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Qualified Immunity Creates Nearly Insurmountable Protection for Defendants Against First Amendment Retaliatory Claim

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NOTE

Qualified Immunity Creates Nearly Insurmountable Protection for Defendants Against First Amendment Retaliatory Claim

Morgan v. Robinson, 920 F.3d 521 (8th Cir. 2019).

Abigail Greene[*]

I. INTRODUCTION

There are more than 3,000 sheriffs' departments in the United States with varying authority based on the state and county in which they are located.[1] Their authority may be as wide reaching as a "full-service countywide law enforcement agenc[y]" or may be as limited as having "no law enforcement jurisdiction in county areas served by local or municipal police departments."[2] Dissimilar to other law enforcement officials, who are hired after an interview and application process, most sheriffs gain their positions through partisan elections.[3] Offices in forty-one states – more than 2,700 counties – conduct partisan elections for the sheriff position.[4]

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1. *Sheriffs' Offices*, BUREAU OF JUSTICE STATISTICS, https://www.bjs.gov/index.cfm?ty=tp&tid=72 [https://perma.cc/D9QD-GSKS] (last visited November 20, 2020).

2. *Id.*

3. Daniel M. Thompson, *How Partisan Is Local Law Enforcement? Evidence from Sheriff Cooperation with Immigration Authorities* (Aug. 20, 2019), http://chriswarshaw.com/lpe_conference/Thompson_Sheriffs_Immigration_Enforcement.pdf [https://perma.cc/QPA4-CCLZ] ("Out of 3,142 counties or county equivalents, 3,083 in 46 states elect a county sheriff.").

4. *Id.* ("Five states, and a small number of counties outside of these states, hold nonpartisan sheriff elections.").

Although the length of an elected sheriff's term varies by jurisdiction,[5] incumbency gives a candidate a significant advantage in an election.[6] In a 2017 study of the 200 largest jails in the United States, all but two of the current sheriffs were incumbents.[7] In the course of a contested election, non-incumbent candidates – who are employed by the sheriff as subordinate officers – may make statements criticizing the office in some way, and promising change for the future. With such a large number of incumbents retaining office, however, those changes are rarely implemented, and sometimes the losing officer is subsequently fired by the incumbent sheriff after he or she wins the election. While it might appear the employee was fired for speaking out during a political campaign – an area considered core protected speech under the First Amendment – the incumbent sheriff likely will not be liable for a First Amendment retaliation claim because he is shielded by qualified immunity.

The Supreme Court of the United States has consistently held that government officials are entitled to some form of immunity – absolute or qualified – if they meet the requirements of the defense.[8] Immunity covers suits for damages in order to "shield [officials] from undue interference with their duties and from potentially disabling threats of liability."[9] While some individuals are entitled to absolute immunity, most officials, including law enforcement officers, are entitled to qualified immunity. Qualified immunity is a controversial and complicated doctrine that is designed to protect law enforcement officers for actions taken in the line of duty.[10] It has proved to be difficult and complex throughout the jurisdictions based on varying interpretations. One common theme is clear: it is nearly impossible for a plaintiff to win against a government official because courts are so sympathetic to a defendant's qualified immunity arguments.

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5. *See Office of Sheriff State-By-State Elections Information*, NATIONAL SHERIFFS' ASSOCIATION, https://www.sheriffs.org/sites/default/files/uploads/documents/GovAffairs/State-by-State%20Election%20Chart%20updated%2008.13.15.pdf [https://perma.cc/CLS3-3J2L].

6. Alex Clark, *Exploring the staying power of elected sheriffs – a preliminary analysis*, Prison Policy Initiative (Aug. 24, 2017), https://www.prisonpolicy.org/blog/2017/08/24/sheriffs/ [https://perma.cc/5HX3-V298].

7. *Id.* District of Columbia and Miami-Dade County had appointed officials to the sheriff's position. *Id.*

8. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). Absolute immunity is the stronger form of immunity, shielding from any liability "regardless of the conduct." It is, however, granted to only a small group of government officials, such as judges. Monroe Bonnheim, *Immunity and Justice for All: Has the Second Circuit Overextended the Doctrine of Absolute Immunity by Applying It to Arbitration Witnesses?*, 2009 J. DISP. RESOL. 213, 217 (2009); *see* discussion *infra* notes 63–69.

9. *Harlow*, 457 U.S. at 806.

10. Vogel Law Firm, *Appeals Court Arrests Immunity Defense For Lewd-Talking Sheriff*, 10 No. 8 N.D. Emp. L. Letter 1 (2005).

This Note examines a recent decision by the United States Court of Appeals for the Eighth Circuit finding qualified immunity applicable to a sheriff when faced with a First Amendment retaliation suit based upon comments made during a political campaign. Part II provides the facts and holding of *Morgan*. Part III describes and analyzes the legal background of both a First Amendment retaliation claim and the defense of qualified immunity. Part IV states the reasoning behind the *Morgan* decision. Part V examines the potential practical consequences of the qualified immunity doctrine and the implications on plaintiffs who are seeking recourse. Finally, Part VI summarizes the need to give less protection to incumbent sheriffs when First Amendment retaliatory actions are taken.

II. FACTS AND HOLDING

In 2014, Donald Morgan ran against Michael Robinson – the incumbent sheriff – in the primary election for sheriff of Washington County, Nebraska.[11] Robinson had been the county's elected sheriff since 2000.[12] Morgan had been a deputy with the sheriff's department since 2002.[13] Throughout the campaign, Morgan made various public statements about the sheriff's department and his plans to improve it if he were elected.[14] Robinson won the election.[15] Six days after the election, Robinson terminated Morgan's employment as deputy.[16] Robinson claimed the reason for the termination was that Morgan violated the sheriff's department's rules of conduct in making his campaign statements.[17] Specifically, the disciplinary action report stated Morgan violated the paragraphs concerning "false statements, slander, and honesty."[18] The statements in question were:

> 1. You continued to state that the communications system was not completed after 10 years of construction although the record reflects it was completed on time and under budget in 2006[.]
>
> 2. You stated the Fire and Rescue agencies could not communicate and stated someone would be hurt or killed if it was not fixed although the

11. Morgan v. Robinson, 920 F.3d 521, 522 (8th Cir. 2019).

12. Morgan v. Robinson, No. 8:14CV212, 2016 WL 10636372, at *1 (D. Neb. Dec. 8, 2016), *aff'd,* 881 F.3d 646 (8th Cir. 2018), *reh'g en banc granted, opinion vacated* (Mar. 21, 2018), *on reh'g en banc*, 920 F.3d 521 (8th Cir. 2019), *and rev'd and remanded,* 920 F.3d 521 (8th Cir. 2019).

13. *Morgan*, 920 F.3d at 522; *Morgan*, No. 8:14CV212, 2016 WL 10636372, at *1.

14. *Morgan*, 920 F.3d at 522.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Morgan*, No. 8:14CV212, 2016 WL 10636372, at *1.

> Fire Chiefs submitted a letter to the local paper saying your comments were false.
>
> 3. You continued to tell the public that morale at the Sheriff's Office was bad and that "all the employees were waiting for the day after I lost to see me walk out of the office". [sic] You also stated several deputies were actively looking for employment. This was proven false when several of the Deputies were consulted and none were looking and did not know of any deputy looking for employment and I was overwhelmingly supported by the employees of the Sheriff's Office.
>
> 4. You stated the K-9 had been taken from you for retribution when in fact you demanded the K-9 be taken because it "hindered your ability to do your job". [sic]
>
> 5. You stated portable radio coverage was poor and continued to state the coverage was poor even after being shown the system coverage for portable radios was 99.2% county wide.[19]

Initially, Morgan brought a grievance under a labor contract in place for his position, but the grievance was denied and that decision was upheld on appeal.[20] Next, he brought suit in the Federal District Court for the District of Nebraska, alleging claims of "retaliation, deprivation of due process, and breach of the labor contract."[21] The court compelled arbitration, in conformity with the contract, and the arbitrator sustained the grievance, found in favor of Morgan and "reinstated his employment with the sheriff's department."[22] In response, Robinson filed a motion to dismiss for summary judgment on the retaliation claim in the district court.[23]

Upon returning to the district court, Robinson claimed he was entitled to qualified immunity on Morgan's First Amendment retaliation claim.[24] The district court denied that motion, finding "genuine issues of material fact regarding the constitutionality of the termination, and whether Robinson

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19. Morgan v. Robinson, 881 F.3d 646, 650 (8th Cir. 2018), *reh'g en banc granted, opinion vacated* (Mar. 21, 2018), *on reh'g en banc*, 920 F.3d 521 (8th Cir. 2019). During the campaign, Morgan said:

> (1) the county communications center had not been completed; (2) rural fire departments lacked adequate radio systems; (3) the county needed more deputies on the road; (4) the office budget did not consider the public's needs; (5) department morale was poor; (6) the department was not doing well; and (7) people were leaving the office because they did not feel respected.

Morgan, 920 F.3d at 525.

20. *Morgan*, No. 8:14CV212, 2016 WL 10636372, at *2.

21. *Morgan*, 881 F.3d at 650.

22. *Id.*

23. *Morgan*, No. 8:14CV212, 2016 WL 10636372, at *2.

24. *Morgan*, 881 F.3d at 650–51.

should have reasonably known the termination was unlawful."[25] Robinson appealed the decision, and an Eighth Circuit panel affirmed.[26] Then, the Eighth Circuit reheard the case en banc, vacated the panel decision, reversed and remanded.[27] The court held that Robinson was entitled to qualified immunity because "the law was not sufficiently clear so that Robinson would have known that terminating him violated his First Amendment rights."[28]

III. LEGAL BACKGROUND

Section 1983 of the U.S. Code ("Section 1983") allows an individual to sue government officials for money damages when that official causes a deprivation of the individual's constitutional rights.[29] Although "deceptively simple in its construction," Section 1983 is in reality full of complex procedural issues.[30] Section 1983 was adopted by Congress in 1871, and provides "private remedies in the form of money damages and injunctive relief for the infringement of constitutional rights."[31] The statute states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress… [32]

The Section became the "procedural keystone for the civil rights litigation of the 1960s" and continues to be a medium that tests the "limits of constitutional rights."[33] It provides protection only in the public sector, not the private sector.[34] Further, "the definition of person has been broadly interpreted to include virtually any governmental entity, including cities, counties, townships, municipal corporations, and the wide variety of local and regional government entities."[35] Finally, Section 1983 provides a remedy of

25. *Morgan*, 920 F.3d at 522; *Morgan*, 2016 WL 10636372, at *5.

26. *Morgan*, 881 F.3d at 650.

27. *Morgan*, 920 F.3d at 523.

28. *Id.* at 527 (Shepherd, Kelly, and Erickson, JJ., dissenting) (*citing* Reichle v. Howards, 566 U.S. 659, 664 (2012)) (internal quotation marks omitted).

29. 42 U.S.C.A. § 1983 (West 2018).

30. 22 AM. JUR. PROOF OF FACTS 3d § 3 (Originally published in 1993).

31. *Id.*

32. 42 U.S.C.A. § 1983.

33. 22 AM. JUR. PROOF OF FACTS 3d § 3.

34. *Id.*

35. *Id.*

both injunctive and monetary relief against the government entity or individual who has violated another's constitutional rights.[36]

A public sector employee may not be fired for any reason that violates that employee's constitutional rights because termination "as a consequence for the making of critical comment, regardless of how motivated or directed, violates the individual's protected right of freedom of speech, guaranteed by the First Amendment."[37] However, a public employee's ability to exercise certain First Amendment rights may be restrained, legally, when "it could lead to inability of elected officials to get their jobs done on behalf of the public."[38] In a case of retaliatory termination, which violates an individual's First Amendment rights, a plaintiff must establish a prima facie case and prove: "(1) [h]is speech was protected by the First Amendment; (2) the governmental employer discharged him from employment; and (3) the protected speech was a substantial or motivating factor in the defendant's decision to take the adverse employment action."[39] Even if a plaintiff is able to establish a prima facie case, however, he will not prevail if the defendant is able to establish qualified immunity.[40]

Qualified – or "good faith" – immunity is an affirmative defense that must be pleaded by a defendant official.[41] The doctrine attempts to strike a balance between "the interest in preventing, and compensating for, constitutional violations and the interest in avoiding the overdeterrence of independent decision making by government officials."[42] The Supreme Court, in a handful of decisions starting in 1967, extended qualified immunity protection to "police officers, executives, school board members, mental hospital administrators, and prison officials."[43] "In essence, ignorance of the law is no more a valid excuse for a government official than for the average citizen."[44]

A. Evolution of the Qualified Immunity Test

The modern test for the qualified immunity doctrine was created in 1982.[45] Since then, the Supreme Court and Appellate Courts have refined and

36. *Id.*

37. *Id.*

38. Gentry v Lowndes County, Miss., 337 F.3d 481, 485 (5th Cir. 2003); 22 AM. JUR. PROOF OF FACTS 3d § 3.

39. 22 AM. JUR. PROOF OF FACTS 3d § 3.

40. 2 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:1 (2020).

41. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

42. NAHMOD, *supra* note 40.

43. *Id.*

44. John P. Gross, Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable, 8 ALA. C.R. & C.L.L. REV. 67, 73 (2017).

45. *Harlow*, 457 U.S. at 802.

expanded the doctrine.[46] The numerous opinions, however, require "[o]ne…to work hard to find some doctrinal consistency or predictability in the case law [as] the circuits are hopelessly conflicted both within and among themselves."[47] The instability in the doctrine conveys the need of revamping.[48]

1. Supreme Court

Prior to 1982, there were two components to the qualified immunity test, an objective and subjective part.[49] The Court held that "qualified immunity would be defeated if an official *knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury…"[50] The objective aspect "involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights."[51] The subjective aspect "refers to permissible intentions."[52] However, the Court largely eliminated that subjective aspect in *Harlow v. Fitzgerald*.[53]

In *Harlow*, petitioners Bryce Harlow and Alexander Butterfield were "alleged to have participated in a conspiracy to violate the constitutional and statutory rights of … respondent A. Ernest Fitzgerald."[54] Fitzgerald alleged Harlow and Butterfield joined the conspiracy "in their capacities as senior White House aides to former President Richard M. Nixon."[55] After Harlow and Butterfield moved for summary judgment, the court held that they were not entitled to absolute immunity.[56] The Court discussed the two tiers of immunity, absolute and qualified.[57] Absolute immunity applies to "officials whose special functions or constitutional status requires complete protection from suit," such as "the absolute immunity of legislators, in their legislative functions … of judges, in their judicial functions … and certain officials of

46. Congressional Research Service, *Policing the Police: Qualified Immunity and Considerations for Congress*, (June 25, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10492 [https://perma.cc/XC4Y-7DT6].

47. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015).

48. *Id.*

49. NAHMOD, *supra* note 40.

50. *Harlow*, 457 U.S. at 815 (internal quotation marks omitted) (emphasis in original).

51. *Id.* (internal quotation marks omitted).

52. *Id.*

53. *See id.* at 816–18.

54. *Id.* at 802.

55. *Id.*

56. *Id.* at 805–06.

57. *Id.* at 807 (internal quotation marks omitted).

the Executive Branch."[58] In contrast, executive officials in general are subject to qualified immunity.[59] These officials have "less discretionary responsibilities" than those who require the greater protection of absolute immunity.[60] Officials that the Court has recognized qualify for this kind of immunity include "a governor and his aides" and "high federal officials of the Executive Branch."[61] The Court explained the acknowledgement of qualified immunity "reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, … but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[62] Finally, the Court determined "the special functions of some officials might require absolute immunity," but "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."[63]

When examining the qualified immunity test in place at the time, the Court noted that the subjective element of qualified immunity is incompatible with the notion that insubstantial claims should not advance to trial because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."[64] Inquiries into an official's subjective good faith, says the Court, "may entail broad-ranging discovery" and "can be peculiarly disruptive of effective government."[65] Conversely, the objective aspect of the test can be measured by clearly-established law and is compatible with the notion that insubstantial claims should not advance to trial.[66] The threshold immunity question, therefore, is if the law was clearly established at the time, and "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, not could he fairly be said to know that the law forbade conduct not previously identified as unlawful."[67] Conversely, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[68] Nevertheless, if the official is able to claim extraordinary circumstances and "can prove that he neither knew

58. *Id.* (The covered Executive Branch officials include "prosecutors and similar officials… executive officers engaged in adjudicative functions, and the President of the United States[.]").

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (internal quotation marks omitted).

63. *Id.* at 808 (internal quotation marks omitted).

64. *Id.* at 815–16.

65. *Id.* at 816–17.

66. *Id.* at 818.

67. *Id.* at 818 (internal quotation marks omitted).

68. *Id.* at 818–19.

nor should have known the relevant legal standard," the defense of qualified immunity can still be successful.[69] Therefore, the Court held 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."[70] This test focuses on the "objective legal reasonableness of an official's acts."[71]

The Court concluded that Harlow and Butterfield were entitled to qualified immunity, recognizing it would be "untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House."[72] Additionally, the Court determined Harlow and Butterfield proved entitlement to immunity based on the "special functions of White House aides," but only on a qualified immunity standard, as opposed to an absolute immunity standard.[73] Absolute immunity may be warranted for some aides, specifically those "entrusted with discretionary authority in such sensitive areas as national security or foreign policy" because it "protect[s] the unhesitating performance of functions vital to the national interest."[74] This exemption does not cover "all Presidential aides in the performance of all their duties."[75] "In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability" and "he was discharging the protected function when performing the act for which liability is asserted."[76] Conversely, "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."[77] The Court "relied on the assumption that this [qualified immunity] standard would permit [i]nsubstantial lawsuits [to] be quickly terminated" when "identifying [it] as the best attainable accommodation of competing values."[78]

Therefore, the objective part of the qualified immunity test "imposes liability only for violations of clearly settled law which a defendant, in the absence of extraordinary circumstances, has a duty to know… [w]here there was no clearly settled law at the time the defendant acted, the defendant escapes § 1983 damages liability."[79]

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69. *Id.* at 819.
70. *Id.* at 818.
71. *Id.* at 819.
72. *Id.* at 809.
73. *Id.* at 811–12 (internal quotations marks omitted).
74. *Id.* at 812.
75. *Id.*
76. *Id.* at 812–13.
77. *Id.* at 813.
78. *Id.* at 814 (internal quotation marks omitted).
79. NAHMOD, *supra* note 40.

Since the *Harlow* decision in 1982, the Supreme Court has only applied the *Harlow* standard in twenty-seven qualified immunity cases.[80] Of those twenty-seven cases, the official prevailed in all but three.[81] *Groh v. Ramirez*, decided in 2004, involved a "glaring mistake in a search warrant,"[82] and *Hope v. Pelzer*, decided in 2002, involved "the use of a hitching post for prison discipline, in apparent violation of longstanding circuit precedent."[83] Finally, *Malley v. Briggs*, decided in 1986, "ordered a remand after rejecting (inter alia) an officer's argument that so long as he does not lie, 'the act of applying for a warrant is per se objectively reasonable.'"[84] The Court's precedent has not merely maintained the doctrine of qualified immunity, but has "doubl[ed] down on it, enforcing it aggressively against lower courts," which ultimately sends a message to lower courts to "think twice before allowing a governmental official to be sued for unconstitutional conduct."[85]

Consequently, lower courts are left to translate the Court's message as they hear thousands of cases involving qualified immunity. Specifically, lower courts hear a multitude of First Amendment retaliation claims where qualified immunity is raised as a defense. Appellate court decisions regarding First Amendment retaliation claims and Section 1983 are not uncommon, especially within the specific context of a sheriff's department, but the results of such cases are complicated, especially when compared against other circuits. While it is well settled law "that a state or local government cannot condition public employment on a basis that infringes upon a public employee's constitutionally protected interest in freedom of expression, … the way that federal and state courts have applied the legal standards … has made it very difficult to predict the outcome in many free speech cases."[86] Aspects like "the background and composition of a particular circuit or appellate panel may affect the way the balancing test is applied."[87] It is clear that "the doctrine of qualified immunity creates a fog of uncertainty surrounding constitutional rights."[88]

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80. William Baude, *Is Qualified Immunity Unlawful?* 39 (Univ. of Chi. L. Sch., Working Paper No. 610, 2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2070&context=public_law_and_legal_theory [https://perma.cc/2P57-3F8N].

81. *Id.*

82. 540 U.S. 551, 564 (2004)

83. 536 U.S. 730, 741-46 (2002)

84. 475 U.S. 355, 345 (1986)

85. Baude, *supra* note 80, at 41.

86. William Herbert, *Balancing Test and Other Factors Assess Ability of Public Employees to Exercise Free Speech Rights*, N.Y. ST. B.J. 24 (2002).

87. *Id.* ("One circuit's application of the balancing test may have little or no persuasive value in another circuit considering a case with similar facts.").

88. Gross, *supra* note 45, at 82.

2. Appellate Court Cases Involving General Critical Speech

In 2005, the United States Court of Appeals for the First Circuit decided a case involving a First Amendment retaliation claim advanced by two officers against the chief of a police department, based on comments made to each of them and other officers about police department matters.[89] The police chief claimed qualified immunity and filed a motion for judgment on the pleading, seeking to dismiss the individual claims.[90] The officers were suspended after the chief allegedly "illegally search[ed] and analyz[ed] recorded telephone conversations between other officers and superiors."[91] The conversations concerned four matters: "(1) requesting criminal offender record information … about several individuals; (2) criticizing the deputy chief and other department management; (3) discussing the chief's absenteeism and referring to him as 'No Show Joe'; (4) discussing safety issues concerning the Dudley Station of the [police department]."[92] Plaintiffs alleged that the personal discipline resulting from these matters caused damages due to their criticism of both "his job performance and the job performance of his deputies" and therefore was a violation of their free speech rights under the First Amendment.[93] The district court rejected the chief's claim of qualified immunity, and the First Circuit affirmed.[94] The court recognized, however, that the relevant qualified immunity case law was generally in the chief's favor, but because all inferences are drawn in favor of the plaintiff, the chief does not succeed.[95] First, the court found that the speech could fall within an area of public concern, as the alleged complaints about the department could be relevant to conditions for the general public.[96] Second, the court found the plaintiffs had sufficiently alleged a constitutional violation.[97] Third, the sheriff was not entitled to qualified immunity based on an argument that the law was unsettled at the time of the conduct:

> If plaintiffs' criticism consisted of serious expression of concern, voiced in an appropriate manner, about the effect of their supervisors' poor performance on public safety or other public matters, and appellant's retaliation was primarily aimed at silencing their criticism for his own advantage, precedent would have clearly established that the balance of interests tipped decisively in plaintiff's favor.[98]

89. Jordan v. Carter, 428 F.3d 67, 70 (1st Cir. 2005).
90. *Id.*
91. *Id.*
92. *Id.* at 70–71.
93. *Id.* at 71.
94. *Id.*
95. *Id.*
96. *Id.* at 73.
97. *Id.* at 74.
98. *Id.* at 75.

Finally, the court determined that it could not award immunity to the sheriff because it rejected the sheriff's argument that "a reasonable officer would not have realized the impropriety of his conduct."[99] Overall, the court cited the insufficient record as the basis for most of its conclusions.[100]

In 1996, the United States Court of Appeals for the Fourth Circuit heard a case brought by Patrick Cromer, a former employee of the sheriff's department of Greenville County, South Carolina.[101] Cromer alleged he was fired from the department as a result of his speech, after he joined a black officers association and made comments about "perceived racial discrimination in the sheriff's office."[102] The association submitted a letter to the sheriff that discussed how the unwritten policies of the department had inhibited "the advancement of Black officers," how black officers were receiving unequal treatment in several areas within the department, and alleged biases against black officers on the promotional boards.[103] The sheriff blamed Cromer and denied each of the charges, in a response letter to the association.[104] The district court granted summary judgment in favor of the sheriff in his individual capacity,[105] holding he was entitled to qualified immunity.[106] The Fourth Circuit reversed on this point.[107] Conversely, it affirmed on the district court's holding that the sheriff, in his official capacity as a state official, was "immune from suit for money damages."[108] The court found that at the time of Cromer's termination, "existing decisions in our sister circuits had given First Amendment protection to speech like Cromer's, that is, a police officer's expressions of concern about racial discrimination and animus in his agency."[109] Specifically, "the First Amendment does not allow state officials to take adverse employment action against an employee who speaks out about the practice of racial discrimination in a law enforcement

99. *Id.* at 76.

100. *Id.*

101. Cromer v. Brown, 88 F.3d 1315, 1318 (4th Cir. 1996).

102. *Id.* Cromer held the position of captain, was demoted to lieutenant, and then was fired. *Id.* Cromer also alleged that his termination was due to racial discrimination, but that will not be discussed in this note, as it is outside of the scope. *Id.*

103. *Id.* at 1320.

104. *Id.* at 1321.

105. There is a distinction for purposes of damages between liability in one's individual or official capacity. Pursuing action against the sheriff in his individual capacity seeks to impose personal liability, while pursuing action against the sheriff in his official capacity as a state official seeks to recover from the state treasury of which the officer is an agent. *Bench Book – 5.3.1.1 Official Capacity versus Individual Capacity*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION (2020), https://www.interstatecompact.org/bench-book/ch5/5-3-1-1-official-capacity-versus-individual-capacity [https://perma.cc/F44L-T2NJ] (last visited March 16, 2021).

106. *Cromer*, 88 F.3d at 1318.

107. *Id.*

108. *Id.*

109. *Id.* at 1329.

agency."[110] Finally, under *Harlow*, the court held "any reasonable official in [the sheriff's] shoes would have realized he would violate the Constitution if he fired Cromer for speaking of widely held concerns about racial discrimination in the sheriff's office."[111]

In 2000, the United States Court of Appeals for the Eleventh Circuit heard a wrongful termination in violation of the First Amendment suit brought by a police officer against the department's chief of police.[112] The officer had voiced concerns that the chief had stolen money from the evidence room, which were based mainly on the chief being manager over the evidence room.[113] The district court denied the chief's motion for summary judgment based on qualified immunity, and the Eleventh Circuit reversed.[114] The court found the statements addressed public concern, there was no evidence of disruption of the office operations, there was a jury question on the element of causation, and the evidence was not strong enough for judgment on a matter of law.[115] Additionally, "a reasonable police chief could have lawfully terminated [the officer] for his misconduct and could have considered [the] termination proper, even if motivated in substantial part by an unlawful motive [the] termination … was objectively reasonable for purposes of qualified immunity."[116]

3. Appellate Court Cases Involving Campaign-Related Speech

In 1992, the United States Court of Appeals for the Fifth Circuit heard a First Amendment retaliation case where deputies were transferred to less-desirable positions after announcing they were running for the sheriff's position.[117] These transfers were for an indefinite time, and "[a]lthough the transfers did not result in a decrease in pay, each man considered his transfer a demotion."[118] The district court found in favor of the sheriff, finding qualified immunity provided protection.[119] First, the court found that a transfer alone was enough to deprive the plaintiff employees of their rights.[120] These positions were "not as interesting or prestigious" as their previous jobs, even if there was no reduction in salary.[121] Appellate level precedent had established that "the law was established clearly enough in this circuit in January 1988 that a reasonable officer should have known that if he retaliated

110. *Id.* at 1330.
111. *Id.* at 1331.
112. Stanley v. City of Dalton, Ga., 219 F.3d 1280, 1282 (11th Cir. 2000).
113. *Id.*
114. *Id.*
115. *Id.* at 1288–94.
116. *Id.* at 1297–98.
117. Click v. Copeland, 970 F.2d 106, 108 (5th Cir. 1992).
118. *Id.*
119. *Id.*
120. *Id.* at 111.
121. *Id.* at 110.

against an employee for exercising his First Amendment rights, he could not escape liability by demoting and transferring the employee rather than discharging him."[122] Therefore, the court concluded the district court erred in finding the sheriff was entitled to qualified immunity.[123]

In 2002, the United States Court of Appeals for the Sixth Circuit heard a case involving a sheriff allegedly refusing to reappoint deputy sheriffs in retaliation of their support for his political opponent in the election for sheriff.[124] This support took the form of speaking with others in their respective neighborhoods about the opposing candidate and encouraging yard signs in their yards, car bumper stickers on their own cars and yard signs, and attending a political dinner while sitting at the opposing party's table.[125] After he took office, the sheriff did not rehire the deputies, citing reasons of frequenting "an adult entertainment club" and receiving complaints about the handling of several rape cases.[126] The district court denied the sheriff's motion for summary judgment based on his qualified immunity claim.[127] The Sixth Circuit affirmed the district court's ruling that the sheriff was not protected by qualified immunity.[128] First, the court found that the sheriff had not demonstrated that the deputy sheriffs may be dismissed due to their political affiliation.[129] Next, the court determined the law was sufficiently clear that "a reasonable official would have understood that taking such an action against them for political reasons was unconstitutional."[130]

In 2014, the Eighth Circuit heard a case brought by a deputy sheriff alleging First Amendment retaliation after the deputy ran against the current sheriff.[131] The sheriff did not claim the campaign was interfered with in any way, and ultimately, the sheriff won the election.[132] The day after the election, the sheriff fired the deputy sheriff, after being told by the human resources consultant and attorney that the sheriff was within his authority to terminate the deputy.[133] This termination caused "some unrest in the County and resulted in a recall election," which the sheriff also won.[134] During the recall campaign, the sheriff "made statements that [the deputy] was fired in accordance with an unwritten rule that deputy sheriffs who run against the sheriff will be fired and for certain statements [the deputy] made during the

122. *Id.* at 111.
123. *Id.* at 113.
124. Heggen v. Lee, 284 F.3d 675, 678 (6th Cir. 2002).
125. *Id.*
126. *Id.* at 679.
127. *Id.*
128. *Id.* at 678.
129. *Id.* at 686.
130. *Id.*
131. Nord v. Walsh Cty., 757 F.3d 734, 737–38 (8th Cir. 2014).
132. *Id.*
133. *Id.*
134. *Id.*

campaign."[135] The deputy's speech included that the sherrif "should not be running for office because his health was so bad," that his wife did not want him to run for sheriff, and that the sheriff was going to resign in two years and run for state senate.[136] The district court denied the sheriff's summary judgment motion that asserted a qualified immunity defense.[137] The Eighth Circuit reversed.[138] The court found that "based upon … precedent and a fair reading of North Dakota Attorney General opinions on the subject, a North Dakota sheriff, in light of pre-existing law, could, and perhaps should, believe that his deputies are at will employees."[139] The court recognized that "the latitude the courts accord a managing law enforcement officer in executing his official duties, including the hiring and firing of employees-especially subordinate officers."[140] The court acknowledged that "Supreme Court precedent strongly implies that some speech may be protected and some may not," but that political speech deserves First Amendment protection, while false factual statements have diminished value.[141] Therefore, the court held

> (1) that at least some of [the deputy's] campaign speech does not merit First Amendment protection…; (2) that even if [the deputy's] speech was fully protected by the Constitution, [the sheriff] could have reasonably believed that the speech would be at least potentially damaging to and disruptive of the discipline and harmony of and among co-workers in the sheriff's office and detrimental to the close working relationships and personal loyalties necessary for an effective and trusted local policing operation … and the above-mentioned adverse employer-employee circumstance did not need to become manifest in order to be acted upon promptly …; (3) that … [the sheriff] could have logically and rationally believed that his decision to terminate [the deputy] was well within the breathing room accorded him as a public official in making a reasonable, even if mistaken, judgment under the circumstances…; and thus (4) [the sheriff] is entitled to qualified immunity to shield him from liability claimed to have arise through violation of the First Amendment as asserted.[142]

IV. INSTANT DECISION

In Morgan, the Eighth Circuit first discussed that "an immediate appeal is appropriate…if the moving party claims qualified immunity…because

135. *Id.*
136. *Id.* at 742 (internal quotation marks omitted).
137. *Id.* at 738.
138. *Id.* at 737.
139. *Id.* at 741 (internal quotation marks omitted).
140. *Id.*
141. *Id.* at 742–43.
142. *Id.* at 743 (internal citations omitted).

immunity is effectively lost if a case is erroneously permitted to go to trial."[143] The court established the standard of review for a denial "of summary judgment based on qualified immunity" is de novo.[144]

Next, the court gave background on the doctrine of qualified immunity, which "shields officials from civil liability in [Section] 1983 actions when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[145] The court cited the two-step qualified immunity analysis used in Eighth Circuit precedent: "Qualified immunity analysis requires a two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct."[146] Unless both of those inquiries are answered affirmatively, the "appellate is entitled to qualified immunity."[147] Finally, courts are allowed to use their "sound discretion in deciding which of the two prongs … should be addressed first."[148]

The court began its analysis by stating it was unnecessary to consider the issue of whether there was "genuine issue of material factors" surrounding Morgan's termination, which would go to the first prong analysis, because the second prong was not satisfied.[149] In other words, "Robinson did not violate a clearly established statutory or constitutional right[] of which a reasonable person would have known."[150]

A clearly-established statutory or constitutional right is a right that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[151] Further, a clearly-established right should be "particularized to the facts of the case"[152] rather than "defined at a high level of generality."[153] Precedent must exist that makes the right question

143. Morgan v. Robinson, 920 F.3d 521, 523 (8th Cir. 2019) (citing Division of Emp't Sec. v. Board of Police Comm'rs, 864 F.3d 974, 978 (8th Cir. 2017)) (internal quotation marks omitted).

144. *Id.*

145. *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted).

146. *Id.* (citing Nord v. Walsh Cty., 757 F.3d 734, 738 (8th Cir. 2014)) (internal quotation marks omitted).

147. *Id.* (internal quotation marks omitted).

148. *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)) (internal quotation marks omitted).

149. *Id.* (citing Morgan v. Robinson, No. 8:14CV212, 2016 WL 10636372, at *5 (D. Neb. Dec. 8, 2016), *aff'd,* 881 F.3d 646 (8th Cir. 2018), *reh'g en banc granted, opinion vacated* (Mar. 21, 2018), *on reh'g en banc,* 920 F.3d 521 (8th Cir. 2019), *and rev'd and remanded,* 920 F.3d 521 (8th Cir. 2019)) (internal quotation marks omitted).

150. *Id.* (*citing Pearson*, 555 U.S. at 231).

151. *Id.* (citing Reichle v. Howards, 566 U.S. 658, 664 (2012)).

152. *Id.* at 524 (citing White v. Pauly, 137 S. Ct. 548, 552 (2017)) (internal quotation marks omitted).

153. *Id.* at 523 (same) (internal quotation marks omitted).

"beyond debate."[154] The policy behind qualified immunity is that it "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law."[155]

The court determined there was a clearly established right when Morgan was terminated by analogizing to *Nord v. Walsh*.[156] This Eighth Circuit case determined the sheriff was entitled to qualified immunity due to established state and federal law, and advice the sheriff received from the county attorney and the human resources consultant.[157] Further, the sheriff's department "enforces the police powers in the county" with a small department, and the sheriff "has the power to appoint and terminate deputies."[158] Finally, the sheriff "has an interest in maintaining the efficient operation of the office."[159]

The court found two distinctions with *Nord* but determined neither demanded a different outcome.[160] First, the speech in this case concerned "matters of public concern," while in *Nord* the speech concerned personal attacks at the sheriff.[161] Second, there was no disruption in *Nord,* and here, "Robinson testified he believed Morgan's statements were detrimental to the office, harmful to morale, and adversely impacted the public's trust of the office" and deputies held the same beliefs.[162] In fact, the "entire command staff," which consisted of five deputies, recommended Morgan be terminated.[163]

The court acknowledged that *Nord* was decided one month after Morgan was fired.[164] However, the court maintained that *Nord* supports Robinson, because the facts are similar, the "decision held the law was not clearly established in November 2010," and "[n]either Morgan nor this court finds any intervening law that clearly established the law before his termination."[165] Therefore, it follows that "the constitutional question was not beyond debate in May 2014."[166]

Even if Robinson could not advance evidence of this disruption, Robinson could still claim qualified immunity because "there is no necessity

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154. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

155. *Id.* at 524 (citing Stanton v. Wims, 571 U.S. 3, 6 (2013)) (internal quotation marks omitted).

156. *Id.*; Nord v. Walsh Cty., 757 F.3d 734 (8th Cir. 2014); *see supra* section III.A.2.

157. *Morgan*, 920 F.3d at 524; *Nord*, 757 F.3d at 743–45.

158. *Morgan*, 920 F.3d at 524; *see* NEB. REV. STAT. § 23-1704.01.

159. *Id.* at 525.; Morgan v. Robinson, 881 F.3d 646, 653–54 (8th Cir. 2018).

160. *Morgan*, 920 F.3d at 525.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 526.

165. *Id.* at 526–27.

166. *Id.* at 527 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) (internal quotation marks omitted).

for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[167] This concern is even more apparent with the sheriff's job because of his duty to manage, hire, and fire subordinate officers.[168] The facts here, specifically "[t]he termination letter, Robinson's testimony, and the testimony of five other deputies," demonstrate that Robinson "could have reasonably believed that Morgan's speech was at least potentially damaging to and disruptive of the discipline and harmony of and among co-workers in the sheriff's office and detrimental to the close working relationships and personal loyalties necessary for an effective and trusted local policing operation."[169] Therefore, "[a]t the time of Morgan's termination, the law was not sufficiently clear so that Robinson would have known that terminating him violated his First Amendment rights"[170] and Robinson is shielded by qualified immunity.[171]

The dissent, authored by Judge Shepherd, argues it was proper to affirm the district court's denial of Robinson's qualified immunity and focused on the majority's alleged error in "rest[ing] on the impermissible factual finding" that Robinson terminated Morgan because of the "potentially damaging and disruptive consequences" of the campaign speech.[172] Conversely, the dissent argues that when viewing the record in favor of Morgan, which is "the proper lens of a summary judgment appeal," Robinson had instead terminated Morgan solely because of the campaign speech.[173] The dissent rests on the contention that the majority failed to adhere to precedent regarding the proper standard of review.[174]

Under the proper standard, the dissent first found that Morgan's campaign statements were made as a citizen and addressed matters of public concern, which "lies at the heart of the First Amendment" and can trigger a First Amendment claim.[175] Next, the dissent stated it was unreasonable for Robinson to use the potentially damaging and disruptive rationale[176] for Morgan's termination because of the "significant evidence" of the termination being based on the campaign speech that "challeng[ed] Robinson's record and call[ed] attention to his view of the status of Sheriff Department

167. *Id.* at 525 (quoting Connick v. Myers, 461 U.S. 138, 152, 154 (1983)) (internal quotation marks omitted).

168. *Id.* at 526; Nord v. Walsh Cty., 757 F.3d 734, 741 (8th Cir. 2014).

169. *Morgan*, 920 F.3d at 526; *Nord*, 757 F.3d at 743.

170. *Morgan*, 920 F.3d at 527 (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)) (internal quotation marks omitted).

171. *Id.* at 527.

172. *Id.* (Shepherd, Kelly, and Erickson, JJ., dissenting).

173. *Id.* at 527–28.

174. *Id.* at 528.

175. *Id.* at 530–31.

176. *Id.* at 525–26 (majority opinion); Nord v. Walsh Cty., 757 F.3d 734, 743 (8th Cir. 2014).

operations."[177] Finally, the dissent would find it is clearly established that Robinson could not terminate Morgan for the campaign speech because Robinson could not have reasonably believed at the time of termination that "a government employer could fire an employee on account of the employee exercising his First Amendment right to free speech during a run for political office where that speech had no disruptive impact on office functioning."[178] The dissent also criticizes the majority's reliance on *Nord v. Walsh*, stating "the majority diminishes critical distinctions in Nord," specifically that Nord spoke out about "the sheriff's personal attributes and fitness for office" and Morgan, conversely, addressed department-wide operation issues.[179]

V. COMMENT

Although the procedural pitfalls of a First Amendment retaliation claim involving a qualified immunity defense can make comparing cases and jurisdictional trends difficult, other aspects of this particular claim add to the confusion. Differences between circuits create confusing standards for plaintiffs and subordinates to follow and base their claims on. It is worth noting, however, that some of these differences may be inevitable, as the analysis is fact specific, and the law is consistently changing. If at the time of the decision the law is established, it may change before the court hears another case on the same qualified immunity issue. For example, the Sixth Circuit, seventeen years before *Morgan*, found no qualified immunity in a case involving termination based on political opponent support in an election for sheriff.[180] Contrarily, the Eleventh Circuit, nineteen years before *Morgan*, held that qualified immunity applied where a police officer was fired allegedly in retaliation for accusing the police chief of theft.[181] Even in the Eighth Circuit, within a matter of one year, the law changed so that qualified immunity applied to Robinson. Another difference in the two *Morgan* decisions out of the Eighth Circuit is that the first was heard by a panel of three judges,[182] while the second was heard en banc. The preceding reasons are just a handful of existing factors that make these types of cases extremely unpredictable.

Cases involving a qualified immunity defense make success unlikely, as "suits against governmental officials almost never succeed."[183] It is notable

177. *Morgan*, 920 F.3d at 532 (Shepherd, Kelly, and Erickson, JJ., dissenting).

178. *Id.* at 533.

179. *Id.* at 535.

180. Heggen v. Lee, 284 F.3d 675, 678–79 (6th Cir. 2002).

181. Stanley v. City of Dalton, Ga., 219 F.3d 1280, 1298 (11th Cir. 2000).

182. The three-judge panel was Judges Benton, Shepherd, and Kelly. *Morgan*, 881 F.3d at 649.

183. George Leef, *Qualified Immunity – A Rootless Doctrine The Court Should Jettison*, FORBES (March 21, 2018, 9:53 AM), https://www.forbes.com/sites/georgeleef/2018/03/21/qualified-immunity-a-rootless-

that sheriffs generally have "absolute control over the selection and retention of deputy sheriffs."[184] Further, the sheriff is "generally given broad authority in the selection and dismissal of deputies, both because the sheriff is responsible for the neglects and defaults of a deputy and so that law enforcement can be centralized in the county."[185] This creates a pretty high bar for sheriffs to be found to not have acted in an objectively reasonable manner. This thought is stated well in the dissent of *Morgan*: "Sheriff Robinson terminated Morgan's employment solely because of his personal objections to the content of Morgan's campaign speech without the reasonable belief that the statements would have a disruptive effect on the operation of the Sheriff's department."[186]

The doctrine of qualified immunity is designed to shield government officials, but it has resulted in excusing egregious government action in many cases. Courts across the United States each year "grant government officials qualified immunity in decisions that describe tragic facts and outrageous behavior."[187] For example, "defendants who have searched homes without probable cause, stolen property in police custody, fabricated evidence, and used excessive force are shielded from liability."[188]

The need for and justifications of protecting officials when exercising their decisions in regard to their official authority is apparent; however, because *Harlow* largely removed the subjective element of the qualified immunity defense, it is likely that a sheriff with personal vendettas against a subordinate could articulate an objectively reasonable basis for the termination, even if there was subjective intent behind it. Further, actual disruption is not a prerequisite to advance a qualified immunity defense and punishment is permitted for speech on issues of public concern. *Harlow* increases the risk that subordinates could suffer wrongful termination based on personal issues because it gives wide protection and discretion to sheriffs and other officers, leaving those individuals no option for recourse.

Specific to the First Amendment, *Harlow* might invite corruption into the system and discourage improvement. By protecting government actors, such as sheriffs, through qualified immunity, it could provoke a fear to speak out about current problems in a system. If an individual knows they may lose their job if they attempt to speak out and implement change, they may decide that is not worth it. Additionally, in order to pre-determine if a government

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doctrine-the-court-should-jettison/?sh=3cddb5031c71 [https://perma.cc/CFZ2-9DEY].

184. Romualdo P. Eclavea and Alan J. Jacobs, *Appointment or election – Of deputy sheriffs*, *in* 70 Am. Jur. 2d Sheriffs, Police, and Constables § 14 (November 2020 Update).

185. *Id.*

186. *Morgan*, 920 F.3d at 527–28 (Shepherd, Kelly and Erickson, JJ., dissenting).

187. Joanna Schwartz, *Imagining a World Without Qualified Immunity, Part I*, REASON (Sept. 16, 2019, 8:03 AM), https://reason.com/volokh/2019/09/16/imagining-a-world-without-qualified-immunity-part-i/ [https://perma.cc/VLG9-Y6JC].

188. *Id.*

actor will be shielded from liability, it would require actively keeping up with appellate specific decisions, drastically inhibiting one's freedom to speak when and how they would like.

VI. CONCLUSION

The Supreme Court has advanced three justifications for qualified immunity: (1) "it derives from a common law 'good faith' defense"; (2) "it compensates for an earlier putative mistake in broadening the statute"; and (3) "it provides 'fair warning' to government officials, akin to the rule of lenity."[189] By examining the modern state of the qualified immunity defense, however, it is clear the articulated justifications of the defense do not stand up to the negatives it produces today. The doctrine has been interpreted in various ways by lower courts, causing a world of uncertainty and unfairness when a victim of egregious government action seeks a monetary remedy. Government officials are shielded from anything that is clearly established at the time of the action, which results in that official escaping liability in a majority of the cases. While this deters meritless lawsuits, it also deters valid suits that will not be pursued given the uncertainty and hurdles that plaintiff faces.

Specific to the First Amendment, shielding government actors who take retaliatory action creates an environment of fear, where improvements will be hard to advocate for and implement, and corruption is not uncommon. Given the wide latitude a sheriff is granted when managing his department, he should be protected by the same level of employee protection as a regular, nongovernmental citizen when it comes to retaliatory actions against an opposing party in an election.

189. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46 (2018).