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NORTHERN DISTRICT PRACTICE PROGRAM:

FALL CIVIL SYMPOSIUM 2022

The Supreme Court's Shaping of Our Constitutional Rights: Past, Present & Future

Qualified Immunity

Strategies for Plaintiffs, by Michael J. Haddad

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The following is a draft chapter from a book that Michael Haddad and Julia Sherwin are writing. The book is intended to help plaintiffs' lawyers handling civil rights cases do them competently, ethically, and successfully from beginning to end.

CHAPTER 18 -- DODGING QUALIFIED IMMUNITY BULLETS

CHAPTER SUMMARY: Qualified immunity is a potent and unpredictable defense. It gives great latitude for judges to throw out your federal damages claims at many points in your case starting with motions to dismiss, at summary judgment, at trial, and again on appeal. Just when you think you have slain the qualified immunity beast, it comes back. Any pretrial denial of qualified immunity also provides officers with the right to an immediate interlocutory appeal and often a delay of trial. We share our approach to briefing and defeating qualified immunity before trial, and to keeping your momentum and your trial date, so you can reach and keep your verdict. This chapter will include case law to set out the parameters of this defense.

Imagine if you had a car accident case, and the defendant driver could get your case dismissed even if you could prove he unreasonably caused the collision and your client's serious injuries. All that defendant driver would have to say is that the plaintiff cannot identify a controlling case from before the incident that said it was negligent to unreasonably to cause a vehicle collision *in that particular way*. The defendant would get to raise that same defense repeatedly at every stage of the case. And if your judge ruled against the defendant, the defendant could immediately file an interlocutory appeal, delaying trial. Welcome to our world.

Qualified immunity is a defense to a federal civil rights claim for damages against a government official. It is available when a reasonable official, under the circumstances of the case, would not have known that his conduct violated a constitutional right that was clearly established at the time of the incident. This judge-created defense is increasingly controversial, both because it does not appear in the constitution or any statute, and because it has become a serious obstacle to police accountability.

As the Supreme Court has ratcheted up the necessary level of specificity of prior controlling cases to place every officer on notice of what law was clearly established under the precise circumstances at issue, qualified immunity encourages some judges to decide for themselves whether a particular officer or plaintiff deserves relief. It places a thumb on the side of the scale for police. And it adds a level of unpredictability to civil rights litigation.

To beat it, we have to build the foundation of our case from training, policy, and generally accepted standards that any reasonable officer should have known at the time of the incident. We have to know the case law, including how best to frame the qualified immunity standards and the clearly established case law that governed the conduct at issue. And we have to seriously and methodically address this defense in court, no matter how obvious the constitutional violation may seem.

What Is Qualified Immunity?

The Supreme Court created qualified immunity. It does not exist in the Constitution, nor in any statute. Its roots go back to 1967, where the Court recognized a "good faith" immunity for police officers sued under 42 U.S.C. § 1983 for unlawful arrest.[1] Soon it was expanded to other violations of rights. In 1982, the Court replaced its immunity based on officers' subjective good faith with a new objective standard which came to be known as qualified immunity.[2]

The Court explained at that time that this new defense was only intended for "insubstantial cases."[3] Since then, in practice, qualified immunity has been applied to all sorts of cases seeking damages against government officials, no matter how substantial. Now, "the Court often corrects lower courts when they wrongfully subject individual officers to liability."[4] And, the Court admonishes that qualified immunity should be decided "at the earliest possible stage."[5]

The Supreme Court has explained that qualified immunity is intended to balance competing policy goals: "the need to hold public officials accountable when they exercise power irresponsibly and

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[1] *Pierson v. Ray*, 386 U.S. 547 (1967).
[2] *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).
[3] *Id*. at 813, 818; see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).
[4] *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S.Ct. 1765, 1774, n. 3 (2015).
[5] *Pearson*, 555 U.S. at 232.

the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[6] It is difficult to understand how an official who violated the Fourth Amendment by his "unreasonable" conduct could have acted "reasonably" to deserve qualified immunity. Nor, can this "get off free" card for violations of rights square with Chief Justice John Marshall's warning over two hundred years ago:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[7]

Nevertheless, officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'"[8] The doctrine of qualified immunity shields public officials from civil liability for damages even if a court or jury later could find that their conduct violated a right, so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9]

For a constitutional right to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[10] For a time, it was often possible to defeat qualified immunity by generally defining the clearly established right, such as the right to be free from objectively unreasonable force – which of course, any reasonable officer should know.[11]

More recently, the Supreme Court has placed a thumb on the scale of justice more heavily in favor of civil rights defendants. Regardless of whether an officer's conduct actually violated a constitutional or statutory right, the Court deems qualified immunity the means to protect officers from liability for their "reasonable mistakes," giving judges a green light to decide what they think was a

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[6] See *Pearson*, 555 U.S. at 227.
[7] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803).
[8] *District of Columbia v. Wesby*, __U.S.__, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088 (2012).
[9] *Pearson*, 555 U.S. at 231 (quoting *Harlow*, 457 U.S. at 818).
[10] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
[11] See *Saucier v. Katz*, 533 U.S. 194, 204 (2001).

reasonable mistake.[12] Thus, "'clearly established law'" should not be defined 'at a high level of generality.'"[13] "The clearly established law must be 'particularized' to the facts of the case."[14]

While the present Court "'do[es] not require a case directly on point'" … "'existing precedent must have placed the statutory or constitutional question beyond debate.'"[15] As courts frequently write, "[i]n other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'"[16]

To make matters worse, in 2009, the Supreme Court changed its previous rule that the two-step qualified immunity test should be done in the proper order, so that courts first decide the first step, whether a right was violated, before deciding the second step, whether that right was clearly established.[17] Now many courts avoid ever deciding whether a "novel" scenario resulted in a violation of rights by jumping to the conclusion that in any event it was not a clearly established violation at the time of that incident. Plaintiffs are left in a Catch-22 situation:

> [M]any courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less *clearly* doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[18]

Not surprisingly, qualified immunity has caused many unjust results. Here's a few:

- While apprehending a fugitive in a residential neighborhood, deputies ordered several young children playing in their front yard to the ground at gunpoint. Deputy Vickers fired a gunshot at the family dog, accidently hitting a ten-year-old boy in the back of his knee. The court

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[12] *Id*. at 206.
[13] *White v. Pauly*, __ U.S. __, 137 S.Ct. 548, 468 (2017) (citing *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011).
[14] *Id*.
[15] *Id.* (citing *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015)).
[16] *Id*.
[17] See *Pearson*, 555 U.S. 223.
[18] *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Don R. Willett dissenting) *cert. denied*, 141 S.Ct. 110 (2020) (citations omitted).

dismissed the case, because "there was no clearly established law making it apparent to any reasonable officer in Vickers's shoes that his actions in firing at the dog and accidentally shooting [the child] would violate the Fourth Amendment."[19]

- St. Louis police were sent to subdue an unarmed, mentally ill Black man, who had run naked onto his lawn. Rather than de-escalate the situation or use other techniques, officers repeatedly tased him until he died. The court granted the officers qualified immunity, finding that prior cases prohibiting repeated tasing were not sufficiently similar.[20]

- Fresno officers who stole over $225,000 in cash and rare coins during a search were given qualified immunity, because there was no prior case where officers stole property under those same circumstances.[21]

Qualified immunity is not without critics, even within the judiciary. For example:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current "yes harm, no foul" imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.[22]

Here's another:

> "The Court disagrees with the Supreme Court's approach [to qualified immunity]. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy…. The judiciary should be true to § 1983 as Congress wrote it."[23]

And another:

> The majority today exacerbates [qualified immunity's] troubling asymmetry…. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.[24]

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[19] *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, __ U.S. __, 207 L. Ed. 2d 1051 (2020).
[20] *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 897-98 (8th Cir. 2014), *cert. denied*, 135 S.Ct. 2348 (2015).
[21] *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019).
[22] *Zadeh*, 928 F.3d at 479 (Don R. Willett dissenting) (citations omitted). See also *Jamison v. McClendon*, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 139327; 2020 WL 4497723 (Aug. 4, 2020 S.D. Miss.).
[23] *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F.Supp.3d 1260, 1295, n. 10 (D.N.M. 2018).
[24] *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148, 1162 (2018) (Sotomayor).

Regardless of whether we agree with this judicially-created immunity, courts are bound to apply it, some less justly than others. So we are bound to deal with it.

Dealing with It.

Since courts are told to address qualified immunity at the earliest possible stage, we should be planning to address it at the earliest possible stage: case selection. When a new potential client calls, we start assessing the strength of their civil rights claims. Assuming we can prove a winning factual scenario, we need to ask ourselves, can we bring the case beyond the "hazy border between excessive force and acceptable force?"[25] Can we show that officers were not limited to "split second decisions,"[26] but rather had time to consider alternatives? Can we show that the officers lacked even "arguable probable cause"[27] for their unlawful search or seizure? Are we aware of, or can we find, a prior case with facts similar to some key liability issue in the new client's scenario? Can we frame this as some recurring scenario, such as 'officers' use of deadly force in response to person with a knife' or 'officers' arrest of a person based on mistaken identity?'

Some potential cases are seductive at first blush, but on deeper analysis, are at high risk for a grant of qualified immunity. For example, consider a scenario where police encounter a known mentally-ill and intoxicated man in possession of a pellet gun who is barricaded inside his own car in front of his house. He's unstable and had previously been seen walking around brandishing the "toy" gun. After nightfall and a couple hours of attempted negotiations by cell phone, officers decide they have had enough and decide to move in to arrest him. Three armed officers sneak up from behind the car. When the first officer gets to the passenger side door, two of the three officers open fire, killing the man. Officers later claim the man pointed what they believed to be a real gun at them so the

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[25] *Kisela*, 138 S. Ct. at 1153; *Saucier*, 533 U.S. at 206.

[26] Compare *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.") and *Tennessee v. Garner*, 471 U.S. 1, (1985) ("Nor do we agree with petitioners and appellant that the [deadly force] rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts.).

[27] See *Muhammad v. Pearson*, 900 F.3d 898, 908 (7th Cir. 2018) (citing *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991); *Escalera v. Lunn*, 361 F.3d 737, 743 (2nd Cir. 2004).

shooting was justified. But a witness from 100 feet away says the man had nothing in his hands. Initially, this looks like it could be a case so long as the man did not point the gun at officers. Maybe the first officer just panicked and the other one engaged in sympathetic fire, hearing the first officer's gunfire. If the man had done something threatening, then why didn't the third officer fire any shots? Body camera video should show what happened.

A week later the police department releases body camera video that is blurry and seems to fleetingly show something dark in the man's hand but it is impossible to discern exactly what it is or what the man is doing with "it." Is it a cell phone? Is it a wallet? Is it a gun? Is he trying to surrender? The pellet gun and a cell phone were recovered on the front passenger seat. The department reports that all three officers saw the man point a gun at them. They had not received information from other officers that the "gun" in the car was only a pellet gun. The third officer claims he did not shoot because other officers were in his line of fire.

We might think we could prove that the man was unarmed or at least not an immediate threat based on the eyewitness, the presence of a black cell phone, that it was "only" a pellet gun, and the ambiguous videos. But this is a scenario where many judges would view this as a "split-second" perception of an immediate threat based on the chaos evident from the fast-moving videos. The eyewitness would not necessarily get us to a jury, because she said the man had nothing in his hands, but the video seemed to show something, and the officers are unequivocal that it was a gun even if they might have been wrong. Qualified immunity protects officers when they make "reasonable mistakes." Here, even if under a plausible scenario of the plaintiff's best facts the object in the man's hand was a cell phone, a court still may grant the officers qualified immunity because reasonable officers could have mistaken a phone for a gun in this situation. In practice we would need a prior case almost exactly on all fours with this situation. Had the use of excessive force been more clear-cut, then in the

real world a prior case that was similar but not virtually identical may have sufficed. In any event, the risk of qualified immunity would weigh against taking this case.[28]

The next point where qualified immunity concerns arise is in drafting the complaint. As we discussed in previous chapters, the federal pleading standard under *Iqbal/Twombly* requires a high level of factual pleading. It is especially important that as 'master of our complaint,' we plead facts, or the absence of facts, in significant detail to be able to oppose a motion to dismiss based on qualified immunity.

It is also important to know what qualified immunity *is not* so that we can plead around it. Qualified immunity is not a defense to a claim seeking declarative or injunctive relief.[29] It does not apply against a municipality.[30] With few exceptions, it does not protect private actors, even when performing a public function or acting in conspiracy with government actors.[31] And, importantly, federal qualified immunity does not apply to state law claims,[32] although many states have their own immunities.

So, when pleading our case, we will include claims for municipal liability and declaratory and injunctive relief where appropriate, and state law claims as well. There have been many cases where the federal damages claims against individuals were subject to qualified immunity, but the case was

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[28] This factual scenario still may lend itself to a negligence claim, including officers' tactics leading up to the shooting. But then there would be comparative fault and possible state law immunities to deal with, and no civil rights attorneys' fees.

[29] See *Morse v. Frederick*, 551 U.S. 393, 400, n.1 (2007). However, based on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), injunctive relief is extremely difficult to win in a federal case, especially in a wrongful death claim where the plaintiff generally cannot meet the Article III standing requirement to show that the same violation of rights would happen to her again.

[30] *Owen v. City of Independence,* 445 U.S. 622, 624-25 (1980).

[31] *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (qualified immunity does not apply to private prison staff). But see *Filarsky v. Delia*, 566 U.S. 377 (2012) (qualified immunity applies to private attorney hired by small town to conduct employment investigation); c.f., *Tanner v. McMurray*, __ F.3d __ (10th Cir. 2021) (employees of private corporations providing medical care in correctional facilities are not entitled to assert qualified immunity).

[32] See *Johnson v. Bay Area Rapid Transit*, 724 F.3d 1159, 1171 (9th Cir. 2013); *Small v. McCrystal*, 708 F.3d 997, 1010 n.4 (8th Cir. 2013); *D'Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995).

saved by the state law claims. And do not overlook state civil rights statutes that provide for damages and attorneys' fees.[33]

If the defendants raise qualified immunity in a motion to dismiss, based on our mindful case selection and factual pleading, we should be in good shape to win the motion. As with any other dispositive motion, we start by persuasively describing the facts, including the officers' conduct and omissions. We brief the standards that we pled in the complaint applied to the officers' conduct, and we brief the law, for example, the Fourth Amendment's requirements for use of force and use of deadly force. Next, we analyze those facts under the law, including the factors from the seminal use of force case, *Graham v. Connor*.[34]

Then, we have to brief the qualified immunity standards, and like most major doctrines, there is more than one line of cases applying it – some positively, some negatively. We will need to present the court with the reasonable, common-sense statements of the qualified immunity standards from cases that describe the plaintiff's burden for this defense in practical – not insurmountable – terms.

Here is an example from one of our Ninth Circuit cases, where a police sergeant, chasing a sixteen-year-old boy who was possibly involved in a homicide, shot the boy in the back of the head, without warning, after the boy jumped over a fence and the officer could not keep up. The unarmed boy was holding up his baggy pants as he ran; the sergeant claimed he thought the boy was reaching for a gun. The sergeant shot the boy through the rail fence, while standing next to a cinder block wall. The sample below is longer than one would usually need, but briefing like this would be appropriate in response to a motion a motion to dismiss or a motion for summary judgment:

> The "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims against government officials [will] be resolved prior to discovery.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, FN2 (1987)). This death case – raising

[33] For example, California has the "Tom Bane Civil Rights Act," California Civil Code §52.1, which provides a civil action for damages and attorneys' fees against anyone who violates rights by threat, intimidation, or coercion.
[34] 490 U.S. 386 (1989).

substantive, well-documented civil rights and municipal liability claims against a police sergeant – is far from "insubstantial."

To defeat a defendant's assertion of qualified immunity, a plaintiff must demonstrate that (1) a federal right has been violated, and (2) the right was clearly established at the time of the violation. *Horton v. City of Santa Maria*, 915 F.3d 592, 599 (9th Cir. 2019) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Although the Court has discretion to decide which of those two prongs should be addressed first, because "[t]he two-step qualified immunity procedure 'is intended to further the development of constitutional precedent,'" courts in the Ninth Circuit "tend to address both prongs of qualified immunity where the 'two-step procedure promotes the development of constitutional precedent' in an area where this court's guidance is … needed.'" *Horton*, 915 F.3d at 602 (citing *Pearson*, 555 U.S. at 237, 242 and *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (*en banc*), *cert. denied*, 132 S.Ct. 2682 (2011)).

A right is clearly established when "[t]he contours of the right [are] sufficiently clear that a **reasonable** official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 744 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Qualified immunity depends "on the objective reasonableness of the official's conduct, as measured by reference to clearly established law." *Anderson*, 483 U.S. at 637.

Qualified immunity must be analyzed considering the facts in the light most favorable to the plaintiff. See *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866 (2014) (reversing appellate court that "failed to view the evidence at summary judgment in the light most favorable to [the plaintiff], and "fail[ed] to credit evidence that contradicted some of its key factual conclusions."). And, "the Court considers only the facts that were knowable to the defendant officers." *White v. Pauly*, __ U.S. __, 137 S.Ct. 548, 550 (2017).

The Supreme Court has advised lower courts construing claims of qualified immunity "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Still, recent Supreme Court cases "do[ ] not require a case directly on point;" rather, "existing precedent must have placed the statutory or constitutional questions beyond debate" such that reasonable officials would understand that their conduct was unlawful. *White*, 137 S.Ct. at 551. Were the rule otherwise, "officers would escape responsibility for the most egregious forms of conduct

simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001) *cert. denied*, 536 U.S. 958 (2002).[35] The High Court recently reaffirmed a holding of *Hope v. Pelzer* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Taylor v. Riojas*, __ U.S. __, 141 S.Ct. 52, 53 (2020).

"[Q]ualified immunity is lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Ashcroft*, 563 U.S. at 746 (quoting *Wilson v. Layne*, 526 U. S. 603 (1999)).

"[T]he focus is on whether the officer had fair notice that her conduct was unlawful…." *Kisela v. Hughes*, __ U.S. __, 138 S. Ct. 1148, 1152 (2018) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). The "salient question" for qualified immunity remains whether the state of the law at the time gave the defendant "fair warning" that her alleged conduct was unconstitutional. *Tolan*, 134 S. Ct. at 1866 (citing *Hope*, 536 U.S. at 739). Requiring facts of previous cases to be "materially similar" to the case at issue is a "rigid gloss on the qualified immunity standard" and "not consistent with our cases." *Hope*, 536 U.S. at 739.

More recently, in *Taylor v. Riojas*, after a series of cases stating that controlling law should be "beyond debate," the Supreme Court clarified that it is not always necessary to identify a case factually on all fours, but in many circumstances, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." 141 S.Ct. at 53-54 (quoting Hope, 536 U.S. at 741).

Qualified immunity shields officers from liability for their "reasonable mistakes" in cases where the border between lawful and unlawful conduct was "hazy" at the time of the incident. *Kisela*, 138 S.Ct. at 1153 (2018); *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Qualified immunity does not shield officials from their unreasonable mistakes as to law or fact. *Torres v. City of Madera*, 648 F.3d 1119, 1127-30 (9th Cir. 2011).[36]

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[35] See also the *en banc* opinion in *Mattos*, 661 F.3d at 442 ("If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment.").

[36] See also *Jones v. Treubig*, 963 F.3d 214, 230 (2d Cir. 2020) ("[Q]ualified immunity only protects 'reasonable mistakes.'") (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

The lynchpin is the reasonableness of their conduct under clearly established law. *Id.* Where officials claim that they did not understand they were violating clearly established law due to a mistake of fact, a jury must decide whether that mistake was reasonable. *Id.*

Finally, when an officer violates training or a policy of his department, he is on notice that his conduct is unreasonable, undercutting any claim to qualified immunity. See *Hope*, 536 U.S. at 743-44 (previous U.S. Department of Justice report and department policy regulations "relevant" to whether defendant had "fair warning" that his conduct violated rights); *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (no qualified immunity where "guidelines of Petitioner's own department placed him on notice that he might be liable"); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (police department's "training materials" relevant to whether force was unlawful and whether a reasonable officer would have been on notice), *cert. denied* 542 U.S. 918 (2004); *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1162, n. 7, 1168, n.9 (9th Cir. 2011) (qualified immunity denied in part based on defendant's violation of California POST training standards).

"[T]he responsibility for keeping abreast of constitutional developments rests 'squarely on the shoulders of law enforcement officials. Given the power of such officials over our liberty, and sometimes over our lives, this placement of responsibility is entirely proper.'" *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006) (citation omitted).

Numerous cases cited herein provided Defendant fair notice that he violated the boy's Fourth Amendment rights, including:

- *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (excessive force where officer shot unarmed, fifteen-year-old boy in the back of the head to stop him from scaling a fence to evade arrest; "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. … A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead. … It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect." And, officers must give a warning before using deadly force when feasible.);
- *A.K.H. v. City of Tustin*, 837 F.3d 1005 (9th Cir. 2016) (deadly force requires an immediate threat; no qualified immunity for officer who shot man he was pursuing who whipped his arm from his hoodie pocket and raised it quickly in an arcing motion, with no weapon);
- *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (*en banc*), *cert. denied*, 572 U.S. 1149 (2014) (officers, responding to wife's call that her elderly disabled husband had a gun, used excessive force when they shot him while he was holding a

gun and refused to drop it, but did not point the gun at them);

- *Harris v. Roderick,* 126 F.3d 1189, 1202 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (holding, in the Ruby Ridge civil case, "[t]he fact that [the suspect] had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight;" and "whenever practicable, a warning must be given before deadly force is employed;" "Law enforcement officers may not kill suspects who do not pose an immediate threat to their safety or the safety of other simply because they are armed;" "Moreover, whenever practicable, a warning must be given before deadly force is employed.");
- *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-25 (9th Cir. 1991) (holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot);
- *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1146-47 (9th Cir. 1996), *cert denied*, 519 U.S. 1009 (1996) (excessive force verdict affirmed where officer, who shot the decedent allegedly for driving his car at officer, could have avoided any risk of injury "by simply stepping to the side").

The defendant officer was put on notice decades ago that his conduct violated clearly established law.

We think it is important to provide the court with several prior cases that would have informed a reasonable officer on the key points of law. If we don't have a case that is factually similar, then we look for a case that is factually similar on one key point, such as a person shot after reaching for their waist, or a person shot while holding a knife, or an officer failing to take advantage of available cover to avoid the need for deadly force, or the requirement of a warning when feasible. Bullet points are helpful to clearly set forth the cases on which we rely, since courts sometimes will just pick one or two cases to address. Obviously, this briefing may be too long or too detailed for any given case. And, this is written for a case in the Ninth Circuit; other circuits may have slightly different law. Feel free to use it for what it is worth.

Next, discovery. This is a part of the case where the Rules of the Road[37] strategy that we discussed in a previous chapter also helps us defeat qualified immunity. To find Rules, we need to identify clear standards, preferably agreed standards. In a police misconduct case, those standards often will come from officers' training, police department policies, Federal Rule of Civil Procedure 30

[37] See Rick Friedman and Patrick Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, Trial Guides, Second Edition (2010).

(b)(6) witnesses described as "persons most knowledgeable," officer testimony, and model jury instructions that you can expect to see at trial. We usually start discovery with a comprehensive request for production of documents that includes the police department's policies and training materials for all of the key issues in the case and every type of force used. While some defense counsel will argue that evidence of such training and policies is only relevant to a municipal liability claim, such evidence also is highly relevant to standard of care, officer liability and qualified immunity: whether a reasonable officer in the defendant's shoes would have known that his conduct violated the law at the time.

As we briefed above, when an officer violates his training or department policy, he is on notice that his conduct is unreasonable, cutting against qualified immunity. Even in a circuit that may not apply that law as the Ninth Circuit does, it is hard for an officer to argue that he did not have fair notice that his conduct was unlawful when we have shown that his conduct violated his own training and department's policies.

Many officers will readily admit that their conduct violated Rules or even was unlawful if we carefully lead them there. For example, in a common situation where the plaintiff alleges the defendant officer used a certain type of force and the officer denies using that force at all (as opposed to admitting she used the force but claims the force was reasonable), try something like this:

Q: Officer, did you punch Mr. Smith in the face?

A: No.

Q: Was there any need to punch him in the face?

A: No. That's why I didn't punch him in the face.

Q: Under these circumstances, you understood that you would not have been legally justified to punch him in the face, right?

A: Correct.

We have just narrowed the case from whether the force was justified to whether that particular use of force happened at all. Now, we just need to prove that the punch to the face happened. And, the officer has admitted that she understood at the time that such force was unlawful under the circumstances. Good-bye qualified immunity.

Here's an example from one of our cases where the officer shot and killed our client, Ronell, who he was chasing for riding a bicycle at night without a light and then for fleeing. The officer chased Ronell into an alley, pushed him down some stairs, repeatedly tased him, then started striking Ronell with his metal flashlight. While the officer was striking him with his flashlight, Ronell caught the flashlight, pulled it out of the officer's hand, and turned to run away. The officer claimed Ronell was about to strike him with his own flashlight so he feared for his life, shooting Ronell multiple times in the back.

Earlier in the officer's deposition, we already established that his department's policies and his training said that a strike to the head with a hard object could cause death or serious injury – the definition of deadly force. Helpfully, the officer claimed he faced an immediate threat because Ronell could have hit him in the head with his own flashlight. (Detroit police officers used to call those heave metal Maglite flashlights "flashclubs"). We knew that we could prove the officer hit our client's head with the flashlight because our expert forensic pathologist had identified a tell-tale "C" shaped laceration on our client's scalp over a skull fracture caused by blunt force trauma inflicted by the round end of the flashlight.

Q: Were you justified to kill him while you were striking him with your flashlight?

[DEFENSE COUNSEL]: That's argumentative and calls for a legal conclusion, expert opinion, misstates his testimony, lacks foundation.

A: I didn't believe at that point the level of force had arose to that.

Q: So you did not believe that deadly force was justified while you were striking him with your flashlight; is that fair to say?

A: Yes.

Q: Can you describe your flashlight that you were using?

A: Yes. It's a Maglite. It's made of aluminum. It had three cells.

Q: How long is it?

A: Maybe a foot long approximately.

[He agreed that pictures of his flashlight taken by investigators "look[ed] similar to what I was carrying."]

Q: How much do you think that weighs?

A: Maybe a pound.

Q: It's made of metal, right?

A: Aluminum, yes.

Q: Have you ever been struck with that thing?

A: Yes.

Q: When?

A: During training.

Q: Where were you struck?

A: In my arm.

Q: Did you have any sort of padding on it?

A: No.

Q: Did it leave a bruise?

A: I don't remember if it did or not.

Q: Which end of the flashlight were you holding while you were striking him?

A: The light end.

Q: The bulbed end?

A: Yes, sir.

Q: And you struck him in the head, didn't you?

[DEFENSE COUNSEL]: Lacks foundation, calls for speculation and assumes facts not in evidence.

A: Not that I'm aware of.

Q: Aren't you aware that you caused him to have a skull fracture?

[DEFENSE COUNSEL]: That's very vague, very -- calls for speculation, assumes facts not in evidence, lacks foundation.

A: I know that he was shot one time in the head and I don't know if that was a cause of the skull fracture.

Under California law, we were armed and ready to argue that our client had the right to resist the officer's use of excessive and deadly force by grabbing the flashlight from the officer's hand in self-defense.[38] The officer and his counsel also knew that they were backed into a corner. Given the officer's violations of his training and department's policies concerning head strikes, his qualified immunity defense was fading away.

Often, usually after deposing the defendant officer and any on-scene officer witnesses, we will

[38] See *Evans v. City of Bakersfield*, 22 Cal. App. 4th 321, 331 (1994). Accordingly, the California Commission on Peace Officer Standards and Training (POST) trains police academy recruits: "Although *Penal Code Section 834a* states that the person being arrested must submit to an arrest, if unlawful or unreasonable force is used to effect the arrest, the person being arrested may lawfully resist to overcome that force." See POST Basic Course Workbook Series Student Materials, Learning Domain 20, Use of Force, Version Two (published 1998, revised February 2006).

depose a Rule 12(b)(6) "person most knowledgeable" ("PMK") from the police department concerning training and policies related to the misconduct at issue. For example, we might depose a PMK regarding carotid/choke holds, or tasers, or tactics for handling emotionally disturbed persons, or warrantless entry into homes. Such witnesses bind the department[39] and can be an excellent source for Rules. They can also help us defeat officers' claims for qualified immunity – both by showing that the department understood and trained officers on the clearly established law and by showing that the officer violated standards that helped place him on notice of clearly established law.

Relevant training and policies rooted in clearly established rights help us prove "a reasonable official would understand that what he is doing violates that right."[40] In real courtrooms, showing a violation of department standards helps us defeat qualified immunity when we do not have a prior case with a close fact pattern.

Obviously, being able to clearly prove the officer's liability through his objectively unreasonable conduct places us in a better position to argue that his conduct does not merit qualified immunity. Strong cases still make good law. Weak cases make bad law.

Showing violations of training and standards helps even more, since training and policies often reflect clearly established law and any reasonable officer should follow training and policies.

The next qualified immunity test generally happens at summary judgment. Here, assuming discovery is complete and the case is ripe for a summary judgment motion, we brief it like we explained in the motion to dismiss context, obviously with more detailed facts. We still need to show a compelling factual scenario, analyzed under proper legal standards. We are showing the court that this case is not on the "hazy border" between lawful and unlawful conduct.

By the way, in arguing qualified immunity in a summary judgment motion, never say it's a "close call." It shouldn't be, or else you seriously risk losing on qualified immunity.

The qualified immunity briefing in a summary judgment opposition follows the same strategy

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[39] See Judge William W. Schwarzer, Judge A. Wallace Tashima & James M. Wagstaffe, *Federal Civil Procedure Before Trial* 11:1517.1 (Rutter Group Practice Guide 2006).
[40] *Anderson*, 483 U.S. at 640.

and will look quite similar to what we presented above. While we will not hesitate to cite helpful caselaw decided right up to the motion hearing date, we also must be mindful to highlight the cases decided before the incident to show the clearly established legal standards at the time of the incident. Watch the decision dates. Don't make the mistake of relying too much on post-incident decisions. On exception is for post-incident decisions that specifically found, under similar facts, that the law was already clearly established before our incident.

When a court denies a defendant summary judgment and qualified immunity, often the decision is based on material questions of fact that must be decided by a jury.[41] For example, if a jury could find that the plaintiff's version of facts happened, then no reasonable officer could believe his conduct was lawful. Seasoned judges often do this to avoid reversal and because it is true.

Let's assume the judge denies the defendant officer's motion for summary judgment and qualified immunity, finding that the officer had "fair notice" that his conduct, under the facts most favorable to the plaintiff, violated the law. We still are not out of the woods. Because the Supreme Court gave another gift to officials sued for violating federal rights: the right to an immediate interlocutory appeal whenever a court denies their motion for qualified immunity.[42] In fact, a defendant has the right to multiple "*Forsyth*" appeals, for example if the court denies the defense in a motion to dismiss and again in a motion for summary judgment.[43] The only legal limitations on such appeals are that the appeal must turn on an "issue of law" without challenging the district court's finding of issues of fact, and the appeal otherwise must not be "frivolous."[44]

The Supreme Court and many circuit courts have repeatedly explained that defendants "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[45] A "frivolous qualified immunity claim is

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[41] *See Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866 (2014); see also *Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003), *cert. denied* 543 U.S. 811 (2004).
[42] *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
[43] *Behrens v. Pelletier*, 516 U.S. 299, 309 (1995).
[44] *Behrens*, 516 U.S. at 310-11. See also *Johnson v. Jones*, 515 U.S. 304 (1995).
[45] *Johnson*, 515 U.S. at 319-320.

one that is unfounded, 'so baseless that it does not invoke appellate jurisdiction.'"[46]

We have seen this right to an automatic interlocutory appeal abused where a defendant files a weak, or improper, or frivolous appeal to help himself to a trial continuance. Courts have too:

> Although this approach [interlocutory appeal of a denial of qualified immunity] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system. During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. The majority of *Forsyth* appeals - like the bulk of all appeals - end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems.[47]

A *Forsyth* appeal ordinarily "divests the district court of its control over those aspects of the case involved in the appeal."[48] In practice, that means if our case only has federal damages claims against individuals who have all appealed the denial of qualified immunity, the case in the district court stops in its tracks. But, if our case also has claims not subject to qualified immunity, such as federal municipal liability claims or state law claims, those claims should not be involved in the appeal and, absent a discretionary stay, should go forward in the district court while the *Forsyth* appeal pends.[49] As the Supreme Court has explained, "[t]he *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] right to immunity is a right to immunity *from certain claims*, not from litigation in general …."[50] In this posture, it is common to see defendants file motions with the district court to stay the remainder of the case pending

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[46] *Marks v. Clarke*, 102 F.3d 1012, 1018, n.8 (9th Cir. 1997) (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). See also *In re George*, 322 F.3d 586, 591 (9th Cir. 2002) ("An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit.").
[47] *Apostol*, 870 F.2d at 1338-39.
[48] *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 790 (9th Cir. 2018) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)).
[49] "An appeal from an interlocutory order does not stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (citing *Ex parte National Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906)). The district court is deprived of jurisdiction only "over the particular issues involved in that appeal." *Ames v. Lindquist*, No. C16-5090 BHS, 2018 U.S. Dist. LEXIS 15979 at *3; 2018 WL 646914 (W.D. Wash. Jan. 31, 2018) (quoting *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001)).
[50] *Behrens*, 516 U.S. at 312 (emphasis in original).

the *Forsyth* appeal.

In cases where the powerful right to an interlocutory appeal is abused or used for an improper purpose such as to delay proceedings, "[c]ourts are not helpless in the face of manipulation."[51] Neither are we. In *Behrens*, the Supreme Court approved the procedure followed by many circuits to certify such improper *Forsyth* appeals as "frivolous," allowing all claims including those on appeal to proceed through trial while the appeal is pending.[52]

In the first case Julia and I tried in California in 2000, not too long after we started our law firm, we were running out of money and pushing hard to get to trial. Our case was a very hard-fought accent-discrimination case where a Palestinian civil engineer was denied a promotion because he had an accent. We had survived the summary judgment motion and our venerable federal judge had rejected qualified immunity. Working late one evening in our office in the basement of our home, preparing pretrial documents that were due the next day, we received a fax from defense counsel. It was a notice of appeal. As Julia walked in carrying a heavy stack of trial binders, I told her what had just come through. She dropped the binders with an expletive. And we quickly figured out what we had to do.

That night, I started writing our motion to certify the appeal as frivolous. We filed it the next day and a few days later, the court granted our motion. Judge William H. Orrick set a status conference where he excoriated the defendants for their abuse of his docket and reset our trial with only a short delay. We went on to win that case at trial – probably about two years sooner than if we had had to go through the appeal first.

Since that first case, we have had to file similar motions to certify frivolous interlocutory qualified immunity appeals many times, and we have won a number of them. It is helpful to have a motion to certify an appeal frivolous as well as an opposition to a motion to stay the trial in the can and

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[51] *Apostol*, 870 F.2d at 1339.
[52] *Behrens*, 516 U.S. at 310-11 (citing *Chuman* v. *Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Yates* v. *Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991); *Stewart* v. *Donges*, 915 F.2d 572, 576-577 (10th Cir. 1990); *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989)).

ready to go when we need it. The loss of momentum that a *Forsyth* appeal causes to a trial-ready case is significant. So is a district court ruling that the appeal is frivolous, allowing trial of all claims to get back on track. Just when the defendants and their counsel thought they had gotten themselves a two-year pass to avoid justice, they are back in the fire.

Qualified immunity can be tricky at trial. Defense counsel often will request multiple factual interrogatories to submit to the jury, or even that the jury should decide both prongs of the qualified immunity test. As plaintiffs' counsel, we know that submitting multiple factual interrogatories to the jury in addition to the ultimate claims questions easily can sow confusion, mistrial, and conflicting results. The Ninth Circuit remarked in a police misconduct case where the jury had been given a series of special interrogatories, "[t]rue to the reputation of special interrogatories in tort cases as *the darling of the insurance industry*, the verdict form created more legal questions than the pleadings and evidence had presented."[53]

Fortunately, "virtually all federal circuits agree that qualified immunity at trial is a question of law to be decided by the court."[54] "The first step analyzes whether a constitutional right was violated, which is a question of fact. The second examines whether the right was clearly established, which is a question of law."[55] Generally, the second clearly established prong of qualified immunity at trial is properly decided by the court in a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50.[56]

A defendant must follow the procedural requirements of Rule 50 to properly raise and preserve qualified immunity at trial and on appeal. For example, in *Ortiz v. Jordan*, the Supreme Court ruled that the defendants had waived any appeal of the district court's Rule 50(a) denial of qualified

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[53] *Ayuyu v. Tagabuel*, 284 F.3d 1023, 1025 (9th Cir. 2002) (emphasis added).
[54] See Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1930 & n.265 (2018). See also *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017) ("Nearly all our sister circuits agree with the position we adopt here. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits take the view that whether a right is clearly established is a legal issue for the judge to decide, although special interrogatories to the jury can be used to establish disputed material facts.") (distinguishing *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000)).
[55] *Tortu v. Las Vegas Metro. Police Dep't.*, 556 F.3d 1075, 1085 (9th Cir. 2009).
[56] *Id*. See also *Morales, supra*.

immunity, because they had failed to renew that motion in a post-trial Rule 50(b) motion.[57]

The Rule 50 framework is important, because that rule requires the court to decide the legal question for the second prong of qualified immunity under the facts in the light most favorable to the plaintiff before verdict, or as found or implied by the jury after a plaintiff's verdict. Applying this deferential standard makes it harder for a court to grant qualified immunity at or after trial, especially if that court already denied qualified immunity before trial, typically based on issues of fact for trial.[58] More importantly for courts, as the Supreme Court has explained, the Rule 50 framework is the correct way to address this defense at trial.[59]

Although in most circuits the court has discretion to use special interrogatories on facts deemed important to decide qualified immunity,[60] we argue that they should be unnecessary except in rare cases, due to the well-established Rule 50 standards. After trial and on appeal, "[d]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry."[61]

Beyond the confusion and deadlock that special interrogatories can introduce to trial, asking the jury to decide special interrogatories concerning discrete facts undermines the "totality of the circumstances" test by which courts and juries must assess the objective reasonableness of arrests and uses of force under the Fourth Amendment:

> When one picks and chooses a few questions to pose to a jury to ferret out historical facts, staying away from asking the broader question of what constitutes reasonable behavior under those facts, one cannot help but focus attention on some events to the

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[57] *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) ("After trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense. *See* Fed. R. Civ. P. 50(a) and (b)").

[58] See *A.D. v. California Highway Patrol*, 712 F.3d 446 (9th Cir. 2013), *cert. denied*, 571 U.S. 1006 (2013) (once jury found that defendant officer violated due process right when he acted with a purpose to cause death unrelated to a legitimate law enforcement purpose, court was "essentially compelled" to deny qualified immunity, as that right was clearly established); *Torres v. City of Los Angeles*, 548 F.3d 1197, 1212 (9th Cir. 2008), *cert. denied*, 556 U.S. 1183 (2009) (under deferential Rule 50 standard, where there was sufficient evidence for a jury to find that defendant officers arrested plaintiff without probable cause, defendants were not entitled to qualified immunity as a matter of law).

[59] *Ortiz, supra.*

[60] See Fed. R. Civ. P. 49(b); *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1149 (9th Cir. 1996), *cert. denied* 519 U.S. 1009 (1996).

[61] *A.D.*, 712 F.3d at 456 (citing *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 528 (1st Cir. 2009)).

> diminution or exclusion of others. In short, a totality-of-the-circumstances test is replaced by a test focusing on those few circumstances featured in the questions a court is able and willing to articulate.[62]

The better way is for the court to decide the second prong of qualified immunity after trial based on the "factual findings the jury must have made to reach its verdict…."[63]

Some circuits that allow the use of special interrogatories for factual issues deemed important for qualified immunity explicitly limit that procedure to "exceptional circumstances."[64] If our court is inclined to use special interrogatories despite our best arguments, it is important to limit the number of those interrogatories and to try to avoid foreseeable inconsistencies between the interrogatories and the special verdict.

As one frequently cited case says,

> Qualified immunity is a legal issue to be decided by the court, and the jury interrogatories should not even mention the term. Instead, the jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues. When a district court has denied the qualified immunity defense prior to trial based upon its determination that the defense turns upon a genuine issue of material fact, the court should revisit that factual issue when, and if, the defendant files a timely Fed. R. Civ. P. 50(a) or (b) motion.[65]

Finally, we always file a detailed trial brief that includes the proper Rule 50 procedure for addressing qualified immunity at trial, with argument and authority for why special interrogatories would be improper in our case. Don't wait for the defense to raise the issue. When the issue comes up during the trial, we can refer the judge to our trial brief for guidance.

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[62] *Curley v. Klem*, 499 F.3d 199, 212 (3d Cir. 2007).
[63] *Acosta*, 83 F.3d at 1147-48.
[64] See, *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1217–18 (10th Cir. 2008) ("[W]e have recognized that *in exceptional circumstances* historical facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated that right.") (emphasis in original); *McKenna v. Edgell*, 617 F.3d 432 (6th Cir. 2010), *cert. denied*, 536 U.S. 904 (2011) (where qualified immunity turned on a single, discrete factual issue of whether defendants officers were acting as law enforcement or as medical responders, that question was properly submitted to the jury); *Curley*, 499 F.3d at 211 ("When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity, … but responsibility for answering that ultimate question remains with the court."). See also *Lam v. City of San Jose*, 869 F.3d 1077, 1085-86 (9th Cir. 2017) (courts are not required to give jury special interrogatories on qualified immunity).
[65] *Cottrell v. Caldwell*, 85 F.3d 1480, 1487-88 (11th Cir. 1996).

We plan to win and we want to keep our verdict on appeal. The last thing we want is reversible error.

A final thought about appeals after trial: in addition to applying all of the strategies we advocate throughout this chapter, we have to be extremely thorough and careful on appeal. We are making the next clearly established law. Use the post-trial Rule 50 standards to our advantage. Do more legal research than usual. Know the trial record like your diary. This is no time to slouch or hope the judges and their clerks will know the law or read the trial record. We are briefing this appeal not only for our clients and ourselves, but for every other victim of civil rights violations, their attorneys, and our future clients. If you do not have experience or expertise to brief the appeal, seek help. More than money is at stake.

Qualified immunity was created to keep us from winning. Most of our judges appreciate our preparation and help to get it right.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ISIAH MURRIETTA-GOLDING, Deceased, THROUGH HIS SUCCESSOR IN INTEREST CHRISTINA PAULINE LOPEZ; and CHRISTINA PAULINE LOPEZ, Individually, et al.

Plaintiffs,

vs.

CITY OF FRESNO, a public entity, CITY OF FRESNO POLICE CHIEF JERRY DYER, SERGEANT RAY VILLALVAZO, individually, and DOES 3 through 10, Jointly and Severally,

Defendants.

No: 1:18-cv-00314-AWI-SKO

PLAINTIFF LOPEZ'S NOTICE AND MOTION TO CERTIFY DEFENDANTS' QUALIFIED IMMUNITY APPEAL AS FRIVOLOUS

Date: November 30, 2020
Time: 1:30 p.m.
Location: Courtroom 2, 8th Floor

Honorable Judge Anthony W. Ishii

NOTICE AND MOTION TO CERTIFY DEFENDANTS' APPEAL AS FRIVOLOUS

TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Please take notice that on November 30, 2020 at 1:30 p.m. in Courtroom 2, 8th Floor, United States District Court, 2500 Tulare Street, Fresno, CA 93721, Plaintiff Christina Lopez will move this Court for an order to certify Defendant's qualified immunity appeal as frivolous, and to allow Plaintiffs' federal claims to proceed to trial, pursuant to *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992).

This motion is based on the following Memorandum of Points and Authorities, filed in support of this motion, all documents and records in the Court record in this matter, and on such further written and oral argument and evidence as may be submitted.

Dated: November 12, 2020

HADDAD & SHERWIN

/s/ Michael J. Haddad
MICHAEL J. HADDAD
Attorneys for Plaintiff Lopez

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POINTS AND AUTHORITIES

On October 15, 2020, this Court denied Defendants' motion for summary judgment where Defendant Sergeant Ray Villalvazo ("Sgt. Villalvazo") asserted qualified immunity, based on numerous issues of fact. (Doc. 77). On October 20, 2020, Defendants filed a Notice of Appeal from this Court's Order denying their request for qualified immunity.[1] A district court's denial of qualified immunity, to the extent that it turns on a **legitimate and reasonably disputable** question of law rather than on a finding that the pretrial record sets forth a genuine issue of material fact for trial, is immediately appealable by an individual defendant. *Mitchell v. Forsyth*, 472 U.S. 511 (1985) ("*Forsyth appeals"*); *Johnson v. Jones*, 515 U.S. 304 (1995). See also *Maropulos v. County. of Los Angeles*, 560 F.3d 974, 975 (9th Cir. 2009) (*per curiam*) ("[A]n order denying qualified immunity on the ground that a genuine issue of material fact exists is not a final, immediately appealable order.")

A legitimate appeal of a question of law ordinarily "divests the district court of its control over those aspects of the case involved in the appeal." *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 790 (9th Cir. 2018) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). "An appeal from an interlocutory order does not stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pacific Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). The district court is deprived of jurisdiction only "over the particular issues involved in that appeal." *Ames v. Lindquist*, No. C16-5090 BHS, 2018 U.S. Dist. LEXIS 15979 at *3; 2018 WL 646914 (W.D. Wash. Jan. 31, 2018) (quoting *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001)). As the Supreme Court has explained, "[t]he *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] right to immunity is a right to immunity *from certain claims*, not from litigation in general …." *Behrens v. Pelletier*, 516 U.S. 299, 312 (1995).

Accordingly, in *Rodriguez v. County of L.A.*, 96 F.Supp.3d 990, 1005-07 (C.D. Cal. 2014), after certain sheriff deputy defendants filed a *Forsyth* appeal upon being denied qualified immunity at summary judgment, the district court retained jurisdiction to try the Bane Act claim (Cal. Civil Code §

[1] Plaintiffs' federal claim against Defendant City of Fresno and all claims against former Police Chief Jerry Dyer are being dismissed by stipulation. Remaining claims include federal and state law claims against Defendant Ray Villalvazo and state law claims against the City of Fresno.

52.1) against appellant-defendants and all claims against non-appellant defendants. That entire case proceeded to trial. Affirming the verdict for the plaintiffs, the Ninth Circuit held that it was harmless error for the district court to also try the federal claims (which were on appeal) against the appellant-defendants without first certifying that the appeal of those claims was frivolous. *Rodriguez*, 891 F.3d at 788, 790-92. The Ninth Circuit explained that those deputies' *Forsyth* appeal was indeed frivolous, because it merely challenged the district court's findings of issues of fact. *Id.* Thus, here, Sgt. Villalvazo's interlocutory appeal of this Court's denial of qualified immunity for the Fourth Amendment excessive force claim cannot divest this Court of jurisdiction to hear "other phases of the case," including state law Bane Act, negligence, and assault and battery claims.

Still, "[i]t has been noted, however, that this result [interlocutory qualified immunity appeals of federal claims] could significantly disrupt and delay trial court proceedings." *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). For that reason, when the district court's determination of clearly established law is not reasonably disputable, **or** when the defendants seek interlocutory appeal of the district court's determination that questions of fact preclude qualified immunity before trial, then the defendants do not have the right to disrupt or delay trial with an immediate appeal. See *Chuman, supra*; *Johnson, supra*; see also *Foster v. City of Indio*, 908 F.3d 1204, 1210-13 (9th Cir. 2018) (explaining *Johnson* in a Fourth Amendment excessive force case).

I. THIS COURT RETAINS SOME JURISDICTION OVER THIS CASE

This Court is not powerless in the face of Sgt. Villalvazo's appeal of its denial of qualified immunity. "[W]hile a proper appeal from a denial of qualified immunity automatically divests the district court of jurisdiction to require the appealing defendants to appear for trial, a frivolous or forfeited appeal does not automatically divest the district court of jurisdiction." *Chuman*, 960 F.2d at 105.

Chuman set forth the procedure that must be followed under these circumstances in order for a district court to retain complete jurisdiction and proceed to trial on all claims:

> Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial. In the absence of such a certification, the district court is automatically divested of jurisdiction to proceed with trial pending appeal.

Id. In that situation, the appealed claim(s) would proceed to trial in the district court along with claims

not on appeal, and the appeal would remain pending in the Court of Appeals to be decided according to the normal appellate timetable. *Id.* A district court's certification that an appeal is frivolous is not appealable. *Marks v. Clarke*, 102 F.3d 1012, 1017 (1997) (as amended). The Defendants could apply to the Ninth Circuit for a discretionary stay. *Id*. Defendants would still get their appeal if it were certified frivolous; but they would not get to disrupt or delay the trial in whole or in part.

The Supreme Court endorsed *Chuman* for this procedure where frivolous qualified immunity appeals may otherwise delay, or deny, justice. *Behrens*, 516 U.S. at 310.[2]

A "frivolous qualified immunity claim is one that is unfounded, 'so baseless that it does not invoke appellate jurisdiction.'" *Marks*, 102 F.3d at 1018, n.8 (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) ("If the claim…is a sham [] the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks.")). See also *In re George*, 322 F.3d 586, 591 (9th Cir. 2002) (stating that "[a]n appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit").

Courts that have embraced this procedure for certifying certain qualified immunity appeals as frivolous have attempted to ameliorate the unfair prejudice to the plaintiff where defendants abuse their extraordinary right to immediately appeal a denial of qualified immunity. As the *Apostol* Court reasoned,

> Although this approach [interlocutory appeal of a denial of qualified immunity] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system. During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will

[2] For some cases where qualified immunity appeals were certified as frivolous, see *Padgett v. Wright*, 587 F.3d 983, 985-86 (9th Cir. 2009) (approving district court's certification that appeal was frivolous); *Estate of Ramirez v. City of Billings*, No. CV-17-52-BLG-DWM, 2019 U.S. Dist. LEXIS 22676 at *4 (D. Mont. Feb. 12, 2019) (Defendant's qualified immunity appeal "attempts to avoid the jury by asking the Ninth Circuit to become a factfinder in contravention of both the limits on the Ninth Circuit's jurisdiction and Plaintiffs' right to a jury trial."); *Aksu v. County of Contra Costa*, No. C 12-04268 CRB, No. C 11-05771 CRB, 2015 U.S. Dist. LEXIS 54984 (N.D. Cal. April 27, 2015) (appeal was frivolous because denial of qualified immunity was obvious); *Todd v. Lamarque*, No. C 03-3995 SBA, 2008 U.S. Dist. LEXIS 125183 at *8, 2008 WL 205591 (N.D. Cal. Jan. 24, 2008) (appeal certified frivolous, and timing on eve of trial found "suspect"); *Turner v. United States*, No. 17-cv-02265-WHO, 2018 U.S. Dist. LEXIS 212239 (N.D. Cal. Dec. 17, 2018) (appeal was frivolous due in part to material issues of fact); *Hahn v. City of Carlsbad*, No. 15-cv-2007 DMS (BGS), 2017 U.S. Dist. LEXIS 110770 (S.D. Cal. July 17, 2017) (appeal frivolous because district court denied qualified immunity due to questions of fact); *Isayeva v. County of Sacramento*, No. 2:13-cv-02015 KJM-KJN, 2015 U.S. Dist. LEXIS 150014, 2015 WL 6744529 (E.D. Cal. Nov. 3, 2015) (same); *Toscano v. City of Fresno*, No. 1:13-cv-01987-SAB, 2015 U.S. Dist. LEXIS 141964, 2015 WL 6163205 (E.D. Cal. Oct. 19, 2015) (same); *Carillo v. County of L.A.*, No. 2:11-cv-10310-SVW-AGR, 2013 U.S. Dist. LEXIS 198323 (C.D. Cal. Jan. 7, 2013) (appeal questioning whether law was clearly established was "wholly without merit").

> be unnecessary. The majority of *Forsyth* appeals - like the bulk of all appeals - end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems.
>
> Courts are not helpless in the face of manipulation. District judges lose power to proceed with trial because the defendants' entitlement to block the trial is the focus of the appeal. If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks.

870 F.2d at 1338-1339.

Before Sgt. Villalvazo is allowed to deprive Plaintiffs of their day in court on their individual federal claims, his claim of appeal must be closely examined to make sure that the issues he seeks to appeal are properly the subject of interlocutory relief. This examination reveals that Sgt. Villalvazo's qualified immunity appeal is "frivolous."

II. DEFENDANT'S INTERLOCUTORY APPEAL OF THIS COURT'S DENIAL OF QUALIFIED IMMUNITY IS FRIVOLOUS

There are two bases on which Sgt. Villalvazo's appeal should be certified as frivolous: (1) because Sgt. Villalvazo seeks to challenge this Court's determination that there are genuine issues of fact for trial, which the Court of Appeals lacks jurisdiction to hear (see *Johnson, supra.*); and (2) because even if Sgt. Villalvazo characterizes his appeal as a question of law – i.e., whether his conduct, viewed in the light most favorable to Plaintiffs, violated clearly established law – that question was already answered years earlier, as discussed below, and as this Court explained in its summary judgment order.

B. This Court Found Questions of Fact that Preclude Qualified Immunity

In *Johnson, supra*, the Supreme Court held that, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. at 319-320. Such interlocutory appeals are available only for "purely legal issues." *Id.* The Ninth Circuit repeatedly has confirmed that such an interlocutory appeal is available only for a "purely legal issue." *George v. Morris*, 736 F.3d 829, 836 (9th Cir. 2013); see also *Foster*, 908 F.3d at 1210-13.

This Court's Order denying summary judgment to Sgt. Villalvazo on qualified immunity grounds was premised on material factual disputes. Specifically, the Court explained:

> [V]iewing the evidence in the light most favorable to Plaintiffs, the crimes for

> which an arrest/detention were being made were non-violent misdemeanors, no warning was given by Villalvazo that any force would be used even though it appears that a warning could have been feasibly given, Villalvazo could have used the cement wall for cover and further observation, and, critically, Murrietta-Golding was not an immediate threat to Villalvazo or others. Under these circumstances, a reasonable jury could find that Villalvazo's use of deadly force violated Murrietta-Golding's Fourth Amendment rights. Therefore, summary judgment on this claim is inappropriate.

(Doc 77, p. 21:25-22:7).

This Court also denied qualified immunity to Sgt. Villalvazo based on material disputes of fact concerning the reasonable interpretation of the daycare video, ultimately concluding that the video, "[C]ould be interpreted as depicting Murrietta-Golding doing nothing but attempting to escape while keeping his baggy pants from falling down." (*Id*. at p. 15:13-14). The Court added that "[U]nder this interpretation, Murrietta-Golding did not present an immediate threat to either Villalvazo or others when Villalvazo used lethal force." (*Id*. at p. 17:1-3). The Court further acknowledged that, "According to Villalvazo's testimony, his actions are based on a mistaken belief that Murrietta-Golding was armed and trying to draw a gun from his pants when Villalvazo fired. In reality, Murrietta Golding was trying to keep his baggy pants from falling down. The evidence is such that a jury will have to determine whether Villalvazo's mistaken belief was reasonable." (*Id*. at p. 17:25-18:2).

It is well-established that where a case concerns traditional forms of force, a determination on qualified immunity necessarily involves a factual determination of the amount of force used and the reasonableness of that force in proportion to the need for it. See, *Santos v. Gates*, 287 F.3d 846, 855 (9th Cir. 2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)) ("[W]hether the officers may be said to have made a 'reasonable mistake' of fact or law, may depend on the jury's resolution of disputed facts and the inferences it draw therefrom. Until the jury makes those decisions, we cannot know, for example, how much force was used, and, thus, whether a reasonable officer could have mistakenly believed that the use of that degree of force was lawful.").

The Ninth Circuit has further held in a police shooting case that video evidence "alone raises material questions of fact about the reasonableness of [the officer's] actions and the credibility of his post-hoc justification of his conduct." *Longoria v. Pinal Cnty.*, 873 F.3d 699, 706 (9th Cir. 2017), *cert denied* 138 S.Ct. 2601 (2018). "[T]he probative value of real-time videos and frozen frames is more appropriately a matter for a jury to view and evaluate, not a matter for a court to resolve on summary

judgment." *Id*, at 706, n. 5.

The Supreme Court and the Ninth Circuit have repeatedly explained that Defendants "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-320. See also, *George, supra; Foster, supra*. The Ninth Circuit applied this rule recently in *Rodriguez, supra*, explaining that where defendant-appellant deputies argued on appeal that they did not participate in any of the plaintiffs' cell extractions, while the plaintiffs presented evidence that those deputies did participate in cell extractions, "[a]ppellants thus failed to show cause why we should not have dismissed the interlocutory appeal of the immunity ruling by the district court for lack of jurisdiction." 891 F.3d at 792. The Court concluded, "further review reveals that appellants' interlocutory appeal was frivolous." *Id*.

All of the disputed issues of material fact that the Court found here also render Sgt. Villalvazo's appeal frivolous.

C. There Can Be No Serious Dispute that the Law Was Clearly Established.

Even if Sgt. Villalvazo's appeal turned on "purely legal issues," the Ninth Circuit still places this Court as gatekeeper to decide whether his appeal, given the law at issue, would be frivolous. *Chuman, supra; George*, 322 F.3d at 591 (stating that "[a]n appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit").

"[I]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). "[T]he focus is on whether the officer had fair notice that [the officer's] conduct was unlawful." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). The "salient question" for qualified immunity remains whether the state of the law at the time gave the defendant "fair warning" that his alleged conduct was unconstitutional. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014) (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The Ninth Circuit continues to apply the "fair warning" standard articulated consistently from *Hope* through *Kisela*. See *Lopez v. Gelhaus*, 871 F.3d 998, 1020 (9th Cir. 2017), *cert. denied*, *Gelhaus v. Lopez*, 138 S.Ct. 2680 (2018) ("fair notice"); See also, *Longoria*, 873 F.3d at 709 ("in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law") (quoting *Brosseau*, 543 U.S. at

199). Requiring facts of previous cases to be "materially similar" to the case at issue is a "rigid gloss on the qualified immunity standard" and "not consistent with our cases." *Hope*, 536 U.S. at 739.

This Court denied Sgt. Villalvazo qualified immunity after noting that, "'Clearly established' means that the statutory or constitutional question was 'beyond debate,' such that every reasonable official would understand that what he is doing is unlawful." (Doc. 77, p. 23:3-6) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

In its summary judgment Order, this Court clearly described why it is indeed "beyond debate" that summary judgment with respect to qualified immunity is inappropriate, and held:

> Viewing the evidence in the light most favorable to Plaintiffs, the facts are that Murrietta-Golding was arrestable for non-violent misdemeanor offenses (Penal Code § 148 and a misdemeanor parole violation), Villalvazo could have moved to his right behind the cement wall for cover and additional observation, no warning was given before lethal force was used although a warning was feasible, Murrietta-Golding was running with his back to Villalvazo and did not look back at Villalvazo a second time, Murrietta-Golding's underwear was visible and his pants looked baggy (i.e. it looked like his pants were falling down), and Murrietta-Golding was running while trying to hold his pants up with his left hand and thus, was not an immediate threat to Villalvazo or others. **Although Murrietta-Golding was in headlong flight, the law nevertheless was clearly established in 2017 that the use of deadly force in these circumstances was unconstitutional.** See *Garner*, 471 U.S. at 10-12; *Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011) ("[F]ew things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to the officer or to others.'" (quoting *Garner*, 471 U.S. at 11)). Therefore, summary judgment with respect to the qualified immunity defense is inappropriate.
>
> (Doc. 77, p. 24:1-16) (emphasis added).

In addition to *Garner*, which also involved a boy shot in the back while trying to escape over a fence, several other cases also provided Defendants "fair warning" that deadly force under these circumstances was unconstitutional:

• *A.K.H. v. City of Tustin*, 837 F.3d 1005 (9th Cir. 2016) (deadly force requires an immediate threat; no qualified immunity for officer who shot man he was pursuing who whipped his arm from his hoodie pocket and raised it quickly in an arcing motion, with no weapon);

• *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (*en banc*), *cert. denied*, 134 S.Ct. 2695 (2014) (deadly force requires an immediate threat; officers, responding to wife's call that her elderly

disabled husband had a gun, used excessive force when they shot him while he was holding a gun and refuse to drop it, but did not point the gun at them);

• *Harris v. Roderick*, 126 F.3d 1189, 1202 (9th Cir. 1997), *cert den.* 522 U.S. 1115 (1998) (deadly force requires an immediate threat; holding, in the Ruby Ridge civil case, "[t]he fact that [the suspect] had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight;" and "whenever practicable, a warning must be given before deadly force is employed.");

• *Curnow v. Ridgecrest Police*, 952 F.2d 321, 324-25 (9th Cir. 1991) (deadly force requires an immediate threat; holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot);

• *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1146-47 (9th Cir. 1996), *cert denied* 519 U.S. 1009 (1996) (deadly force requires an immediate threat; excessive force verdict affirmed where officer, who shot the decedent allegedly for driving his car at officer, could have avoided any risk of injury "by simply stepping to the side.");

• *Price v. Sery*, 513 F.3d 962, 967-70 (9th Cir. 2008) (deadly force requires an immediate threat; even under the "fleeing felon" rule, "It is the specification of the threat (as an immediate one involving death or serious physical harm) … that controls.");

• *Porter v. Osborn*, 546 F.3d 1131, 1136-39 (9th Cir. 2008) (Fourteenth Amendment standard met where officer intended "to inflict force beyond that which is required by a legitimate law enforcement objective," or where officer's "own conduct created and agitated this escalating situation and that his reactions were disproportionate to the situation he faced.").

It is "beyond debate" that clearly established law provided Sgt. Villalvazo with "fair notice" that his use of deadly force, when considered in the light most favorable to Plaintiffs, was unlawful. As another Eastern District judge found under similar circumstances:

> In sum, the denial of qualified immunity in this case is not based on issues of law, but rather on genuine issues of material fact. Hence, the court finds [Defendant officers'] appeal baseless and insufficient to deprive this court of jurisdiction. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006) (citing *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) (no jurisdiction over an interlocutory appeal that focuses on whether there is a genuine dispute about the underlying facts)). For the same reasons the court finds the appeal baseless, it declines to enter a stay.

Isayeva v. County of Sacramento, No. 2:13-cv-02015-KJM-KJN, 2015 U.S. Dist. LEXIS 150014, *6 (E.D. Cal., Nov. 4, 2015). This Court should do the same here.

D. Defendants' Interlocutory Appeal Is Highly Disruptive at this Stage, and Given This Court's Continuing Jurisdiction Over the State Law Claims, Will Not Protect Defendants from Trial.

As shown above, Sgt. Villalvazo's interlocutory appeal of federal claims does not divest this Court of jurisdiction to hear "other phases of the case," including the state law Bane Act, negligence, and assault and battery claims. *Plotkin*, 688 F.2d at 1293. Thus, in the absence of an order staying the rest of the case, Defendants will still have to face trial for the state law claims. It would be a great waste of the Court's and the parties' resources to have to try this case twice, simply due to Sgt. Villalvazo's meritless appeal.

Numerous courts have noted how such qualified immunity appeals are prone to abuse. See *e.g. Apostol*, 870 F.2d at 1338-1339; *Yates v. City of Cleveland*, 941 F.2d 444, 448-49 (6th Cir. 1991) (discussing the potential for abuse); *Estate of Ramirez, supra* at footnote 1 (After substantial trial preparation, "the appeal serves only to disrupt and delay the trial schedule. This is precisely what the Ninth Circuit aimed to prevent in allowing district courts to certify interlocutory appeals as frivolous."); *Todd v. Lamarque, supra* at footnote 1 (timing of appeal on eve of trial "highly suspect").

The parties are scheduled for trial on March 30, 2020, with voluminous pretrial documents due January 27, 2021. Defendants' appeal is disruptive to the Court's docket and to the parties' efforts to prepare for the important wrongful death trial in this case. Isiah's parents are entitled to the trial of this matter without unnecessary delay.

As the Ninth Circuit said the district court in *Rodriguez v. County of L.A.* should have done, this Court should certify Defendants' appeal as frivolous to allow the parties to try all claims together, while Defendants' appeal proceeds on a dual track in the Court of Appeals. *Rodriguez*, 96 F.Supp.3d 990, 1005-07 (C.D. Cal. 2014), *aff'd by* 891 F.3d at 788, 790-92.

RELIEF REQUESTED

For these reasons, Plaintiff Christina Lopez respectfully request that Defendant Villalvazo's interlocutory appeal be certified as frivolous and that all federal claims proceed to trial along with Plaintiffs' state law claims.

Respectfully Submitted,

Dated: November 12, 2020

HADDAD & SHERWIN LLP

/s/ *Michael J. Haddad*
MICHAEL J. HADDAD
Attorneys for Plaintiff Lopez

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ISIAH MURRIETTA-GOLDING deceased through his successor in interest Christina Lopez, et al.,

Plaintiffs

v.

CITY OF FRESNO, CITY OF FRESNO POLICY CHIEF JERRY DYER, FRESNO POLICE SGT. RAY VILLALVAZO, and Does 1-10,

Defendants

CASE NO. 1:18-CV-0314 AWI SKO

ORDER ON DEFENDANT'S MOTION STAY AND PLAINTFFS' MOTION FOR CERTIFICATION OF APPEAL AS FRIVOLOUS

(Doc. Nos. 86, 87)

This case arises from a fatal encounter between decedent Isiah Murrietta-Golding ("Murrietta-Golding") and City of Fresno police officer Ray Villalvazo ("Villalvazo"). Plaintiffs Christina Lopez and Anthony Golding, both individually and purporting to be successors in interest to Murrietta-Golding, bring claims under 42 U.S.C. § 1983 for violations of the First, Fourth, and Fourteenth Amendments, and state law claims for California Civil Code § 52.1 ("Bane Act"), negligence, and assault and battery. On October 15, 2020, the Court denied Villalvazo's motion for summary judgment, which included a denial of qualified immunity. On October 20, 2020, Villalvazo appealed the denial of qualified immunity to the Ninth Circuit. On November 12, 2020, after unsuccessful negotiations, the parties filed two related motions. Plaintiffs filed a motion to certify Villalvazo's appeal as frivolous (Doc. No. 87), and Villalvazo filed a motion to stay the case (Doc. No. 86). All briefing on these motions have been received. After review, the Court will grant Plaintiffs' motion and deny Villalvazo's motion.

Plaintiffs' Arguments

Plaintiffs argue that it is true that a legitimate appeal divests the court of jurisdiction over aspects of the case involved in the appeal. However, the state law claims in this case are separate from the federal claims being appealed, so the appeal does not divest the Court of jurisdiction to resolve those claims. Moreover, when a court certifies that an appeal is frivolous, the court may proceed to trial on the claims that are the subject of the appeal. Plaintiffs argue that Villalvazo's appeal is frivolous because qualified immunity was denied based on factual disputes. The Court's summary judgment order noted that the daycare videotape could be interpreted in more than one way, but ultimately interpreted the video in Plaintiffs' favor by holding that it depicted Murriatta-Golding as doing nothing more than trying to escape while keeping his baggy pants from falling down. Additionally, Plaintiffs argue that the appeal is frivolous because, accepting Plaintiffs' version of events, the law was clearly established that officers cannot use lethal force against a suspect like Murrietta-Golding who posed no danger to officers or others. Therefore, Plaintiffs contend that the Court should certify Villalvazo's appeal as frivolous and let the entirety of this case proceed.

Defendant's Argument

Defendants argue that, pursuant to *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992), the interlocutory appeal has divested the Court of jurisdiction while the appeal is pending. *Chuman*'s exception depends on the district court certifying that the appeal is frivolous. However, there has been no such finding. Defendants argue that they have consistently maintained that the facts are uncontroverted because they were captured on video, and to the extent that a dispute exists, have accepted Plaintiffs' version for purposes of summary judgment. Therefore, the *Chuman* stay divests the Court of all jurisdiction.

Alternatively, Defendants argue that a discretionary stay under *Landis v. North Am. Co.*, 299 U.S. 248 (1936) should be imposed. Plaintiffs' desire to proceed with additional discovery on the state law claims and trial flies in the face of judicial economy. If Plaintiffs are allowed to proceed to trial on their state law claims, but are ultimately successful on appeal, this will result in two trials arising out of the same nucleus of facts – one on state law claims and one on federal

claims. If Defendants are successful on appeal, then the Court will have undertaken a needless trial on state supplemental claims that would have been better adjudicated in state court. Judicial economy weighs in favor of a single trial on the merits and thus, favors a *Landis* stay.

Legal Standard

A defendant who is denied qualified immunity before trial may file an immediate interlocutory appeal where the denial turns on an issue of law. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Sharp v. County of Orange, 871 F.3d 901, 909 n.6 (9th Cir. 2017); Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992). "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982); see Rodriguez v. County of L.A., 891 F.3d 776, 790 (9th Cir. 2018); Chuman, 960 F.2d at 105. However, there is an exception to the divestiture rule in qualified immunity cases. See Rodriguez, 891 F.3d at 790-91; Chuman, 960 F.2d at 105. If the district court certifies in writing that the defendant's appeal of qualified immunity is frivolous or has been waived, the district court is no longer divested of jurisdiction and the case may proceed in the district court. See Rodriguez, 891 F.3d at 790-91; Chuman, 960 F.2d at 105. In the absence of such a certification (sometimes called "*Chuman* certification"), the district court remains automatically divested of its authority to proceed with trial pending appeal. See Rodriguez, 891 F.3d at 791; Chuman, 960 F.2d at 105. A qualified immunity appeal may be "frivolous" if the denial of qualified immunity was based on the presence of a genuine issue of fact for trial. See Rodriguez, 891 F.3d at 791; George v. Morris, 736 F.3d 829, 834 (9th Cir. 2013); Estate of Farmer v. Las Vegas Metro. Police Dep't, 2019 U.S. Dist. LEXIS 99110, *8-*9 (D. Nev. June 13, 2019). An appeal may also be "frivolous" if the results are obvious. United States v. Kitsap Physicians Serv., 314 F.3d 995, 1003 n.3 (9th Cir. 2002); Estate of Farmer, 2019 U.S. Dist. LEXIS 99110 at *8-*9. A district court's certification that an interlocutory appeal is frivolous is not an appealable order. Marks v. Clarke, 102 F.3d 1012, 1017 (9th Cir. 1997). Nevertheless, a defendant who disagrees with the district court's certification may apply to the Ninth Circuit for a discretionary stay. Id.; Chuman, 960 F.2d at 105 n.1.

Discussion[1]

There is no dispute that, pursuant to *Chuman* and *Rodriguez*, this Court has been divested of jurisdiction over Plaintiffs' Fourth Amendment claims. There are disputes about whether Villalvazo's appeal is frivolous and about the appropriateness of a discretionary *Landis* stay.

1. Frivolous Appeal

In denying Villalvazo's motion for summary judgment, the Court relied heavily on the videotape from the daycare. See Murrietta-Golding v. City of Fresno, 2020 U.S. Dist. LEXIS 192487, *24-*31 (E.D. Cal. Oct. 15, 2020). The video showed Murrietta-Golding fleeing and Villalvazo firing his weapon. See id. at *13-*15. The Court explained that there were at least two possible interpretations of the videotape, one in which Villalvazo reacted to a reasonably perceived immediate threat, the other in which Murrietta-Golding was merely running while trying to keep his baggy pants from falling down and thus, posing no threat. See id. at *24-*28. Because the Court was required to view the evidence in the light most favorable to the Plaintiffs, the Court concluded that the evidence showed that Murrietta-Golding posed no threat to Villalvazo. See id. at *31. This finding was key to resolving the summary judgment motion. The nature of the threat posed by a suspect to officers or others is the most important consideration in evaluating excessive force cases. See Nehad v. Browder, 929 F.3d 1125, 1132 (9th Cir. 2019). The summary judgment determination that Murrietta-Golding posed no threat to Villalvazo or others when lethal forced was used was what tipped the balance in Plaintiffs' favor and resulted in the denial of summary judgment and qualified immunity. See Murrietta-Golding, 2020 U.S. Dist. LEXIS 192847 at *38, *41-*42. The summary judgment recognized that the Ninth Circuit has explained that "few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to officers or others." Torres v. City of Madera, 648 F.3d 1119, 1128 (9th Cir. 2011) (quoting Tennessee v. Garner, 471 U.S. 1, 10-12 (1985)). Additionally, the summary judgment order concluded that Villalvazo's

[1] The parties are familiar with facts of this case. An extensive recitation of the relevant facts can be found at *Murrietta-Golding v. City of Fresno*, 2020 U.S. Dist. LEXIS 192487 (E.D. Cal. Oct. 15, 2020).

version of events was essentially based on a mistake of fact, i.e. that Murrietta-Golding was drawing a weapon when he was actually only trying to hold up his pants. See Murrietta-Golding, 2020 U.S. Dist. LEXIS at 192847 at *31. Whether a mistaken belief was reasonable is a question of fact. See Nehad, 929 F.3d at 1133-34.

From the above, it is apparent that questions of fact precluded the Court from either granting qualified immunity or holding that no Fourth Amendment violation occurred. The questions of fact turn on interpretation of the videotape and the credibility of Villalvazo. As the order explained, the videotape can be viewed in at least two ways, one supportive of Villalvazo and one supportive of Plaintiffs. Because multiple inferences are possible, it is a question for the trier of fact to determine what exactly the video depicts and whether Villalvazo reasonably perceived that Murrietta-Golding posed an immediate threat of harm to himself or to others. See id.; see also Vos v. City of Newport Beach, 892 F.3d 1024, 1028, 1032 (9th Cir. 2018); Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2015) (recognizing that when the evidence lends itself to more than one reasonable inference, the trier of fact must ultimately determine how to view evidence); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1175 (9th Cir. 2003) (same).

Defendants contend that there are no genuine factual disputes because of the videotape. However, simply because a videotape exists is not dispositive. "The mere existence of video footage of the incident does not foreclose a genuine factual dispute as to the reasonable inferences that can be drawn from the footage." Vos, 892 F.3d at 1028; see also Blankenhorn v. City of Orange, 485 F.3d 463, 468 n.1 (9th Cir. 2007). Videotape footage is dispositive when it so utterly discredits or blatantly contradicts a party's version of events that only one reasonable inference can be drawn from the video. See Scott v. Harris, 550 U.S. 372, 378-80 (2007); Vos, 892 F.3d at 1028. The Court examined the video in this case and concluded that it does not so blatantly contradict either Plaintiffs or Villalvazo such that only one reasonable inference can be drawn.

Villlalvazo also contends that even if disputed facts are viewed in Plaintiffs' favor, he is entitled to qualified immunity. The Court cannot agree. The description of *Garner* in *Torres*, a 2011 case, is very clear: the law does not permit an officer to "seize an unarmed, nondangerous

suspect by shooting him dead in the absence of probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to officers or others." Torres, 648 F.3d at 1128 (citing Garner, 471 U.S. at 10-12. The facts viewed in Plaintiffs' favor are that Murrietta-Golding was fleeing, not looking at Villalvazo, and was only trying to hold up his baggy pants. That is, Murrietta-Golding posed no danger to anyone when lethal force was used.

In sum, because qualified immunity was denied because more than one reasonable inference was possible from the videotape, and the Plaintiffs' version of events shows a violation of clearly established Fourth Amendment law, the Court concludes that Villalvazo's appeal is "frivolous" for purposes of *Chuman*. See Rodriguez, 891 F.3d at 791; George, 736 F.3d at 834.

2. *Landis* Stay

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North Am. Co., 299 U.S. 248, 254 (1936). Defendants contend that without a *Landis* stay, the Court will either have to conduct two trials (one for federal claims and one for state claims) or will have unnecessarily conducted a trial on state law claims that should have been conducted in state court.

The Court does not agree that two "complete" trials would result if Villalvazo's appeal is unsuccessful. This is because Plaintiffs' Fourth Amendment excessive force, Bane Act, and California battery claims against Villalvazo are based on the same conduct and depend on the unreasonable use of force by Villalvazo. See Moore v. City of Berkeley, 801 F. App'x 480, 483 (9th Cir. 2020); Cameron v. Craig, 713 F.3d 1012, 1022 (9th Cir. 2013); Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 922 (9th Cir. 2001); Estate of Adkins v. County of San Diego, 384 F.Supp.3d 1195, 1207 (S.D. Cal. 2019). A jury's reasonableness determination on a Bane Act or battery claim against Villalvazo would apply to the Fourth Amendment excessive force claim.[2] See id. Where there would be a possible difference would be a jury's finding on punitive damages. Under state law, malice, fraud, or oppression must be proven by clear and

[2] For this reason, the Court regularly refuses to instruct juries on Bane Act and battery claims when a Fourth Amendment excessive force claim is also pursued. Instead, the Court instructs juries on Fourth Amendment excessive force and deems the answers to those questions to be the answers to Bane Act and battery claims.

convincing evidence. See Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1135 (9th Cir. 2003). Under federal law, however, malice, fraud, or oppression need only be proven by the lower preponderance of the evidence standard. See Dang v. Cross, 422 F.3d 800, 808 (9th Cir. 2005). A jury's finding that Villalvazo did not act with malice, fraud, and oppression by clear and convincing evidence under California law does not answer the question of whether he acted with malice, fraud, or oppression by a preponderance of the evidence under federal law. Thus, if Villalvazo's appeal is unsuccessful, a more focused trial on the issue of punitive damages under federal law could be needed. While a second jury would not necessarily need to hear all of the evidence that the first jury heard in order to determine punitive damages, a significant degree of overlap between the two trials would occur. Generally, it is more advisable and efficient for a single jury to hear all of the evidence and decide all of the issues.

With respect to conducting trial on purely state law questions, that is a possibility. As a general proposition, the Court agrees that state law claims should be resolved in state court. Accordingly, this Court usually exercises its discretion under 28 U.S.C. § 1367(c)(3) and relevant Ninth Circuit case law to decline supplemental jurisdiction over state law claims when all federal claims have been disposed of prior to trial. E.g. Jack v. Pearson, 2019 U.S. Dist. LEXIS 6218, *29-*30 (E.D. Cal. January 13, 2019) (declining to exercise supplemental jurisdiction over state law claims after granting summary judgment on all federal claims). However, § 1367(c)(3) is not mandatory, and purely state law claims are regularly resolved in federal court through the exercise of diversity jurisdiction. Nevertheless, if the Ninth Circuit were to grant Villalvazo qualified immunity, there is a significant probability that the Court would decline supplemental jurisdiction under § 1367(c)(3) of Plaintiffs' state law claims.

Finally, although not raised by any party per se, the Eastern District of California has not been conducting jury trials since approximately February 2020 due to Covid 19 restrictions. This has resulted in the vacation of numerous trials and has created an extensive trial backlog. Even if the Court were to deny a stay, it is unknown when a trial could realistically be expected to be held. It is possible that the Covid 19 restrictions and case backlog could regrettably create a de facto stay, irrespective of the Court's resolution of this motion.

Given these considerations, the Court finds that the appropriate course is to permit discovery and settlement efforts to proceed. Regardless of how the Ninth Circuit rules on the issue of qualified immunity, the entirety of this case will not be resolved (particularly the negligence claim). Once the Ninth Circuit rules, presumably all necessary discovery will be completed, all realistic settlement efforts will have been exhausted, and the case will be ready to proceed to trial, be it in this Court or the Fresno County Superior Court. However, the Court will not set a trial date. Given the Covid 19 situation and corresponding courthouse restrictions, the possibility of substantial overlap between a "state law claims trial" and a "federal law claims trial," and the possibility of invoking § 1367(c)(3), the Court finds that there is little utility in setting a trial date at this time. Once any necessary outstanding discovery has been completed, and any voluntary settlement efforts exhausted,[3] the parties will be permitted to file a request for a trial date or a new motion to stay the case.[4] Depending on future developments, the Court will either set a trial date or stay this matter pending resolution of Villalvazo's appeal.[5]

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to certify that Defendant's qualified immunity appeal as frivolous (Doc. No. 87) is GRANTED;
2. The Court certifies that Defendant's qualified immunity appeal is frivolous;
3. Defendant's motion to stay (Doc. No. 86) is DENIED;
4. The parties may conduct any necessary discovery or voluntary settlement efforts, but, as explained above, no trial date will be set at this time;

[3] The Court is not ordering the parties to engage in settlement efforts. Settlement remains a voluntary endeavor for both Plaintiffs and Villalvazo. A party's steadfast refusal to engage in settlement negotiations would constitute exhaustion.

[4] Any request for a new trial date shall include proposed trial dates. The parties are to meet and confer in order to propose mutually agreeable trial dates. The Court will not view a mutually agreeable trial date as a concession that a trial date should be set. A party that agrees that a proposed trial date is otherwise available may still move to stay the case.

[5] If a trial date is set, it is possible that other trials may be set on that date. In such circumstances, the Court gives priority to the oldest case.

5. Upon completion of any remaining necessary discovery, and the exhaustion of any voluntary settlement efforts, the parties shall petition the Court for a trial setting or file a renewed motion to stay.

IT IS SO ORDERED.

Dated: December 31, 2020

SENIOR DISTRICT JUDGE