applied. *Id.* at *13 (quoting [Brosseau](#), 543 U.S. at 198) (stating that the “[r]easonableness inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition”). Instead, the court cited

Anderson to support its holding that the general “state created danger doctrine” was set forth with “reasonable clarity” to put Whitman on notice, even without a prior decision with materially similar facts. *Id.* at *19-20. Though the court came to a conclusion that would have been best supported by the Hope Doctrine, the district court failed to even mention Hope once.

[FN270]. See [Brosseau, 543 U.S. at 199](#).

[FN271]. Compare [Harris v. Coweta County, 433 F.3d 807 \(11th Cir. 2005\)](#), with [Robinson, 415 F.3d 1252](#). In *Harris*, Judge Barkett, for the Eleventh Circuit, distinguished *Brosseau* from the facts of the case, and applied Hope instead to an action against an officer for violating the plaintiff's Fourth Amendment rights by running him off the road with his squad car. [Harris, 433 F.3d at 819](#). The court stated that “under Hope, the requirement that the officers have ‘fair warning’ that their conduct violates a constitutional right through a general constitutional rule, ‘even through the very action in question has [not] previously been held unlawful,’ has been satisfied.” [Id. at 820](#) (quoting *Hope*, 546 U.S. at 740-41). Under the court's analysis the official was not entitled to qualified immunity for “unreasonably us[ing] deadly force to seize [the plaintiff] by ramming him off the road” with his squad car. *Id.* at 821.

[FN272]. See, e.g., Craig T. Jones, *Hope for Civil Rights: Plaintiffs Are Starting to Feel the Effects of the Supreme Court's Ruling in Hope v. Pelzer as Courts Reexamine Qualified Immunity*, TRIAL, Apr. 2004, at 38-39 (arguing that the varying applications and interpretations of the Hope Doctrine from state to state have complicated [Section 1983](#) litigation for plaintiffs because the “Constitution means one thing in Alabama and another in California, at least in the context of whether victims of abusive government officials are entitled to recover damages”).

[FN273]. [436 U.S. 658, 690 \(1978\)](#) (holding that “Congress did intend municipalities and other local government units to be included among those persons to whom [Section 1983](#) applies” so municipalities were subject to suit under [Section 1983](#)), overruling in pertinent part, [Monroe v. Pape, 365 U.S. 167 \(1961\)](#).

[FN274]. See, e.g., [Wright v. Smith, 21 F.3d 496, 501 \(2d Cir. 1994\)](#).

[FN275]. [473 U.S. 159, 167 n.14 \(1985\)](#).

[FN276]. See, e.g., *Alvarez v. City of Newburgh*, 150 F. App'x. 147 (2d Cir. 2005) (holding that, based on record of course proceedings, the plaintiff failed to assert an individual claim against the officers).

[FN277]. [Brosseau, 543 U.S. at 202](#) (Stevens, J., dissenting).

[FN278]. *Id.* at 198 (quoting [Saucier v. Katz, 533 U.S. 194, 201 \(2001\)](#)).

[FN279]. See *Anderson*, 150 F. App'x. at 646 n.6.

[FN280]. U.S. District Court, Southern District of N.Y., *Individual Practices of Judge Colleen McMahon*, at 5 (Feb. 3, 2006), available at http://nysd.uscourts.gov/Individual_Practices/McMahon.pdf. It is interesting to note that the judge requires the “plaintiff who brings an action in which qualified immunity is ordinarily asserted as a defense [to] send or otherwise call defense counsel's attention to this rule.” *Id.*

[FN281]. See Jones, *supra* note 272, at 41 (“In cases involving novel fact patterns that have not been litigated previously, plaintiff's counsel should draw analogies to the facts of *Hope* [to] demonstrate that the factual circumstances are as unique and compelling as those that befell Larry Hope in that they, too, offend the core constitutional values of a civilized society.”).

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