"THERE'S A NEW SHERIFF IN TOWN": WHY GRANTING QUALIFIED IMMUNITY TO LOCAL OFFICIALS ACTING OUTSIDE THEIR AUTHORITY ERODES CONSTITUTIONAL RIGHTS AND FURTHER DETERIORATES THE DOCTRINE

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INTRODUCTION

Although not always recognized as a significant legal issue by the American public at large, the doctrine of qualified immunity was brought to the national forefront with the growth of the police reform movement following the death of George Floyd in 2020.[1] Today, qualified immunity is widely denounced as a vehicle for shielding violent police officers from liability for their brutality in official actions,[2] and indeed, most legal discourse on the subject today considers whether to abolish the doctrine altogether.[3] But the defense does not just apply to bad-acting police—it applies to every government employee, both state and federal.[4]

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[1] *See* Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021), https://time.com/6061624/what-is-qualified-immunity/ [https://perma.cc/N9H5-8S4Q] ("As calls for greater police accountability gained momentum in 2020, the decades-old doctrine that protects officers from some lawsuits came under fresh scrutiny."). The quote in the title of this Note is pulled from *Cent. Specialties, Inc. v. Large*, 18 F.4th 989, 1000 (8th Cir. 2021) (Grasz, J., concurring in part and dissenting in part).

[2] *See* John Guzman, *Five Times Police Used Qualified Immunity to Get Away with Misconduct and Violence*, LEGAL DEF. FUND, https://www.naacpldf.org/qi-police-misconduct/ [https://perma.cc/7XQT-K9AV] (last visited Dec. 4, 2023); Desmond Mantle, *Qualified Immunity Enables Misconduct and Prevents Accountability*, REASON FOUND. (Mar. 2, 2022), https://reason.org/commentary/qualified-immunity-enables-misconduct-and-prevents-accountability/ [https://perma.cc/6DKY-2MT5]; *End the Court Doctrine That Enables Police Brutality*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html [https://perma.cc/F62M-T66X].

[3] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018). This article by William Baude is widely cited as persuasive authority for overturning the doctrine of qualified immunity. He conducts a thorough analysis of the legal origins of the doctrine, examining three different proffered justifications for its existence. It is interesting to consider from the outset that the *legal* origins of the doctrine are hazy at best, and that the legal system seems to take its existence as granted. Baude persuasively and thoroughly argues that qualified immunity is indeed unlawful, with no adequate basis in law. With that in mind, the issues presented in this Note become definitively more concerning. For a further discussion of whether qualified immunity should be overturned, see *infra* Part VII.

[4] *See* Butz v. Economou, 438 U.S. 478, 504 (1978). As described in Part I, the doctrine applies to the states through the Fourteenth Amendment.

The doctrine's role in protecting violent police from civil damages is a blatant offense against constitutional sensibilities, but qualified immunity works a further, more insidious corruption of civil rights through an unlikely channel: its use to shield low-level state officials against suit for blatant constitutional violations. It may not seem a serious concern—and, indeed, it is not as grievous as police receiving immunity for killing innocent bystanders[5]—but as the defense is granted to bad-acting low-level officials one by one across the country, fundamental constitutional rights are slowly eroded. If this slow and steady series of civil rights violations by the government is allowed to continue, the doctrine of qualified immunity will become a near-impenetrable shield against liability for all but the most blatant abuses.

The Supreme Court was given the opportunity to address this over-broadening of qualified immunity in the 2021 case *Central Specialties, Inc. v. Large*, in which the Eighth Circuit Court of Appeals granted immunity to a county engineer who wrongfully detained two truck drivers knowing full well that he did not have the authority to do so.[6] The petitioners asked the Court to decide once and for all how the accused official acting outside his scope of given authority factors into the qualified immunity analysis.[7] However, the Court denied the petitioners' writ of certiorari and let the incorrectly decided Eighth Circuit decision stand.[8]

In doing so, the Court solidified the split already separating the Fifth and Eighth Circuits on the elusive "scope of authority" aspect of the qualified immunity inquiry, which requires consideration of a government employee's official duties in determining whether the defense applies.[9] Most high-profile qualified immunity cases involve police officers, who have broad discretionary authority allowing them to make quick decisions in the name of public safety.[10] However, when qualified immunity is considered for nonpolice government employees, the scope of their granted authority becomes critical to the inquiry.[11] In *Sweetin v. City of Texas City*,[12]

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[5] *See* Indisputable with Dr. Rashad Richey, *Police Shoot Complying Black Man and Six Bystanders*, YOUTUBE (Aug. 18, 2022), https://www.youtube.com/watch?v=31agayrIIZI [https://perma.cc/QG2Z-SLHP].

[6] 18 F.4th 989, 989 (8th Cir. 2021).

[7] *See* Petition for Writ of Certiorari, Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021) (No. 21-1552).

[8] *See* Order List, 598 U.S. 2 (Oct. 31, 2022).

[9] *See infra* Part III.

[10] For clear examples of acts within police officer authority, see *Fontana PD Policy Manual*, FONTANA POLICE DEP'T (Jan. 20, 2021), https://www.fontana.org/DocumentCenter/View/34149/100-Law-Enforcement-Authority [https://perma.cc/94QD-8GVF]. *See also* Juha-Matti Huhta et al., *Experience-Dependent Effects to Situational Awareness in Police Officers: An Eye Tracking Study*, INT'L J. ENV'T RSCH. & PUB. HEALTH (Apr. 21, 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9105864/ [https://perma.cc/5XPE-HVD3] ("Police work consists of evaluating and resolving complex situations, quite often under time pressure and uncertainty. Potentially violent encounters are especially demanding and require rapid assessment and effective judgement, decision-making, and actions.").

[11] *See infra* Part III.

[12] 48 F.4th 387 (5th Cir. 2022).

the Fifth Circuit Court of Appeals—a year after *Large* and shortly prior to the Supreme Court's denial of cert—considered a qualified immunity claim involving strikingly similar circumstances and determined that the bad-acting low-level official did *not* merit immunity because he acted outside his scope of authority.[13] These cases demonstrate the widely existing confusion among courts as to what components actually constitute the qualified immunity analysis, and how to evaluate them.

This Note analyzes the circuit split by comparing the reasoning in *Large* and *Sweetin* and argues that the court in the latter case engaged in the correct qualified immunity analysis by not only applying the correct standard of review, but also considering the proper scope of authority question.

Part I traces the history of qualified immunity and the doctrine's analytical changes over time, detailing the twofold test as it currently stands. Part II considers *Large* and *Sweetin*, comparing the courts' approaches to essentially similar scenarios and evaluating the differences in outcome. Part III addresses the Supreme Court's denial of the *Large* plaintiffs' petition for certiorari and explicates the "scope of authority" question the Court declined to address. Part IV breaks down the decision in *Large* and conducts the qualified immunity analysis anew, determining that the court misapplied the doctrine regardless of its failure to consider the scope of authority inquiry and concluding that had the court correctly followed the proper analysis (as demonstrated in *Sweetin*), the official in *Large* would have rightly been denied qualified immunity for committing an unconstitutional seizure.

Part V argues that courts justifying grants of qualified immunity to undeserving low-level officials through labeling each violated right as not clearly established will result in an over-broadening of the qualified immunity doctrine with potentially dire consequences for civil rights.[14]

Part VI suggests solutions to end this slippery slope, including a return to the order of analysis in *Saucier v. Katz*, an addition of a good-faith element to the existing standard, and the inclusion of the scope of authority analysis. Finally, Part VII employs recent scholarship to consider whether qualified immunity deserves to be bolstered by these solutions, or if it should be abandoned altogether as a doctrine too bereft of benefit.

I. HISTORY AND PARTICULARS OF THE QUALIFIED IMMUNITY DOCTRINE

What makes qualified immunity significant within constitutional law is that it is a judge-made doctrine which remains relatively unfixed, operating differently in

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[13] *See id.* at 390.

[14] *See infra* Section V.B. Courts, following the same reasoning as in *Large*, conclude that because local officials have never before violated citizens' constitutional rights, the right to not have your rights violated by that official has not been clearly established. As each official in these circumstances is granted immunity, due process rights are slowly eroded, and the qualified immunity doctrine loses both its effectiveness and its intended value.

different courts at different times, often to the detriment of plaintiffs seeking redress for violations of their constitutional rights.[15] Although it certainly exhibits inconsistencies, the doctrine indeed has a purpose.[16] Qualified immunity exists to shield government actors "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[17] In essence, the doctrine is meant to protect government officials from paying monetary damages when they have made mistakes in their professional duties resulting in a constitutional violation.[18] The doctrine is intended to encourage officials to act in unusual circumstances without fear of liability for a misstep.[19] Although it seems relatively straightforward, the doctrine is more complex (and perhaps overly so) in its origins and development.

Any history of qualified immunity must begin with 42 U.S.C. § 1983.[20] Section 1983 states that every state government official or employee who "under color of any statute, ordinance, regulation," etc., deprives any citizen of any "rights, privileges, or immunities secured by the Constitution and laws," will be liable to civil suit for their actions.[21] Section 1983 was originally enacted as part of the Ku Klux Klan Act, signed into law by President Ulysses S. Grant in 1871 to "protect[] Black Americans from white supremacist violence and murder in the postbellum South."[22] Although created to give Black citizens a cause of action for bringing suit against government actors who violate their civil rights,[23] § 1983 was later limited by a judge-made defense which disproportionally affects Black Americans: the doctrine of qualified immunity.[24]

Although qualified immunity was once justified as resting on historical standards of a good-faith defense,[25] the Supreme Court abandoned this shaky foundation which was simply "read into the statute"[26] and provided a definitive basis for the

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[15] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 46–47 (2017).

[16] *See id.*

[17] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[18] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[19] *See Harlow*, 457 U.S. at 819.

[20] 42 U.S.C. § 1983. Although § 1983 only provides protection against state and local actors, the 1971 Supreme Court case *Bivens* provides the doctrinal equivalent for federal actors. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 388 (1971).

[21] *Bivens*, 403 U.S. at 388.

[22] Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU D.C. (Apr. 20, 2021), https://www.acludc.org/en/news/happy-150th-anniversary-section-1983 [https://perma.cc/4PYB-ABNW].

[23] *Id.*

[24] *See* Baude, *supra* note 3, at 52–53.

[25] *See id.* at 51.

[26] *Id.* at 52.

doctrine in its 1982 case *Harlow v. Fitzgerald*.[27] There the Court set down the first test for granting government officials qualified immunity, holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[28] The Court designed the test to be "essentially objective," providing "no license to lawless conduct" while still enabling an official to take required action where "clearly established rights are not implicated" for the benefit of the public interest.[29]

The 2001 case *Saucier v. Katz* laid down the now familiar two-prong test for qualified immunity.[30] The inquiry mandated that courts must *first* consider whether the government official violated the complainant's constitutional right, and *then* must determine whether the violated right was "clearly established" in that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" in the circumstances he actually confronted.[31]

In *Saucier*, the Court applied its test by first considering whether Saucier, a military police officer, used excessive force against Katz when he subjected Katz to a "gratuitously violent shove" when placing him in a military van, thereby violating Katz's Fourth Amendment right against unreasonable search and seizure.[32] After assuming that a constitutional violation did in fact occur (because the Supreme Court could determine only the appropriateness of granting immunity), the Court went on to apply the second prong of the analysis, and determined that "[a] reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene . . . was within the bounds of appropriate police responses."[33] Therefore, the Court concluded that since "neither [Katz] nor the Court of Appeals ha[d] identified any case demonstrating a clearly established rule prohibiting [Saucier] from acting as he did [in these circumstances]," and that a reasonable officer in Saucier's position would not have known he was violating a constitutional right, "[Saucier] was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings."[34]

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[27] *See* Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 555 (2020); Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982). For a discussion of how qualified immunity disproportionately affects the Black community, see *Groups Urge Senate Leadership to End Qualified Immunity*, HUM. RTS. WATCH (May 10, 2021, 6:30 PM), https://www.hrw.org/news/2021/05/10/groups-urge-senate-leadership-end-qualified-immunity [https://perma.cc/QC3C-C42S] ("When applied to instances of police misconduct and abuse in particular, qualified immunity disproportionately harms Black people, who are more likely to be stopped without cause and killed by police than white people.").

[28] *Harlow*, 457 U.S. at 801.

[29] *Id.* at 819.

[30] 533 U.S. 194 (2001).

[31] *Id.* at 202.

[32] *Id.* at 197–98, 208.

[33] *Id.* at 207–08.

[34] *Id.* at 209.

This sequence of inquiry applied and declared mandatory in *Saucier* was made discretionary in the later case *Pearson v. Callahan*;[35] from then on, a court could first consider whether the right invoked by the complainant was clearly established before addressing whether the right was trespassed upon.[36] This broadening of the qualified immunity analysis has led to inconsistencies in § 1983 cases, with courts across the twelve circuits varying widely on whether to address the constitutional question or ignore it altogether.[37] In their article *A Qualified Defense of Qualified Immunity*, Professors Aaron Nielson and Christopher Walker reviewed every circuit court decision in qualified immunity cases to determine the effects of the *Pearson* test on the doctrine.[38] Their study yielded significant outcomes:

> The circuit courts denied qualified immunity 28% of the time by finding that the constitutional right was clearly established at the time of the violation. By contrast, 27% of the time the courts opted not to reach the constitutional question, declaring that any right was not clearly established. Of the remaining claims (45%), the courts exercised Pearson discretion to reach the constitutional question. In that subset of cases, 92% of the time the circuit courts found no constitutional violation, with courts recognizing that a constitutional right had not been previously established in only 8% of cases.[39]

These inconsistencies in qualified immunity created by *Pearson*'s holding are significant not just for the continuity of legal doctrine, but for the people who seek restitution for the illegal actions of the government. In recent years, qualified immunity has come to the forefront of American minds with the hundreds of incidents of illegal police action, particularly against the Black community.[40] These and all other victims whose rights have been violated deserve their legal avenue of civil suit to be clearly defined, not subject to the whims of the courts who hear their cases. There should be some level of consistency in § 1983 litigation, with similarly situated government officials in similar situations either receiving or being denied immunity with a reliability of outcome across cases.

This atmosphere of inconsistency in qualified immunity doctrine is the background of the two competing cases highlighted in this Note, in which two state

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[35] 555 U.S. 223, 224 (2009).

[36] *See id.* at 236.

[37] *See* Zach Lass, Lowe v. Raemisch*: Lowering the Bar of the Qualified Immunity Defense*, 96 DENV. L. REV. 177, 186 (2018); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117–18 (2009).

[38] Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1882 (2018).

[39] *Id.* at 1882–83.

[40] *See* HUM. RTS. WATCH, *supra* note 27.

officials in considerably similar circumstances deprived the complainants of their constitutional rights, with one official receiving qualified immunity for his actions while the other is denied, the difference in outcome based almost solely on the different circuits which heard each case.[41]

II. *SWEETIN V. CITY OF TEXAS CITY* AND *CENTRAL SPECIALTIES, INC. V. LARGE*: WHERE THE CIRCUITS SPLIT

As explained in Part I of this Note, there is a very specific test courts must use in determining whether to grant qualified immunity.[42] In its 2022 case *Sweetin v. City of Texas City*, the Fifth Circuit Court of Appeals properly applied the test and held that a low-level county official was not entitled to qualified immunity, because his actions were "not within scope of his discretionary authority."[43] One year earlier in *Central Specialties, Inc. v. Large*, the Eighth Circuit Court of Appeals failed to apply the correct "discretionary authority" standard and granted immunity to the county engineer who knowingly acted outside his delegated powers.[44] In *Large*, the Eight Circuit should have followed its established precedent, properly considered the engineer's scope of authority, and denied qualified immunity. Failing to do so widened the already gaping circuit split and fostered further confusion as to the true nature of qualified immunity.

A. Sweetin*: The Proper Inquiry*

Sweetin concerned the actions of Wendall Wylie, a captain in the Texas City Fire Department.[45] He was designated the "EMS Administrator," a position in which he issued permits to private-sector, nonemergency ambulances and investigated whether they met state and local requirements.[46] His authority further extended to developing "'such reasonable regulations subject to the approval of the City Commission as may be necessary for the proper enforcement and implementation' of the City's rules about ambulance services."[47] The plaintiffs in the case were Zane Sweetin and Michael Stefek, emergency medical technicians (EMTs) employed by Windsor, a private ambulance company.[48] On the day in question, the EMTs had

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[41] *See* Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021); Sweetin v. City of Texas City, 48 F.4th 387 (5th Cir. 2022).

[42] *See supra* Part I.

[43] 48 F.4th at 388.

[44] 18 F.4th at 989.

[45] 48 F.4th at 390.

[46] *Id.*

[47] *Id.*

[48] *Id.*

driven into Texas City, but were not aware that Windsor no longer had a permit thereby making their entrance a city ordinance violation.[49]

While Sweetin and Stefek were in a nursing home with a patient, EMS Administrator Wylie drove by the parking lot and noticed the Windsor ambulance parked outside the home.[50] Knowing that Windsor no longer had a valid permit, he pulled in to "investigate" by taking pictures of the ambulance.[51] After the EMTs loaded their patient into the ambulance, Wylie pulled up and asked them some questions, which Sweetin and Stefek refused to answer because of patient confidentiality.[52] Wylie said that he would allow them to complete their scheduled trip before talking with them, and followed them to their destination, a clinic in another city.[53] En route, Wylie called the Fire Marshal and asked him to meet them at the clinic to issue citations to Sweetin and Stefek.[54] Once they arrived, the EMTs brought their patient into the clinic and Wylie parked in a spot near the front of the ambulance.[55]

After the EMTs returned to the ambulance and began to load the stretcher, Wylie approached them and stated: "You are detained. You are not allowed to leave. You must wait right here."[56] Sweetin and Stefek were surprised to be confronted by "a man in a paramedic's uniform, driving a Texas City Fire Department vehicle, detaining them in a city other than Texas City."[57] They re-entered their ambulance to decide whether they should leave; they knew Wylie was not a police officer but were worried that he might nevertheless have the authority to detain them.[58]

Sweetin and Stefek decided to stay and submit to Wylie's apparent authority; during the wait, Stefek called their supervisor at Windsor and attempted to have him speak with Wylie, but Wylie told them to "get the F back into the vehicle" and wait for the Fire Marshal.[59] When the Marshal arrived, he asked the EMTs some questions, issued their citations, and allowed them to leave.[60]

After these events, Sweetin and Stefek sued Wylie and the City under 42 U.S.C. § 1983, alleging that Wylie violated the Fourth Amendment by unreasonably seizing them.[61] Wylie, however, contended that the EMTs were never seized; he said Sweetin and Stefek were "free to leave whenever they wanted," and claimed that he merely identified himself as the EMS supervisor and sat in his vehicle while they

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 390–91.
[58] *Id.* at 391.
[59] *Id.*
[60] *Id.*
[61] *Id.*

waited for the Marshal, never displaying a weapon or using physical force.[62] The District Court avoided the question and granted summary judgment for Wylie, holding that regardless of any seizure, the law was not clearly established enough to deny Wylie qualified immunity.[63]

The Court of Appeals began its review with the usual reiteration of the test for qualified immunity, but honed in on the fact that the government official must first establish "that his conduct was within the scope of his discretionary authority."[64] This threshold requirement, the court explained, "often gets overlooked: To even get into the qualified-immunity framework, the government official must 'satisfy his burden of establishing that the challenged conduct was within the scope of his discretionary authority.'"[65] To determine this question, courts must look to state law.[66]

Here, Wylie was obviously acting outside the scope of his authority because "state law does not give a permit officer the authority to conduct stops of any kind";[67] in fact, "Texas law criminalizes a public official's act of 'intentionally subject[ing]' a person to 'seizure' 'that he knows is unlawful.'"[68] Wylie admitted that he knew he had no authority to stop the EMTs but did so anyway, thereby subjecting them to seizure and forfeiting qualified immunity.[69]

The court's decision rightly focused on the scope of authority prong of the qualified immunity test.[70] After determining that Wylie had no authority, implied or explicit, to conduct stops of any kind, the court properly refused to consider the rest of the inquiry, demonstrating that justice would not be served by granting immunity to an unmeritorious government official.[71]

B. Large

The plaintiff in *Large* was Central Specialties, Inc. (CSI), a road and highway construction company which had been awarded a contract by the Minnesota Department of Transportation (MnDOT) to complete work on one of the state highways.[72] CSI was responsible for proposing certain roads to be designated haul roads to be used by their trucks to haul away materials during the road work;[73] however, CSI later informed MnDOT and the Mahnomen County Engineer, Jonathan Large

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 392 (citing Cherry Knoll, LLC v. Jones, 922 F.3d 309, 318 (5th Cir. 2019)).
[66] *Id.*
[67] *Id.*
[68] *Id.* (citing TEX. PENAL CODE § 39.03).
[69] *Id.*
[70] *See supra* Part II.
[71] *See id.*
[72] 18 F.4th 989, 993 (8th Cir. 2021).
[73] *Id.*

(whose position made him responsible for maintaining all county roads) that they would be using two non-haul roads as return routes for their empty trucks.[74] Large objected, and informed CSI that if they proceeded to use the undesignated roads it would be between CSI and the local road authority.[75]

On the morning of the incident in question, Mahnomen County approved a weight restriction on one of the roads CSI had decided to use lowering it from "a five-ton axle weight to a five-ton total weight limit" and posted a sign bearing the new weight limit before noon.[76] Large asked an MnDOT official to inform CSI, which he did by email at 1:19 PM; less than an hour later, Large observed two trucks driving on the road with the recently changed weight limit.[77] Large could not tell if the trucks were loaded or unloaded but assumed that they would exceed the weight limit either way.[78] Large blocked the road with his truck and waved for the drivers to stop, which they did.[79]

Large called the local sheriff's office, "which told him that it did not have the capacity to handle the situation."[80] He then called the White Earth Tribal Police, who came to the scene but decided they did not have the authority to give the drivers citations.[81] In the end, Large learned that the state police could weigh and give citations to the truckers; a trooper cited one of the two trucks for exceeding the posted weight limit.[82] Before finally being allowed to leave, the two drivers were stopped for over three hours, during which one driver witnessed signs along the road being changed while the other watched multiple large trucks drive by while Large did nothing to stop them.[83]

CSI brought a claim against Large under the Fourth and Fourteenth Amendments, alleging specifically that Large "violated the Fourth Amendment by exceeding the scope of his authority and detaining the CSI trucks for roughly three hours."[84] Large moved for summary judgment, and the district court granted him qualified immunity.[85] CSI appealed, arguing that the district court ignored recorded evidence that Large "intentionally violated CSI's rights."[86]

In reviewing the grant of qualified immunity, the Eighth Circuit Court of Appeals began—as did the Fifth Circuit in *Sweetin*—with reiterating the test for

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[74] *Id.* at 994.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 994–95.
[84] *Id.* at 995.
[85] *Id.*
[86] *Id.* at 996.

qualified immunity: "a two-prong framework, first considering 'whether the plaintiff has stated a plausible claim for violation of a constitutional or statutory right,' and second, 'whether the right was clearly established at the time of the alleged infraction.'"[87] From here, however, the court's approach dramatically departed from that in *Sweetin*, completely ignoring the "threshold requirement" that the government official must "satisfy his burden of establishing that the challenged conduct was within the scope of his discretionary authority."[88]

Instead, the court charged on to the "clearly established" prong of the analysis and stated that CSI simply had not presented a case that clearly established the "violative nature of *particular* conduct . . . ."[89] The court continued, declaring:

> Under the unique circumstances of this case, we cannot say that it was clearly established that Large, a county engineer tasked with oversight of all county roads, could not prevent trucks that he had reason to believe were operating above the posted weight limit from passing over and damaging the roadway or could not call law enforcement to investigate compliance with the new, reduced weight restrictions.[90]

The court continued on to conclude that no seizure had even taken place, because the drivers could have just turned around and left.[91] Thus, the court held that the grant of qualified immunity was justified, affirming the judgment of the district court.[92]

Judge Grasz, however, rightfully disagreed with the court's decision, explaining in his partial concurrence that the majority's holding "runs counter to precedent dictating qualified immunity is not available in this context."[93] Indeed, he explains, "the holding implicitly cloaks . . . officials [like Large] with near-absolute immunity for their actions since there are no existing cases circumscribing or defining the scope of this newly discovered, unwritten law enforcement authority."[94]

He continued on to explicitly state what the majority refused to acknowledge: that in *Johnson v. Phillips*, the Eighth Circuit officially "adopted the rationale in [of the Fourth Circuit] in *In re Allen*" and established the threshold requirement that the official must be acting within "the scope of his discretionary authority . . . to claim

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[87] *Id.* (quoting Kulkay v. Roy, 847 F.3d 637, 642 (8th Cir. 2017)).

[88] Sweetin v. City of Texas City, 48 F.4th 387, 392 (5th Cir. 2022) (citing Cherry Knoll, LLC v. Jones, 922 F.3d 309, 318 (5th Cir. 2019)).

[89] *Large*, 18 F.4th at 996 (quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015)).

[90] *Id.* at 997.

[91] *Id.*

[92] *Id.* at 1000.

[93] *Id.* at 1000–01 (Grasz, J., concurring in part and dissenting in part).

[94] *Id.*

qualified immunity."[95] In almost the exact same process as the judges in *Sweetin*—and as prescribed by the Eighth Circuit's own adopted precedent—Judge Grasz looked to the state law to determine whether the official's actions were within his given authority, and determined that under Minnesota law, Large as county engineer was entitled to "impose weight and load restrictions on any highway under [his] jurisdiction," but was in no way entitled to make arrests or seizures.[96] In fact, the Minnesota Supreme Court had previously held that even special deputies were not peace officers by Minnesota law and therefore were not entitled to make investigative stops.[97]

This, Judge Grasz concluded, was the inquiry the majority should have conducted, and through which they should have decided that Large—as a county engineer with no authority to make investigative stops—was not even entitled to claim qualified immunity for his actions.[98]

III. THE SCOPE OF AUTHORITY QUESTION AND CSI'S PETITION FOR CERTIORARI

This 'scope of authority' analysis Judge Grasz conducted is *exactly* what the Fifth Circuit Court of Appeals used to swiftly evaluate and reject the claim of qualified immunity in *Sweetin v. City of Texas City*, a case with facts so similar to *Central Specialties, Inc. v. Large* that it is striking to consider.[99] In both cases, a low-level county official charged with a responsibility completely unrelated to law enforcement (permitting ambulances and imposing road weight restrictions, respectively) made an investigatory stop, detaining drivers by blocking their vehicles from leaving.[100]

In both cases, the official not only acted outside the scope of his authority by exercising the powers of a law enforcement officer, but also did so *knowing full well that he did not have the authority to conduct stops*.[101] Although both officers undoubtedly acted impermissibly,[102] the Eighth Circuit refused to apply the scope of authority inquiry in its decision, granting an undeserving actor qualified immunity and widening the existing circuit split.[103]

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[95] *Id.* at 1001 (quoting Johnson v. Phillips, 664 F.3d 232, 236 (8th Cir. 2011)).

[96] *Id.* at 1002 (citing MINN. STAT. § 163.02 subdiv. 3 (2022)).

[97] *Id.* (describing the facts of *State v. Horner*, 617 N.W.2d 789, 793–94 (Minn. 2000)). Although the case cited refers to water patrol officers, Judge Grasz argued (rightfully) that if "a water patrol officer authorized to enforce water safety laws does not have authority to make an investigatory stop under Minnesota law, then surely a county engineer does not." *Id.*

[98] *Id.* at 1003.

[99] *Compare* Sweetin v. City of Texas City, F.4th 387, 391–92 (5th Cir. 2022), *with Large*, 18 F.4th at 1001–03 (Grasz, J., concurring in part and dissenting in part).

[100] *See Sweetin*, 48 F.4th at 390–91; *Large*, 18 F.4th at 994–95.

[101] *See Sweetin*, 48 F.4th at 392 ("Wylie admits he knew he had no authority to stop them."); *Large*, 18 F.4th at 997 ("[I]n his deposition, Large acknowledged that he did not have the authority to perform a traffic stop.").

[102] *See Sweetin*, 48 F.4th at 392.

[103] *Large*, 18 F.4th at 997.

On June 8th, 2021, CSI petitioned the Supreme Court for certiorari to determine this very issue.[104] The question presented in its petition was "[w]hether, before proceeding to the qualified immunity analysis, courts must determine that a government official was acting within the scope of his authority."[105] On October 31, 2022, the Supreme Court denied CSI's Petition for Certiorari and provided no opinion along with the rejection, thereby denying American courts any clarification as to whether there is a threshold requirement in the qualified immunity analysis for an official acting outside the scope of his authority.[106]

This is undoubtedly a troubling outcome, as the question has been unresolved for years and has become a major circuit split.[107] In its petition, CSI argued that the Court must resolve the split because of its obfuscation of qualified immunity doctrine and its determinativeness in the case.[108] Although doubtlessly correct, what is even more troubling is the point presented in the two amicus curiae briefs filed with the petition: that the decision in *Large* fundamentally contradicts the underlying reasoning in *Harlow v. Fitzgerald*, the 1982 case establishing qualified immunity, both by granting immunity to an undeserving official and by refusing to apply the scope of authority inquiry.[109]

The issues presented by the case are surely significant matters requiring clarification not only in the interests of justice for CSI and constitutional fidelity, but also for the survival (or downfall) of the doctrine itself in a time of pervasive hostility toward qualified immunity.[110] However, what is especially distressing in the Supreme

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[104] *See generally* Petition for Writ of Certiorari, *supra* note 7.

[105] *Id.*

[106] *See* Order List, *supra* note 8.

[107] *See* Pat Fackrell, *A Call to Clarify The "Scope of Authority" Question of Qualified Immunity*, 68 CLEV. ST. L. REV. 1, 11–18 (2019) (explaining that at the time of the article, the Fifth and Tenth Circuits did not require an official to demonstrate that his acts were within his scope of authority; the Second, Sixth, and Eleventh Circuits required that an official cite state law affirmatively giving him power to commit his specific actions; and the Fourth, Eighth, and Ninth Circuits required an official to demonstrate that his actions were within his clear scope of authority). This survey of federal circuit precedent is striking: it demonstrates clearly that within three years of its publication, the Fifth and Eighth Circuits reversed direction in their qualified immunity cases, the Fifth now requiring a scope of authority analysis and the Eighth departing from precedent and refusing to apply the threshold inquiry.

[108] *See* Petition for Writ of Certiorari, *supra* note 7, at 20 ("Had the case below been brought in any of the seven circuits that require the scope-of-authority inquiry, Large would not have been granted qualified immunity.").

[109] *See* Brief of Peter H. Schuck as Amicus Curiae Supporting Petitioner at 3–12, Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021) (No. 21-1552); Brief of Professor Brian Pérez-Daple and The Law Enforcement Action Partnership as Amici Curiae Supporting the Petitioner at 5–16, Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021) (No. 21-1552); Harlow v. Fitzgerald, 457 U.S. 800, 814–20 (1982).

[110] *See, e.g.*, Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, 901 POL'Y ANALYSIS CATO INST., Sept. 14, 2020, at 6, https://www.cato.org/sites/cato

Court's denial of certiorari is *not* that American courts and citizens alike were denied once more a coherent doctrine of qualified immunity, but that the Court's denial implicitly supported the blatantly incorrect legal reasoning in Large's reply brief.[111] There, Large argued that in order for the question of a scope of authority requirement to be decided by the Supreme Court, it must have been "presented" and "passed on" by the Court of Appeals.[112] This, however, is fundamentally incorrect.

The "threshold requirement" that the government official claiming immunity must demonstrate that his acts were within his statutory authority is not an issue to be raised, but in the Eighth Circuit's own words, it is "another aspect of qualified-immunity analysis."[113] Indeed, the Supreme Court itself explained that "[g]overnment officials are entitled to qualified immunity with respect to '*discretionary functions*' performed in their official capacities," not only demonstrating that the scope of authority requirement is part and parcel of the qualified immunity analysis, but also providing a justification for the scope of authority inquiry.[114]

It is, therefore, concerning that the Supreme Court would deny CSI's petition for certiorari in the face of such a negatively influential circuit split with such a crucial question at issue. CSI and its amici are correct: the refusal to consider the question presented will continue the arguably disastrous mess that is current qualified immunity doctrine. However, the Eighth Circuit's refusal to address the scope of authority issue is not the only fundamental misapplication of law in *Large*.

IV. THE ENTIRELY FLAWED APPLICATION OF THE QUALIFIED IMMUNITY ANALYSIS IN *LARGE*

A. The Court of Appeals Misapplied the Standard of Review and Falsely Determined that Large's Detention of the CSI Trucks Was Not an Unlawful Seizure, and Therefore Not a Constitutional Violation

In some sense, it may not even matter that the Eighth Circuit completely disregarded the fundamental scope of authority requirement in *Central Specialties, Inc. v. Large*. Even if the scope of authority inquiry did not exist, under a *proper* application of the qualified immunity analysis Large still would not have merited immunity for one simple reason: the Eighth Circuit misapplied the standard of

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.org/files/2020-09/pa-901-update.pdf [https://perma.cc/A53A-GAZB]; BEN COHEN, ABOVE THE LAW: HOW "QUALIFIED IMMUNITY" PROTECTS VIOLENT POLICE (2021); Andrea Januta et al., *Rooted in Racism*, REUTERS INVESTIGATES, https://www.reuters.com/investigates/special-report/usa-police-immunity-history/ [https://perma.cc/7GJH-D2LM].

[111] *See generally* Brief in Opposition, Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021) (No. 21-1552).

[112] *Id.* at 15.

[113] Johnson v. Phillips, 664 F.3d 232 (8th Cir. 2011); Sweetin v. City of Texas City, 48 F.4th 387, 392 (5th Cir. 2022); *see also* Hawkins v. Holloway, 316 F.3d 777, 788 (8th Cir. 2003).

[114] Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017).

review, and falsely concluded that there was no seizure.[115] In the qualified immunity analysis, courts are required to determine "whether the facts that [the] plaintiff has alleged or shown make out a violation of a constitutional right."[116] In this case, the alleged constitutional violation is an illegal seizure, the existence of which is "a pure question of law, [which the court] review[s] de novo."[117]

Because *Large* is an appeal challenging a grant of summary judgment, the court must construe the facts in favor of *the nonmoving party* (CSI).[118] Indeed, as the Court of Appeals explained in its prior case *Jones v. McNeese*, each court "must take a careful look at the record, determine which facts are genuinely disputed, and then view those facts in a light most favorable to the non-moving party as long as those facts are not so 'blatantly contradicted by the record . . . that no reasonable jury could believe [them].'"[119] By dismissing as ridiculous CSI's claim that Large seized them, the court incorrectly decided the issue of whether it was a seizure; the facts should have been construed in favor of the nonmoving party, as Judge Grasz mentions in his dissent.[120]

1. Large Violated the CSI Drivers' Constitutional Right to Be Free from Unlawful Seizure

By blocking the CSI truckers from continuing down the road, Large committed an unlawful seizure.[121] The Supreme Court explained in its case *Whren v. United States* that "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]."[122] In 2015, the Supreme Court of Minnesota stated that the "blocking of a vehicle may constitute a seizure because that sort of conduct might indicate to a reasonable person that she is not free to leave."[123] The court clarified, furthermore, that a seizure definitely

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[115] *See* Cent. Specialties, Inc. v. Large, 18 F.4th 989, 997 (8th Cir. 2021).

[116] Pearson v. Callahan, 555 U.S. 223, 232 (2009).

[117] United States v. Va Lerie, 424 F.3d 694, 700 (8th Cir. 2005); 63C AM. JURIS. 2d Public Officers and Employees § 389 ("The question of qualified immunity is one of law for the court.").

[118] Masson v. New Yorker Mag., Inc., 501 U.S. 496, 520 (1991) ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party.").

[119] 675 F.3d 1158, 1161–62 (8th Cir. 2012) (quoting O'Neil v. City of Iowa City, 496 F.3d 915, 917 (8th Cir. 2007)).

[120] *See Large*, 18 F.4th at 1003 n.3 (Grasz, J., concurring in part and dissenting in part) ("We are supposed to resolve all facts in favor of the nonmoving party. . . . Viewing the facts in the light most favorable to CSI, this was in fact a stop and detention.").

[121] *See* Whren v. United States, 517 U.S. 806, 809–10 (1996).

[122] *Id.*

[123] Illi v. Comm'r of Pub. Safety, 873 N.W.2d 149, 152 (Minn. Ct. App. 2015) (quoting State v. Sanger, 420 N.W.2d 241, 243 (Minn. Ct. App. 1988)).

occurs "*when the officer actually positions his squad car so as to prevent the other vehicle from leaving*."[124] It is clear that the drivers were indeed blocked by Large, and evident that they felt that they were not free to leave; as explained by Judge Grasz, "The driver of the first truck stopped by Large asserted that 'Large used his vehicle as a roadblock to block CSI's truck for [sic] continuing.'"[125] "After the driver stopped the truck, Large called law enforcement and told the driver she 'had to wait until law enforcement arrived.'"[126]

Therefore, by blocking the trucks from continuing down the road and leading the drivers to believe that they were not free to leave, Large committed an unlawful seizure and thereby violated a constitutional right.[127]

2. The Court of Appeals Incorrectly Determined Whether a Seizure Occurred

In determining that Large had not seized the trucks, the Court of Appeals focused solely on the fact that Large had "motioned for the CSI drivers to pull over and called law enforcement for assistance."[128] The court concluded that because "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," no seizure took place.[129] As described above, however, Supreme Court precedent and Minnesota law state otherwise.[130]

As to the issue of whether Large blocked their trucks "so as to prevent the other vehicle from leaving," the Court of Appeals had a quick retort: "there is no evidence in the record that the CSI drivers were not free to simply turn around and drive away before law enforcement arrived."[131] This, however, would not have been easily done. In a video about the case made by the Institute of Justice—which represented CSI—the roads and trucks in question are clearly shown; with the large size of the trucks and the tightness of the county roads, it is unlikely that the trucks could have turned around, at least not "simply," as the court assumes.[132]

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[124] *Id.*

[125] *Large*, 18 F.4th at 1000–01 n.3 (quoting Declaration of Peggy Strommen, ¶ 1, Cent. Specialties, Inc. v. Large, 18 F.4th 989 (8th Cir. 2021) (No. 21-1552), ECF No. 74).

[126] *Id.* at 1001 n.3.

[127] *Id.*; *see Whren*, 517 U.S. at 809–10; *Illi*, 873 N.W.2d at 152.

[128] *Large*, 18 F.4th at 997.

[129] *Id.* at 997.

[130] *Whren*, 517 U.S. at 809–10; *Illi*, 873 N.W.2d at 152.

[131] *Illi*, 873 N.W.2d at 152; *Large*, 18 F.4th at 997.

[132] *See* Institute for Justice, *Government Official with NO Police Authority Detained Drivers, Granted Qualified Immunity*, YOUTUBE (June 8, 2022), https://www.youtube.com/watch?v=sI4Y2s9C69s [https://perma.cc/8RPA-2FXT]. In his opinion, Judge Grasz "put aside" the question of whether they could turn around, because the issue should not even have had to be considered. *Large*, 18 F.4th at 1000–01 n.3 (Grasz, J., concurring in part and dissenting in part).

It is actually doubtful that the trucks could have turned around, and in fact, *it should not even have mattered*. The facts should have been construed in favor of CSI *as a matter of law*. As Judge Grasz forcefully states, "the court's characterization of the encounter is *impermissible* at the summary judgment stage."[133] The majority should not have even had to question whether the trucks could have turned around. Instead of determining that no seizure took place, the court should have correctly applied the standard of review, followed the precedent of the Minnesota Supreme Court, and determined that given all the facts, the CSI drivers were subject to a deprivation of their rights.[134]

B. Large Violated a Clearly Established Right and Was Not Entitled to Qualified Immunity

1. Because He Committed an Unlawful Seizure and Because Every Similarly Situated Official in His Situation Would Know That the Detention Was Unlawful, Large Violated a Clearly Established Right

By blocking the trucks with his vehicle and preventing their forward movement, Large seized the CSI truckers and thereby violated a clearly established right: the freedom from unreasonable search and seizure guaranteed by the Fourth Amendment.[135] As previously explained, "[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[136] The Supreme Court has repeatedly held that the clearly established right should not be "defined at a high level of generality" but should be "particularized to the facts of the case."[137] However, in *William v. Jackson*, the Eighth Circuit better enunciated the standard:

> We have often stated that "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." We have never held, however, that bright lines only exist where facts as alleged are identical to what a court has previously addressed. Rather, "[t]he Supreme Court has clearly stated

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[133] *Large*, 18 F.4th at 1000 n.3.

[134] This is exactly what the Fifth Circuit did in *Sweetin*. Granted, the court did find the scope of authority question to be dispositive, but the resolution of that inquiry went toward the question of the seizure's reasonableness; regardless, the court decided that the ambulance drivers were indeed seized when Wylie prevented them from leaving by blocking them with his truck. Sweetin v. City of Texas City, 48 F.4th 387, 392 (5th Cir. 2022).

[135] *See supra* Section IV.A.1; U.S. CONST. amend. IV.

[136] *Large*, 18 F.4th at 998 (quoting Morgan v. Robinson, 920 F.3d 521, 523 (8th Cir. 2019)).

[137] White v. Pauly, 580 U.S. 73, 79 (2017); Mullenix v. Luna, 577 U.S. 7, 12 (2015).

> that in establishing qualified immunity, the test must be applied at a level of specificity that approximates the actual circumstances of the case."[138]

There is one more requirement in the qualified immunity analysis which must be met: the reasonableness of the acting official.[139] The "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a *reasonable* officer that his conduct was unlawful in the situation he confronted."[140] The inquiry entails not the abstract consideration of what the Platonic "reasonable prison officials" would think, but rather what a reasonable official *in these circumstances* would believe to be lawful.[141]

An official in these circumstances would be another county engineer, just like Large (just as the reasonable official in cases involving a police officer would be another police officer). The key question, then, becomes would a reasonable county engineer in Large's exact circumstances believe that detaining two truck drivers by blocking their path would be lawful? Obviously not, for two crucial reasons: first, Minnesota state law does not give county engineers authority to conduct traffic stops, so detaining any drivers is inherently unlawful;[142] second, *Large knew that what he was doing was unlawful*.[143]

Minnesota state law states that a county engineer "shall make and prepare all surveys, estimates, plans, and specifications which are required of the engineer" and "may impose weight and load restrictions on any highway under its jurisdiction."[144] Nowhere in this section does it give county engineers to conduct traffic stops.[145]

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[138] Williams v. Jackson, 600 F.3d 1007, 1013–14 (8th Cir. 2010) (first quoting Littrell v. Franklin, 388 F.3d 578, 582 (8th Cir. 2004); and then quoting Engleman v. Murray, 546 F.3d 944, 949 n.4 (8th Cir. 2008)).

[139] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[140] Saucier v. Katz, 533 U.S. 194, 202 (2001).

[141] *See* Landrum v. Gomez, 37 F.3d 1505 (9th Cir. 1994) ("The pertinent inquiry here is whether reasonable prison officials *in these circumstances* would have believed that their conduct was lawful."); McDaniel v. Woodard, 886 F.2d 311, 313 (11th Cir. 1989) ("In reviewing a qualified immunity claim we . . . determine the purely legal issue of whether those facts show a violation of clearly established rights of which a reasonable official in defendant's circumstances would have known."); Thompson v. Upshur County, 245 F.3d 447, 457 (5th Cir. 2001) ("The defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.").

[142] *See* MINN. STAT. § 163.07 (2022).

[143] *See* Cent. Specialties, Inc. v. Large, 18 F.4th 989, 997 (8th Cir. 2021).

[144] MINN. STAT. §§ 163.07 subdiv. 1, 163.02 subdiv. 3.

[145] *Id.* Judge Grasz also raised the question of whether Large's actions were lawful under Minnesota statutes; however, he did so in determining whether Large acted within the scope of his authority.

This is contrary to Large's own claim of his authority, as described by the majority: "Large acknowledged that he did not have the authority to perform a traffic stop, stating instead that his authority as County Engineer allowed him to close or control traffic on the highway in question."[146]

This is obviously untrue: Large did not have that authority under Minnesota law.[147] However, regardless of Large's actual knowledge, a reasonable county engineer in Large's circumstance would presumably know the state law and be aware that they did not have the authority to stop any vehicles, even in the interest of maintaining the integrity of county roads.[148] Therefore, a reasonable official in Large's place would know such a detention "was unlawful in the situation he confronted," and could not claim qualified immunity for his actions.[149]

2. The Court of Appeals Misapplied the "Clearly Established Right Test" and Incorrectly Determined That the Right in *Large* Was Not Clearly Established

As explained above, "[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right,'"[150] and the test for determining whether a right is clearly established "must be applied at a level of specificity that approximates the actual circumstances of the case."[151] The court of appeals, on the other hand, misapplies the test in *Large*, falsely believing that the *exact same* situation must have occurred before for the right to be clearly established; the court explains:

> Under the unique circumstances of this case, we cannot say that it was clearly established that Large, a county engineer tasked with oversight of all county roads, could not prevent trucks that he had reason to believe were operating above the posted weight limit from passing over and damaging the roadway or could not call law enforcement to investigate compliance with the new, reduced weight restrictions.[152]

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[146] *Large*, 18 F.4th 989 at 997.

[147] MINN. STAT. § 163.07.

[148] *See id.*

[149] Saucier v. Katz, 533 U.S. 194, 202 (2001). An actual *law enforcement official* in Large's place believed his actions to be unlawful, as evidenced by the fact that the State Police officers who initially cited the drivers apparently dropped the charges the next day. Institute for Justice, *supra* note 132.

[150] *Large*, 18 F.4th at 996 (quoting Morgan v. Robinson, 920 F.3d 521, 523 (8th Cir. 2019)).

[151] Williams v. Jackson, 600 F.3d 1007, 1013–14 (8th Cir. 2010) (quoting Engleman v. Murray, 546 F.3d 944, 949 n.4 (8th Cir. 2008)).

[152] *Large*, 18 F.4th at 997.

This application of the test falsely assumed that the right which Large violated was some unclear entitlement to not be pulled over by a county engineer for violating a road weight restriction—but that was not the case.[153] The right at issue is not only clearly established, but also truly fundamental: the right not to be unreasonably searched or seized, as provided by both the Fourth Amendment to the United States Constitution and the Minnesota State Constitution.[154]

V. NOT GRANTING CERTIORARI IN *LARGE*: A MISSED OPPORTUNITY AND THE BEGINNING OF A SLIPPERY SLOPE

A. Missed Opportunity

Having walked through the proper qualified immunity analysis, it becomes abundantly clear that the Eighth Circuit Court of Appeals bungled the analysis in *Central Specialties, Inc. v. Large*, failing even to properly apply the correct standard of review.[155] Although it led to a distressing miscarriage of justice, the process and outcome could have had a positive result—if only the Supreme Court had granted certiorari.[156]

Despite Large's failed arguments to the contrary, the case was the perfect opportunity to bring the scope of authority issue to a final conclusion.[157] *Sweetin v. City of Texas City* demonstrated how efficiently the court in *Large* could have addressed and dismissed the improper qualified immunity claim; however, without clear, binding Supreme Court precedent on the issue, the Eighth Circuit was left free to discard its own precedent and refuse to consider the threshold requirement it once championed.[158]

By granting CSI's petition for certiorari, the Supreme Court could have not only decided the scope of authority question once and for all, but also righted the Court of Appeals's mistakes in the standard of review and application of the qualified immunity analysis for the sake of lower courts.[159] This was, doubtless, a missed

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[153] It is worth noting that the Fifth Circuit Court of Appeals (which decided *Sweetin* in 2022) was scolded by the Supreme Court for making *just this mistake* two years earlier in *Taylor v. Riojas*. *See* 141 S. Ct. 52, 53–54 (2020). Perhaps the Court's condemnation of such an inaccurate use of the "clearly established test" was enough to correct the Court of Appeals' qualified immunity jurisprudence in time for *Sweetin*. Unfortunately, the Eighth Circuit did not learn from its sister court's mistake.

[154] U.S. CONST. amend. IV; MINN. CONST. art. 1, § 10.

[155] *See supra* Section IV.A.

[156] *See* Order List, *supra* note 8.

[157] *See* Brief in Opposition, *supra* note 111, at 15; Brief of Professor Brian Pérez-Daple and The Law Enforcement Action Partnership as Amici Curiae Supporting the Petitioner, *supra* note 109, at 3.

[158] *See supra* notes 88–90, 101 and accompanying text.

[159] *See* Petition for Writ of Certiorari, *supra* note 7, at 20.

opportunity, and although there are surely many reasons why the Court denied certiorari, it is hard to imagine what could have outweighed the benefit of a clearer doctrine.

B. The Slippery Slope

Although certainly regrettable that the Supreme Court did not take the opportunity to address the scope of immunity question, what is even more concerning is the ramifications of allowing qualified immunity for actors like Large to stand. Large was not a prison guard who was deliberately indifferent to an inmate's safety, a school principal who suppressed a student's speech, or a police officer who killed a suspect—each government official engaging in actions which have some semblance of connection with their positions and corresponding duties.[160] Instead, Large was a county engineer who acted so far outside the authority granted to him by law, he became a self-ordained peace officer.[161]

Qualified immunity was designed to protect from civil suit government officials who deprive citizens of their rights while engaging in their *official actions* to protect officials who make mistakes in exercising their discretionary authority.[162] The doctrine was *not* intended as an absolute, unyielding shield from consequences whenever a government official acts illegally.[163] In fact, every action must be under color of state law (and the powers ordained to the official in question) to be covered by the doctrine.[164]

What Large did in blocking the CSI truckers was not just outside his granted authority as county engineer, but an action which embodied something far worse: the acts of an unauthorized peace officer, a position with broad powers (including the authorized deprivation of citizens' rights through seizures and arrests).[165] By allowing Large's grant of qualified immunity to stand, the Supreme Court unwittingly created precedent for allowing small-town officials to commit blatant due process violations.

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[160] *See generally* Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011); Kisela v. Hughes, 138 S. Ct. 1148 (2018).

[161] *See supra* notes 74–78 and accompanying text; *supra* notes 156–59 and accompanying text.

[162] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

[163] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting) (addressing that qualified immunity is *not* an absolute shield).

[164] 42 U.S.C. § 1983.

[165] *See, e.g.*, FONTANA POLICE DEP'T, *supra* note 10. These powers come with accompanying restrictions, including the requirements for warrants and probable cause. U.S. CONST. amend IV.

The Tenth Amendment reserves to the states "the powers not delegated to the United States by the Constitution."[166] This includes the "police power" of "promoting the public welfare by restraining and regulating the use of liberty and property."[167] As a result, each state has created some form of "peace officer" position; for example, Minnesota law designates as a peace officer "an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest."[168]

Police officers and sheriffs are charged with the prevention of crime and, as such, are enabled by the Constitution to commit one specific deprivation of rights: to violate the right to be secure in their persons and possessions through conducting searches and seizures.[169] This is perhaps *the* fundamental aspect of the peace officer's authority, and involves a long history of balancing between the interests of society and the need of the government to protect its citizens.[170] Peace officers are specially vetted, trained, and licensed so that they can exercise the authority given to them.[171]

This is the key issue in Large's situation: by seizing the CSI drivers and their trucks, he deprived them of their right to be secure in their persons and possessions, a right which can only be constitutionally abridged by a peace officer.[172] He did not just deprive the drivers of a right to freedom from undue interference on a county highway—he took on the powers of a peace officer without special training, licensing, or statutory authorization.[173]

Regardless of the "scope of authority" issue mentioned before, it borders on distressing that Large was granted qualified immunity for knowingly exceeding his authority as a county engineer and depriving citizens of their rights.[174] The result is, in essence, a circumvention of the Fourth Amendment. As citizens subject to the

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[166] U.S. CONST. amend X.

[167] ERNST FREUD, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS, at iii (1904).

[168] MINN. STAT. § 626.84 subdiv. 1(c)(1) (2022); *Powers to Investigate Crime and Make Arrests*, MINN. HOUSE RSCH. DEP'T (Oct. 2002), https://www.house.leg.state.mn.us/hrd/issinfo/cr-invst.aspx?src=4 [https://perma.cc/SU42-HZ6X].

[169] U.S. CONST. amend IV; *see* THE USE AND ABUSE OF POLICE POWER IN AMERICA: HISTORICAL MILESTONES AND CURRENT CONTROVERSIES 1–2 (Gina Robertiello ed., 2017). The Fourth Amendment does, of course, require that peace offers have a valid warrant in order to conduct searches and seizures.

[170] THE USE AND ABUSE OF POLICE POWER IN AMERICA: HISTORICAL MILESTONES AND CURRENT CONTROVERSIES, *supra* note 169, at 1–2. However, there is a "fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen." Warren v. District of Columbia, 444 A.2d 1, 4 (D.C. 1981).

[171] *See, e.g.*, VA. CODE ANN. §§ 15.2-1705 to -1706 (2020).

[172] *See id.*

[173] *See id.*

[174] *See supra* Part III and Section IV.A on the importance of the scope of authority analysis.

judicial system, we "expect" to be legally deprived of our rights when a crime occurs; we know that if we commit a robbery, the police will seize our getaway car and arrest us. We, as a people, have not consented to the expansion of the Fourth Amendment to include warrantless seizures of persons and property by low-level officials who are in no way qualified to do so.[175]

Qualified immunity cannot be used as a justification for infringement on due process rights through the implicit grant of undue powers to low-level government officials. The doctrine was not intended to protect actors against liability for committing actions completely outside their government-authorized purview.[176] The *Large* court's holding that the county engineer did not violate any clearly established right implies that other county engineers could detain highway travelers with no recourse, despite the fact that their actions would be inherently lawless.[177]

By allowing Large to receive qualified immunity for exercising unauthorized police power and seizing the CSI drivers and their trucks,[178] the Supreme Court opens the floodgates to unmerited grants of immunity to bad-acting officials in the lowest levels of local government.[179] Because these small-town actors like Large and Wylie are presumed so unlikely to commit such blatant constitutional violations, it does not seem concerning to include them in the doctrine; however, the facts of the two cases demonstrate that low-level officials who are granted some amount of authority can bring about situations so obscure as to enable them to seriously violate constitutional rights.

This is such a serious concern because in any case of a lowly official violating a constitutional right, a court may simply state that the right was not clearly established in light of the obscurity of the official.[180] Take *Large* for example: the court

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[175] It is indeed striking to consider this outcome in light of the recent movement to abolish the police altogether; the fact that this case is an implicit expansion of police powers is concerning. *See generally* Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, THE NEW YORKER (May 7, 2021), https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition [https://perma.cc/UP4P-GC76].

[176] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) ("Government officials are entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities.").

[177] *See* 18 F.4th 989, 1002 (8th Cir. 2021) (Grasz, J., concurring in part and dissenting in part).

[178] Even if Large's stop of the CSI drivers was not *legally* a seizure, it certainly was a seizure in effect. *See supra* Section IV.A.

[179] *See, e.g.*, Green v. Manross, No. CV 18-289, 2022 WL 4790412 (W.D. Pa. Sept. 30, 2022) (granting qualified immunity to a City Code Enforcer); Sterling v. Bd. of Trs. of Univ. of Arkansas, 642 F. Supp. 3d 787 (E.D. Ark. 2022) (granting qualified immunity to a technical college hiring official); Martin v. Denver Pub. Schs., No. 120CV02829DDDNRN, 2021 WL 4991714 (D. Colo. Oct. 27, 2021) (granting qualified immunity to a school bus driver).

[180] See generally *Large*, 18 F.4th 989 and *Sweetin v. City of Texas City*, 48 F.4th 387 (5th Cir. 2022), for the role obscurity plays in qualified immunity.

held that the engineer was entitled to qualified immunity because he did not violate a clearly established right to not be pulled over by a county engineer.[181]

In every case with a low-level official who exceeds their authority and violates a citizen's constitutional right, a court can just hold, in essence, that a constitutional violation committed by X low-level official is not clearly established because it has never happened before.[182] Simply because each minor official has never before committed a specific violation, qualified immunity can allow thousands of constitutional deprivations to stand without ever being addressed or remedied.[183]

This is the slippery slope: that by allowing actors like Large to get away with depriving citizens of their rights, the Supreme Court implicitly creates precedent that low-level officials who act wildly outside their authority can escape liability for their actions as long as this specific deprivation by this specific actor in these specific circumstances has not occurred before. This is a dangerous outcome for the fate of constitutional rights in this country—a glimpse into a hazy future of decreased civil rights and increased due process violations.

However, the slippery slope's inertia may be arrestable if the doctrine of qualified immunity itself can be altered or the elements of its analysis shifted and re-emphasized so that cases like *Large* can never again be allowed to slip through. It is necessary for the future of constitutional rights and the continued survival of qualified immunity—if it should survive at all—that the doctrine be changed.[184]

VI. HOW TO PREVENT THE SLIPPERY SLOPE

A. Put the Scope of Authority Issue in Pride of Place

Returning this "threshold inquiry" to pride of place in the qualified immunity analysis is the best means of preventing immunity for unmeritorious actors like

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[181] "We cannot say that it was clearly established that Large, a county engineer tasked with oversight of all county roads, could not prevent trucks that he had reason to believe were operating above the posted weight limit from passing over and damaging the roadway." *Large*, 18 F.4th at 989.

[182] It is essential to note that the court in *Large* misapplied the clearly established test; however, by letting the ruling stand, the Supreme Court allows this false reasoning to continue. *See* discussion *supra* Section IV.B.

[183] In its 2020 case *Taylor v. Riojas*, the Supreme Court overturned a Fifth Circuit Court's grant of qualified immunity to prison officials who confined an inmate in a sewage-filled cell, condemning the lower court's application of the clearly established prong. 141 S. Ct. 52, 53–54 (2020) ("But, based on its assessment that '[t]he law wasn't clearly established' that 'prisoners couldn't be housed in cells teeming with human waste' 'for only six days,' the court concluded that the prison officials responsible for Taylor's confinement did not have '"fair warning" that their specific acts were unconstitutional.'").

[184] Most academic discussion of qualified immunity concerns whether it should continue to exist. For further discussion, see *infra* Part VII.

Large and Wylie and ending the slippery slope.[185] As the above analysis of *Central Specialties, Inc. v. Large* demonstrates—especially as compared to *Sweetin v. City of Texas City*—avoiding the scope of authority inquiry allows low-level officials to take on powers above their 'pay grade' and avoid liability for their illegal actions, resulting in cases with unjust results.[186]

As explained by CSI in its petition for certiorari and the amici in their briefs, it is high time for the scope of authority question to be resolved.[187] Whether or not a court finds the analysis to be a mandatory aspect of the qualified immunity doctrine or a merely irrelevant consideration determines, in so many cases, whether the official is made liable for his illegal actions or finds protection from consequences.[188] Bringing the scope of authority issue to the fore of the qualified immunity analysis—perhaps even making it a mandatory threshold inquiry as described in *Sweetin*—would prevent actors like Large from receiving immunity for their bad acts.[189]

If each qualified immunity case began by looking to state law for the source of the official's authority and a determination of whether the act committed was remotely within that official's explicated authority, every case in which a low-level actor took on powers not granted to them to violate constitutional rights would be immediately resolved. There would no longer be a need to even consider whether a *reasonable* official in the official in question's circumstances would know they did not have the authority to engage in the violative actions: the case would simply be brought to an end when it was determined that the official did not have the authority to do what he did. Furthermore, well-meaning, mistaken police officers with proper discretionary authority would still be able to claim immunity for their actions.

Aside from bringing an end to the slippery slope, this change in doctrine would give qualified immunity a firmer foundation by both tightening the doctrine and returning it to its roots. As Pat Fackrell explains, the adoption of a clear scope of authority analysis would enable clarity and reliability in qualified immunity while remaining faithful to the tradition, history, and purpose of the doctrine, which focused for most of its existence on whether an official acted within his authority.[190] This would be the best means by which to bring an end to the slippery slope without fundamentally changing qualified immunity as it currently stands.

B. Bring Back the Order of Analysis in Saucier v. Katz

As mentioned above, *Saucier* required that the qualified immunity analysis be conducted in a particular order: first to establish that a constitutional right was

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[185] *See supra* Part III and Section IV.A on the importance of the scope of authority analysis.

[186] *See supra* Part III.

[187] *See supra* notes 99–100, 102–03, 105.

[188] See Fackrell, *supra* note 107, at 10–21, 31–35 for his assessment of the scope of authority question and conclusion that its place in the analysis must be made mandatory.

[189] *See* 48 F.4th 387, 391 (5th Cir. 2022).

[190] *See* Fackrell, *supra* note 107, at 22–32.

infringed, and then to determine whether the right was clearly established.[191] However, when *Pearson v. Callahan* made the order of analysis purely discretionary, courts began to grant a majority of qualified immunity claims on the basis that the right violated was not clearly established.[192]

If the test were to return to the *Saucier* order of analysis, the slippery slope of over-granting immunity can be avoided. Instead of first stating that every right is not clearly established and quickly granting immunity, a court would have to first acknowledge the reality that a constitutional violation took place. In so many cases, this would result in a completely different outcome: no longer could a court simply follow the reasoning in *Large* and resolve the case by claiming the right so obscure that it could not be clearly established.[193]

Courts would be forced to acknowledge that a constitutional violation may take many forms and be committed by unlikely actors. In *Large*, the court would have first determined that the CSI drivers were subject to a seizure and then been forced to conclude that the Fourth Amendment right against unreasonable seizures was indeed clearly established.[194] This is not, however, a perfect solution. Although it should result in many more officials held rightfully accountable for their unconstitutional actions, in some circumstances a court may still find the right not clearly established when it reaches the second prong of the test.[195] Therefore, this solution is definitively unideal, still allowing unmeritorious cases to pass through the cracks.

However, this solution has a clear benefit: it does not require any direct action from the Supreme Court (which is unlikely to ever undo the dramatic change it effected in *Pearson*). Because *Pearson* made the twofold inquiry purely discretionary, every court can simply choose to address first whether a right was infringed, and higher courts can even go so far as to make it the standard for their jurisdiction. This relatively easy change would remedy years of injustice and jurisprudential confusion, bringing much needed clarity to the qualified immunity doctrine.[196]

C. Return to the Good Faith Standard

A key solution for solving the over-broadening of the qualified immunity doctrine is to return to the good faith standard which existed before the test articulated in

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[191] *See supra* notes 30–31 and accompanying text.

[192] *See supra* notes 34–36 and accompanying text.

[193] *See* 18 F.4th 989, 998 (8th Cir. 2021).

[194] This, of course, presupposes that the court would have followed established law and correctly determined that a seizure occurred.

[195] *See, e.g.*, Frasier v. Evans, 992 F.3d 1003, 1008 (10th Cir. 2021).

[196] It is worth noting that a plaintiff's attorney can always argue that the question of whether an infringement has occurred should be addressed first by the court; however, because it is purely discretionary—and, in many cases, an issue of politics—such an appeal is likely to effect very little change.

Harlow v. Fitzgerald.[197] Large was a willfully bad actor, taking the law into his own hands while knowing full well that he did not have the authority to do so.[198] In his defense, he saw what he believed to be a serious danger in the truckers driving on the low-weight highway and felt the need to act immediately to prevent serious damage.[199] However, the threat of immediate danger to property cannot be used to justify the deprivation of constitutional rights, especially when the actor knows full well that he is acting illegally.

Large was not a police officer who shot a suspect he erroneously believed to be armed—he was a county engineer with no authority to conduct stops of any kind or in any way impede the movement of vehicles upon the road.[200] Furthermore, he was in no way mistaken as to his authority to conduct stops: he *admitted freely* that he could not do so.[201] Surely an actor such as this should not be protected from suit for his undoubtedly bad actions.

Although made purely objective by *Harlow*, if the element of bad intent were reintroduced into the analysis—even so that it is proved beyond a reasonable doubt—it would allow qualified immunity to return to its original purpose: to protect "all but the plainly incompetent or those who knowingly violate the law."[202]

1. Necessity as a Good Faith Justification

A possible justification for Large's actions—and those of other similarly situated actors—is that of necessity. Necessity is a defense to criminal conduct at common law, which "may excuse an otherwise unlawful act if the defendant shows that '(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm.'"[203] Although obviously not operating in this case as a defense, defendants like Large could use the concept of necessity to argue that they merit immunity despite the fact that they did not act in good faith by knowingly violating the law.[204]

Take as an example a small-town bridge engineer in Minnesota charged with the maintenance of local bridges. If he sees a large eighteen-wheeler approaching one of his one-lane charges and—knowing that the bridge can only support the maximum weight of a pickup truck—decides to park his car in front of the oncoming vehicle

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[197] *See* Lass, *supra* note 37, at 182–83.

[198] *See Large*, 18 F.4th at 997.

[199] *See id.* at 993–94.

[200] *Id.* at 1002 (citing MINN. STAT. § 163.02 subdiv. 3 (2022)) (describing the facts of State v. Horner, 617 N.W.2d 789, 793–94 (Minn. 2000)).

[201] *See id.* at 997.

[202] Malley v. Briggs, 475 U.S. 335, 335 (1986).

[203] United States v. Al-Rekabi, 454 F.3d 1113, 1121 (10th Cir. 2006) (quoting United States v. Unser, 165 F.3d 755, 764 (10th Cir. 1999)).

[204] *See Malley*, 475 U.S. at 335.

to prevent certain damage from the bridge, is he justified in doing so? In other words, does he have a claim that he acted out of necessity to prevent harm? The engineer would have to argue that (1) he had no legal alternative, (2) the harm to the bridge was imminent, and (3) his seizure of the oncoming truck was directly connected to the avoidance of harm.

This could be a compelling argument for a carve out in the good faith requirement for apparently necessary action, since knowingly acting illegally to prevent certain harm is, in essence, an act done in good faith.[205] However, for an official to claim necessity, he would have to prove that there were no legal alternatives to his illegal action.[206] The above-mentioned engineer would likely fail, as there are other means for preventing the truck from driving over the bridge: attempting to get the attention of the driver before he crossed the bridge or even running in front of the truck (at a safe distance) to stop it in its path.[207]

However, Large would find no relief in a necessity defense. First, he had no evidence that the trucks were going to cause actual harm to the road under his care, and therefore could offer no proof that he avoided certain imminent harm.[208] Second, Large had many legal alternatives to detaining the drivers, as evidenced by his calls to three different law enforcement organizations who could have legally handled the situation for him.[209] Finally, Large did not actually detain the drivers for the purpose of avoiding harm to the road: he detained them so that officials with real authority could issue them citations.[210] Since the drivers had already proceeded down the road, there was no *need* to detain them at all, thereby depriving them of due process.

Although an interesting consideration, the necessity defense—at least in most cases—would not exculpate low-level bad actors like Large and Sweetin from liability for depriving citizens of their rights. In the majority of cases, there is no excuse for committing constitutional violations.

VII. TO SAVE OR NOT TO SAVE—IS QUALIFIED IMMUNITY WORTH THE EFFORT?

Part VI of this Note provides a handful of solutions for remedying the slippery slope that is granting qualified immunity to underserving officials. The doctrine of

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[205] This carve out would be a 'defense' to the good faith requirement, which would prevent those who knowingly act illegally from receiving immunity for their actions. Using the necessity doctrine, an official could argue that he had no choice but to act illegally.

[206] *See Al-Rekabi*, 454 F.3d at 1121.

[207] This example is given to illustrate an official avoiding imminent, destructive harm to property under his care. However, it is an imperfect example compared to the actual circumstances in *Large* because the engineer pulling his vehicle in front of the truck—though a seizure under Minnesota law—would likely not take a sufficient length of time for a court to consider it a seizure. Illi v. Comm'r of Pub. Safety, 873 N.W.2d 149, 152 (Minn. Ct. App. 2015) (quoting State v. Sanger, 420 N.W.2d 241, 243 (Minn. Ct. App. 1988)).

[208] *See* Cent. Specialties, Inc. v. Large, 18 F.4th 989, 994 (8th Cir. 2021).

[209] *See id.*

[210] *See id.*

qualified immunity is doubtlessly messy, with clearly contradictory results depending on which court applies the doctrine and how it interprets the minute details of each case. Qualified immunity is like a hydra, growing more heads and becoming more unruly as the doctrine develops confusingly inconsistent precedential offshoots. Is it worth the effort to remove only the heads grown by the over-broadening addressed in this Note? Or would it be better to jettison the doctrine altogether, slaying the monster outright?

Although some scholarship focuses simply on the various dangers of qualified immunity,[211] while others seek to remedy its missteps or predict its future,[212] the majority of scholarship debates whether qualified immunity should continue to exist at all.[213] Influenced by Professor William Baude's persuasive argument that qualified immunity is in fact unlawful, many conclude that the doctrine must be overturned.[214]

In fact, the doubts cast in Baude's article have been so influential as to convince a supreme court justice; in his concurring opinion in the 2017 case *Ziglar v. Abbasi*, Justice Clarence Thomas references the origins of the doctrine, stating "some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine."[215] Justice Thomas went on to express his concern about the doctrine's departure from its original intention: "Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make."[216] Justice Thomas's decision to speak out is striking, as most onlookers consider conservatives to be consistent supporters of qualified immunity.[217]

The majority of the calls for qualified immunity's overturning stem from outrage over the doctrine's role in shielding violent police from liability for their

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[211] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020); Bryan Lammon, *Assumed Facts and Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. 959 (2021); Hon. Cathy Bissoon, Hon. Benita Y. Pearson, & Hon. David A. Sanders, *From the KKK to George Floyd: Three Judges Explore Qualified Immunity*, 22 SEDONA CONF. J. 533 (2021).

[212] *See, e.g.*, Nielson & Walker, *supra* note 38; Rosenthal, *supra* note 27; Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity's 51 Imperfect Solutions*, 17 DUKE J. CONST. L. & PUB. POL'Y 321 (2022); Jennifer E. Laurin, *Reading* Taylor*'s Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241 (2022).

[213] *See, e.g.*, David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 283 (2022); Fred O. Smith Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121 (2021); Allison Weiss, *The Unqualified Mess of Qualified Immunity; A Doctrine Worth Overruling*, 76 WASH. & LEE L. REV. ONLINE 113 (2020).

[214] *See* Coyle, *supra* note 213, at 289 n.21; Smith, *supra* note 213, at 123 n.17; Weiss, *supra* note 213, at 118 n.17. *See generally* Baude, *supra* note 3.

[215] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part).

[216] *Id.* at 1871 (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

[217] *See* Clark Neily, *The Conservative Case against Qualified Immunity*, CATO INST. (Aug. 25, 2021, 7:19 PM), https://www.cato.org/blog/conservative-case-against-qualified-immunity [https://perma.cc/7KVL-PJ3M].

brutality, especially against members of the Black community.[218] In response to these cries for justice, a group of Democrats in the House of Representatives introduced H.R. 1470, the "Ending Qualified Immunity Act."[219] Although it has not been passed, it has received widespread support from Democrats in the House.[220] The public at large and lawmakers alike seem to agree that the doctrine should be discarded as ineffective—but there is a key reason for why the doctrine should endure: stare decisis.

Stare decisis is the legal doctrine "derive[d] from the Latin maxim 'stare decisis et non quieta movere,' which means to stand by the thing decided and not disturb the calm'" and "which calls for prior decisions to be followed in most instances."[221] In his recent article, David Coyle considers whether stare decisis would yield to an overturning of qualified immunity.[222] After a thorough analysis of the doctrine under the established qualified immunity factors, Coyle concludes that the doctrine *must* continue, though hopefully with beneficial alterations.[223]

This Note does not go so far as to conclude whether or not qualified immunity should or will be overturned; however, it certainly is not a reach to say that the doctrine has gotten out of hand. Although designed to limit the amount of damages government actors would have to pay in civil suits brought under § 1983,[224] the doctrine is no longer serving its purpose, instead "insulat[ing] officials too much from liability, leaving them without adequate incentives to respect the constitutional rights of those they encounter."[225] Officials, particularly police officers, are invoking the defense more and more often as they seize, injure, and sometimes kill the Americans they are meant to serve.[226]

What is even more troubling is the disproportionate effect the defense has on the Black community, since § 1983 was created specifically to protect Black Americans from violence at the hands of white government officials.[227] Qualified immunity has

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[218] *See, e.g.*, Yuliya Shyrokonis, *Police Qualified Immunity is a Dangerous Loophole*, MICH. J. PUB. AFF. BLOG (Aug. 4, 2021), https://mjpa.umich.edu/2021/08/04/police-qualified-immunity-is-a-dangerous-loophole/ [https://perma.cc/G2BC-VA3F]; *Demand Congress End Qualified Immunity*, BLACK LIVES MATTER, https://blacklivesmatter.com/demand-congress-end-qualified-immunity/ [https://perma.cc/MWC6-X94K] (last visited Dec. 4, 2023).

[219] H.R. 1470, 117th Congress (2021).

[220] *Cosponsors: H.R. 1470—Ending Qualified Immunity Act*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1470/cosponsors [https://perma.cc/733A-RAJD] (last visited Dec. 4, 2023).

[221] Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Kavanaugh, J., concurring in part); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

[222] Coyle, *supra* note 213, at 297.

[223] *Id.* at 303–19.

[224] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); 42 U.S.C. § 1983.

[225] Baude, *supra* note 3, at 46–47.

[226] *See* Guzman, *supra* note 2.

[227] *See* HUM. RTS. WATCH, *supra* note 27; Michelman, *supra* note 22.

devolved into a mechanism for officers to avoid ramifications for their illegal and sometimes violent acts directed so often at the Black community.[228] Although it does successfully protect honest government officials from personal liability when they make true mistakes, it seems to do more harm than good.[229]

CONCLUSION

Although the future of qualified immunity's existence is uncertain, one thing is clear: if the doctrine continues to grow more and more dangerous and unruly, constitutional rights will be so diminished as to become virtually powerless. If significant changes are not made, injustice will continue unchecked. One small yet powerful solution to the overgrowth of the doctrine is to follow the example of the Fifth Circuit Court of Appeals in *Sweetin v. City of Texas City*, and to refuse qualified immunity for low-level officials who knowingly act outside the scope of their granted authority. To allow such actors to receive immunity is to enable consistent constitutional violations by government officials with illusions of law enforcement officer status. And as is demonstrated by the rash of unchecked illegal police activity pervading American society: there are already enough sheriffs in town.

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[228] HUM. RTS. WATCH, *supra* note 27.

[229] Pearson v. Callahan, 555 U.S. 223, 231 (2009); *see* Guzman, *supra* note 2.