Missouri Law Review

Volume 88 | Issue 4 | Article 8

Fall 2024

When Push Comes to Shove: How Qualified Immunity Shuts the Door to Constitutional Claims Against Law Enforcement

Scott J. Bower

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

Scott J. Bower, *When Push Comes to Shove: How Qualified Immunity Shuts the Door to Constitutional Claims Against Law Enforcement*, 88 Mo. L. Rev. ()
Available at: https://scholarship.law.missouri.edu/mlr/vol88/iss4/8

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

NOTE

When Push Comes to Shove: How Qualified Immunity Shuts the Door to Constitutional Claims Against Law Enforcement

Martinez v. Sasse, 37 F.4th 506 (8th Cir. 2022).

Scott J. Bower[*]

I. INTRODUCTION

Sometimes lawyers get pushed around—both literally and figuratively. However, it is not every day that a Netflix camera crew might capture such an altercation on camera. While filming a Netflix documentary about the experiences of undocumented persons in the United States, Andrea Martinez found herself in a precarious situation that resulted in her suing two United States Immigration and Customs Enforcement agents for allegedly violating her Fourth Amendment rights.[1] Plaintiffs like Martinez often struggle to overcome the strenuous legal doctrine of qualified immunity when filing suit against government officials. Several circuits across the country are clarifying legal guidelines and applying them to claims similar to those of Martinez. The Eighth Circuit should follow suit by clarifying its guidelines in the context of Fourth Amendment claims and qualified immunity.

This Note addresses the Eighth Circuit's application of qualified immunity, how the court arrived at its conclusions, and why this decision may be troublesome for plaintiffs attempting to overcome qualified immunity. Part II details the facts and holding of *Martinez v. Sasse*. Part III discusses the legal background of qualified immunity as a judicially created doctrine. Additionally, it draws attention to notable criticisms of qualified immunity and describes the differences between *Bivens* actions

[*] B.S.B.A., Avila University, 2020; J.D., University of Missouri School of Law, 2023; Associate Member, *Missouri Law Review*, 2022–2023. I would like to thank Professor Ryan Redmon for advising me during the writing process and Professor Randy Diamond for his invaluable guidance regarding the research involved in this note. I also thank members of the *Missouri Law Review* who worked tirelessly to edit this note and my family for their unfaltering support during my time in law school.

[1] *See generally* Martinez v. Sasse, 37 F.4th 506 (8th Cir. 2022).

Missouri Law Review, Vol. 88, Iss. 4 [], Art. 8

and claims brought under the Federal Tort Claims Act. Part IV explains the court's decision in *Martinez v. Sasse*. Finally, Part V highlights the court's cherry-picked reliance on precedent from a sister circuit, the potential negative ramifications of the court's decision, and why the Federal Tort Claims Act may not be an ideal "alternative" when plaintiffs fail to surpass the high threshold of qualified immunity.

II. FACTS AND HOLDING

Andrea Martinez is an immigration lawyer in Kansas City, Missouri.[2] Martinez sued Everett Chase and Ronnet Sasse, officers employed by the United States Immigration and Customs Enforcement agency ("ICE").[3] Martinez claimed Chase and Sasse violated her Fourth Amendment rights by effecting a seizure through excessive force.[4] She also sued the officers in their individual capacities pursuant to the Federal Tort Claims Act ("FTCA") for assault, battery, false arrest, false imprisonment, and negligent infliction of emotional distress.[5]

The suit arose through Martinez's representation of Kenia Bautista-Mayorga and her three-year-old son, N.B.M., who sought asylum in the United States in 2016.[6] Following a traffic stop in Missouri, Bautista-Mayorga was detained in the Platte County Detention Center.[7] Soon after, Martinez began representing Bautista-Mayorga.[8] While detained, Bautista-Mayorga was separated from N.B.M.[9] During that period, N.B.M. traveled to Texas to stay with Luis Alfredo Diaz Inestroza, Bautista-Mayorga's partner.[10] On June 25, 2018, in anticipation of a decision from the Board of Immigration Appeals, Martinez instructed Diaz Inestroza to bring N.B.M. from Texas to Kansas City to reunite N.B.M. with his mother in the event of an order to deport both Bautista-Mayorga and N.B.M to Honduras.[11] The Board of Immigration Appeals denied the request for an emergency stay of N.B.M. and Bautista-Mayorga's deportation.[12] Subsequently, staff at the ICE Enforcement and Removal Operations Facility in Kansas City instructed Martinez to arrive at the

[2] *Id.*

[3] *Id.* at 507.

[4] *Id.* This type of action is sometimes referred to as a "Bivens" action. *Id.*; Martinez v. United States, 5:19-CV-06135-FJG, 2021 WL 1207740, *1 (W.D. Mo. Mar. 9, 2021), *rev'd and remanded* Martinez v. Sasse, 37 F.4th 506 (8th Cir. 2022).

[5] *Martinez*, 2021 WL 1207740 at *1.

[6] *Id.* at *3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at *4.

[12] *Id.*

facility parking lot at 3:30 a.m. on June 26, 2018, to hand N.B.M. over to his mother.[13]

A Netflix crew filming a documentary featuring the family's story accompanied Martinez, an associate attorney, Diaz Inestroza, and N.B.M. to the facility at 3:30 a.m.[14] Over the phone, Officer Sasse asked Martinez to bring Diaz Inestroza and N.B.M. to reunite inside the facility because of the light rain.[15] After Martinez and the associate walked up to the facility to discuss logistics, Officer Chase followed them as they walked back to the parking lot. He interrupted their conversation with Diaz Inestroza, grabbed Diaz Inestroza's arm, and forcibly walked him towards the entrance of the facility with N.B.M. in his arms.[16] Officer Sasse held the facility's front door open, at which point Officer Chase pushed Diaz Inestroza and N.B.M. inside and entered behind them.[17] Martinez and the associate attempted to accompany their clients inside, but Officer Chase moved in front of them, physically barring their entrance to the facility.[18] Officers Chase and Sasse then pushed Martinez, causing her to fall to the ground, and immediately shut and locked the door to the facility.[19] As a result, Martinez suffered a fracture to her right foot, lacerations, bleeding, and a concussion.[20] Seconds later, Officer Chase unlocked the door and allowed Martinez, but not her associate, to come inside, even though Martinez and her associate informed the officers that they both represented N.B.M. and Bautista-Mayorga.[21]

Following these events, Martinez filed claims in the Western District of Missouri against Officer Chase and Officer Sasse, claiming they violated her Fourth Amendment rights.[22] At the start of the litigation, Sasse moved for judgment on the pleadings, asserting that she was entitled to qualified immunity because Martinez could not show a Fourth Amendment violation.[23] Sasse argued that the amount of force she applied was reasonable under the circumstances, claiming the events were a "rapidly developing situation which was potentially hostile or dangerous toward herself or her fellow officer and others."[24] She stated that

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at *5.

[17] *Id.* at *6.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at *10–11.

[23] *Id.* at *2 ("Although Martinez sued Chase and Sasse, only Sasse moved for judgment on the pleadings.").

[24] *Id.*

Martinez's attempt to enter the facility threatened the safety of the officers, the detainee, and bystanders.[25]

In opposition, Martinez argued that Chase and Sasse used objectively unreasonable force against her because she was not suspected of committing a crime, was not being arrested, had not made threats, and was present at the officers' invitation as an attorney to represent her clients.[26] She contended that no force was necessary because it was not a "tense, uncertain, rapidly evolving situation" that might have required Chase and Sasse to determine an appropriate amount of force.[27] Martinez further argued that the unlawfulness of Chase and Sasse's unnecessary force was clearly established by 2018—the year that the incident with Martinez occurred—and the relevant case law gave the officers notice of the unlawfulness of such force.[28] Martinez urged the court to deny Sasse's motion for judgment on the pleadings, arguing that Sasse failed to show she was entitled to the qualified immunity defense.[29] The federal district court denied Sasse's motion for judgment on the pleadings, reasoning that the Fourth Amendment violations were clearly established at the time of the incident.[30]

Sasse appealed the district court's denial of qualified immunity to the U.S. Court of Appeals for the Eighth Circuit.[31] The Eighth Circuit reversed and remanded, instructing the district court to dismiss the Fourth Amendment claim against Sasse.[32] In its opinion, the court analyzed whether Sasse's pushing of Martinez to the ground effectuated a seizure within the meaning of the Fourth Amendment.[33] First, the court held Sasse's act was not a seizure within the meaning of the Fourth Amendment because her shove was performed to "repel" rather than to apprehend Martinez.[34] Second, the authority cited by Martinez did not "clearly establish" that the use of force to repel is a seizure under the Fourth

---

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* For a plaintiff to successfully defeat a defense of qualified immunity, he or she must show that the unlawfulness of the officer's conduct was "clearly established" at the time of the alleged offense. D.C. v. Wesby, 583 U.S. 48 (2018). To be clearly established, the plaintiff needs to show that there is existing circuit precedent and a robust consensus of persuasive authority. *Id.*; Martinez v. United States, 5:19-CV-06135-FJG, 2021 WL 1207740, 2 (W.D. Mo. Mar. 9, 2021), *rev'd and remanded* Martinez v. Sasse, 37 F.4th 506 (8th Cir. 2022).

[29] Martinez v. United States, 5:19-CV-06135-FJG, at *2.

[30] *Martinez*, 37 F.4th at 507.

[31] *Id.* at 508.

[32] *Id.* at 510.

[33] *Id.* at 509.

[34] *Id.* at 510.

Bower: When Push Comes to Shove: How Qualified Immunity Shuts the Door t

Amendment.[35] Thus, the Eighth Circuit held that when an officer shoves a person to the ground in an effort to "repel" rather than apprehend, there is no Fourth Amendment violation because the distinction is not readily apparent to a reasonable officer.[36]

III. LEGAL BACKGROUND

Qualified immunity, created by the U.S. Supreme Court, is "a legal doctrine that protects public officials, including police officers, immigration officers, and immigration detention center staff from civil liability for statutory or constitutional violations."[37] This section will first discuss qualified immunity as a judicially created doctrine. Next, this section will highlight notable critiques of qualified immunity. Finally, this section addresses the differences between a *Bivens* action and an FTCA suit.

A. Qualified Immunity as a Judicially Created Doctrine

The protection of qualified immunity extends to all government officials except for the "plainly incompetent or those who knowingly violate the law."[38] Government officials are entitled to qualified immunity unless a court finds that the official violated clearly established statutory or constitutional rights that a reasonable person would have known.[39] According to the Supreme Court, 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."[40] The purported driving force behind qualified immunity is to resolve insubstantial claims against government officials at the outset of lawsuits.[41] When qualified immunity is applied, government officials are provided immunity not only from civil damages, but also from having

[35] *Id.*

[36] *Id.*

[37] *Issue Brief: Qualified Immunity in Immigration*, THE NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD (June 2021), https://nipnlg.org/sites/default/files/2023-03/2021_24June_qualified-immunity-brief.pdf [https://perma.cc/CEY3-JP22] [hereinafter *Qualified Immunity in Immigration*].

[38] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[39] Whitney K. Novak, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS (2023) [hereinafter Novak, POLICING].

[40] *Id*. at 1 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

[41] *Pearson*, 555 U.S. at 231–32 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

Published by University of Missouri School of Law Scholarship Repository,

to defend against litigation altogether, as satisfying qualified immunity will dismiss the suit.[42]

Qualified immunity applies to federal and state officials who are sued under 42 U.S.C. § 1983.[43] While Section 1983 only applies to claims against officials acting under state law, the Supreme Court recognizes an implied damages claim for constitutional misconduct by federal officials, known as a "*Bivens* action."[44] There is no statutory cause of action for plaintiffs who wish to sue federal officials for violating their constitutional rights.[45] In other words, federal constitutional claims for damages are cognizable only under the Supreme Court's *Bivens* decision. This claim runs against individual officers in his or her personal capacity.[46] Consequently, federal officials facing liability in a *Bivens* action may claim qualified immunity as a defense.[47]

The doctrine of qualified immunity has developed significantly since it was first established by the Supreme Court in *Pierson v. Ray*.[48] After *Pierson*, the Supreme Court set out a two-part analysis to determine whether an official is entitled to qualified immunity in *Saucier v. Katz*.[49] As articulated by *Saucier*, a court must determine (1) whether the facts alleged by the plaintiff amount to a constitutional violation and (2) whether the constitutional right at issue was "clearly established" at the time of the conduct.[50] Plaintiffs must meet both prongs to proceed.[51] When analyzing the second prong, a right is "clearly established" when "the contours of [a] right [are] sufficiently clear" so that every "reasonable official would have understood that what he [was] doing [violated] that right."[52] In conducting this evaluation, courts consider whether it is "beyond debate" that existing

[42] Novak, POLICING, *supra* note 39, at 1–2.

[43] Qualified immunity is available for state and local government officials in actions brought under Section 1983, and federal officials may also claim qualified immunity under the *Bivens* Doctrine. Butz v. Economou, 438 U.S. 478, 504 (1978); *see generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[44] Whitney K. Novak, CONG. RSCH. SERV., LSB10500, REGULATING FEDERAL LAW ENFORCEMENT: CONSIDERATIONS FOR CONGRESS (2023) [hereinafter Novak, REGULATING].

[45] Jonathon M. Gaffney, CONG. RSCH. SERV., R45732, THE FEDERAL TORTS CLAIMS ACT (FTCA): A LEGAL OVERVIEW, 37 (2019).

[46] *Id.* at 5 n.4.

[47] *Bivens*, 403 U.S. at 397.

[48] Pierson v. Ray, 386 U.S. 547 (1967); *Qualified Immunity in Immigration*, *supra* note 37, at 2.

[49] Saucier v. Katz, 533 U.S. 194, 200 (2001).

[50] *Id.* Note that the Court has partially overruled this framework, holding that courts have the discretion to address the two elements in either order. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[51] *Saucier*, 533 U.S. at 200.

[52] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

legal precedent establishes the illegality of the official's conduct.[53] While the Supreme Court has yet to expand its two-part test, some circuits, including the Eighth Circuit, add an additional, third prong to the analysis.[54] This prong asks whether the official's conduct was "objectively reasonable" in light of clearly established law.[55] The circuits employing this additional prong have done so with inconsistency over the years.[56]

Notably, the Supreme Court has left it to the various circuits to determine what particular law is considered "clearly established" under the second prong of the qualified immunity analysis.[57] Although every circuit holds that a right may be clearly established by either the court's own precedent or a decision of the Supreme Court, there is a circuit split on the extent to which they consider decisions from other circuits or district court decisions in determining whether a right was clearly established.[58] The Fourth, Fifth, and Eleventh Circuits consider only the precedents of the Supreme Court and their own circuit. If state law is at issue, they may also weigh the decisions of that state's highest court.[59]

---

[53] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[54] This includes the First, Second, Fourth, Fifth, and Sixth Circuit. *See* Wilson v. City of Bos., 421 F.3d 45, 57–58 (1st Cir. 2005); Taravella v. Town of Wolcott, 599 F.3d 129, 135 (2d Cir. 2010); Gould v. Davis, 165 F.3d 265, 272 (4th Cir. 1998) ("In the final prong of the qualified immunity analysis, we must determine whether a reasonable person in the officers' position would have known that his actions violated the right alleged by the plaintiff."); Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003) ("Even were a reasonable suspicion constitutional standard clearly established in 1999 for these circumstances, the question would be whether an objectively reasonable officer in Officer McClellan's position could have understood that his actions did not violate the Fourth Amendment. This question could be considered to merge the second and third prongs of the immunity analysis."); Dunigan v. Noble, 390 F.3d 486, 491 n.6 (6th Cir. 2004).

[55] However, the Supreme Court has not expanded its two-part analysis to date. *Taravella*, 599 F.3d at 135.

[56] *Compare* Feist v. Simonson, 222 F.3d 455, 462 (8th Cir. 2000) (explaining the third prong as whether a reasonable officer "would know or should have known" that the conduct infringed on a constitutional right), *with* Tlamka v. Serrell, 244 F.3d 628, 632 (8th Cir. 2001) (explaining the third prong as whether a reasonable person "would have known" his conduct violated clearly established law), *and* Wilson v. Lawrence Cnty., 260 F.3d 946, 951 (8th Cir. 2001), *and* Henderson v. Munn, 439 F.3d 497, 501–02 (8th Cir. 2006), *and* Howard v. Kansas City Police Dep't, 570 F.3d 984, 987–88 (8th Cir. 2009).

[57] 59 AM. JUR. PROOF OF FACTS 3d 291 (originally published in 2000).

[58] *Id.*

[59] *See* Wilson v. Layne, 141 F.3d 111, 114 (4th Cir. 1998), *cert. granted in part*, 525 U.S. 981, (1998), *aff'd*, 526 U.S. 603 (1999) ("The law is clearly established such that an officer's conduct transgresses a bright line, for purposes of qualified immunity,

Conversely, The Second, Seventh, Eighth, and Ninth Circuits look to relevant case law from all circuits.[60] The First, Sixth, and Tenth Circuits fall somewhere in between.[61] These courts look to decisions of other circuits for a case with similar facts or consensus on a particular issue; however, they focus predominately on their own precedents.[62] The Third Circuit has yet to decide this issue.[63]

The modern test for qualified immunity comes from *Harlow v. Fitzgerald*.[64] In *Harlow*, the U.S. Supreme Court overruled *Pierson*'s "subjective good faith" test because it led to increased litigation costs, discouraged officials from performing their duties, and distracted them from their obligations.[65] The *Harlow* Court employed a new "objective" test, holding that officials performing discretionary functions are generally shielded from civil liability if their conduct does not violate clearly

---

when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.") (citations omitted).

[60] *See* Varrone v. Bilotti, 123 F.3d 75, 79 (2d Cir. 1997) ("The law was 'clearly established' if the circuit's decisions 'clearly foreshadow' a particular ruling on the issue. Decisions of other circuits also may indicate whether the law was clearly established.") (citations omitted); Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994) ("In ascertaining whether a particular right has been 'clearly established' within the meaning of Harlow, this court has not required binding precedent from the Supreme Court or the Seventh Circuit. In the absence of controlling authority on point, we seek to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.") (citations omitted).

[61] *See* El Dia, Inc. v. Governor Rossello, 165 F.3d 106, 110 (1st Cir. 1999) ("We are not inclined to adopt either a hard-and-fast rule that precedent from another circuit is always determinative of whether a law is clearly established or a rule that such precedent is always irrelevant. Among other factors, the location and level of the precedent, its date, its persuasive force, and its level of factual similarity to the facts before this Court may all be pertinent to whether a particular precedent 'clearly establishes' law for the purposes of a qualified immunity analysis.") (citations omitted); Blake v. Wright, 179 F.3d 1003, 1007 (6th Cir. 1999) ("A right is clearly established, for qualified immunity purposes, if there is binding precedent from the Supreme Court, the relevant Circuit Court of Appeals, or the district court itself, or case law from other circuits which is directly on point.") (citations omitted).

[62] *See generally El Dia*, 165 F.3d at 110; *Blake*, 179 F.3d at 1007.

[63] Johnson v. Horn, 150 F.3d 276, 286 (3d Cir. 1998), *as amended* (Oct. 16, 1998) (citation omitted) ("The inmates point to no decision of the Supreme Court or this Court, and we are aware of none, that clearly establishes their right to a kosher diet. This, however, may not end the inquiry, because the courts of appeals are divided as to whether, and to what extent, out-of-circuit decisions may be considered in determining whether the law was clearly established. We need not answer this difficult question, because we conclude that, under any standard, the law entitling the Inmates to a kosher diet was not clearly established when Horn and Sobina refused the Inmates' requests for kosher meals.").

[64] *Qualified Immunity in Immigration*, *supra* note 37, at 2.

[65] Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

Bower: When Push Comes to Shove: How Qualified Immunity Shuts the Door t

established rights of which a reasonable person would have known.[66] Since *Harlow*, courts have not considered an official's subjective state of mind to decide whether he or she was acting in good faith for purposes of qualified immunity.[67] Today, courts are only to consider whether a reasonable person in the official's position would have known his or her actions violated clearly established legal principles.[68]

In the years following *Harlow*, the Court attempted to define when a constitutional right is "clearly established" for purposes of qualified immunity. The Supreme Court heard eighteen cases addressing this issue from 2000 to 2016.[69] In sixteen of them, many of which involved allegations of excessive force in violation of the Fourth Amendment, the Court found that the officials were entitled to qualified immunity because they did not violate clearly established law.[70] In the course of this jurisprudence, the Court emphasized that the clearly established right must be defined with specificity.[71] In other words, minor differences between the case at hand and the case in which the legal right was first established can immunize defendant-officials on the basis of qualified immunity.[72] For example, in 2019 the Court heard a claim of excessive force brought against a police officer in *City of Escondido, California v. Emmons*.[73] The Court held that the officer was entitled to qualified immunity, explaining that the appropriate inquiry is not whether the officer violated the man's clearly established right to be free from excessive force generally, but whether clearly established law "prohibited the officers from stopping and taking down a man *in these circumstances*."[74] Because "clearly established law" is so narrowly defined with respect to the claim at issue, and facts vary per case, plaintiffs face a serious challenge in clearing the hurdle of a qualified immunity defense.

B. Criticisms of Qualified Immunity

As the doctrine of qualified immunity has expanded over the years and more defendants have successfully employed the doctrine as a defense, criticism of the doctrine has also grown.[75] One such criticism is

[66] *Id.* at 819.

[67] *Qualified Immunity in Immigration*, *supra* note 37, at 2.

[68] *Id.*

[69] Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016).

[70] *Id*.

[71] City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019).

[72] *Id.*

[73] *See generally id.* at 502.

[74] *Id.* at 503.

[75] This Note focuses on critiques from Justices Clarence Thomas, Stephen Breyer, and Sonia Sotomayor.

Missouri Law Review, Vol. 88, Iss. 4 [], Art. 8

that qualified immunity has no basis in the common law.[76] Justice Clarence Thomas has given credence to this perspective, arguing that the Court's qualified immunity jurisprudence looks less like its common law backdrop and, instead, more like a "freewheeling policy choice," the contours of which were intended for Congress.[77] In Justice Thomas' view, the Court tends to substitute its own policy preferences for the mandates of Congress, and in an appropriate case, the Court should "reconsider" its qualified immunity jurisprudence.[78]

Other critics of qualified immunity take issue with the practical implications of the doctrine.[79] They argue that the doctrine is not necessary to achieve its policy goals of protecting officials from the expense and distraction of litigation or from being unable to perform their duties.[80] Justice Stephen Breyer has further expressed this view, asserting that indemnification by police departments of their employees may just as easily alleviate employees' concerns about facing liability upon accepting employment.[81] Justice Breyer suggests that, because cities and counties often cover monetary damages if an official is found liable, candidates are not deterred, and employees are not distracted, by the threat of litigation.[82]

Yet another group of qualified immunity critics are concerned with the increasing difficulty for plaintiffs to demonstrate that the alleged misconduct is clearly established under the law.[83] Some scholars have argued that, because qualified immunity raises the bar for plaintiffs, the purpose of Section 1983 as a tool towards recovery for constitutional violations is in danger.[84] Justice Sonia Sotomayor has expressed such

---

[76] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter Schwartz, 93 NOTRE DAME L. REV.].

[77] Ziglar v. Abbasi, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring).

[78] *Id.* at 160.

[79] Schwartz, 93 NOTRE DAME L. REV., *supra* note 76, at 1803–04.

[80] *Id.*

[81] Richardson v. McKnight, 521 U.S. 399, 411 (1997).

[82] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014); *see also McKnight*, 521 U.S. at 400.

[83] Schwartz, 93 NOTRE DAME L. REV., *supra* note 76, at 1814–15.

[84] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) ("The problem is that, due to sovereign immunity protections for the federal government and state governments, and the need to prove an unlawful policy or custom to hold a municipality liable under § 1983, claims against law enforcement officers are often the only remedy for individuals who suffer violations of their constitutional rights. However, in the name of protecting these officers from being held formally accountable for 'minor' errors made in the line of duty, the Court has through qualified immunity created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights.").

concerns, arguing that the doctrine functions as an absolute shield for officials, rendering the protections of the Fourth Amendment "hollow."[85]

Looking beyond Supreme Court justices, the doctrine of qualified immunity also draws criticism from a broad coalition of opponents.[86] For instance, an ideologically diverse group of organizations such as the American Civil Liberties Union, the Cato Institute, the Alliance Defending Freedom, and the NAACP Legal Defense & Educational Fund have provided legal support for plaintiffs in cases involving qualified immunity.[87] Federal judges with the unique perspective of observing inconsistent and improper applications of qualified immunity have also voiced distaste for the doctrine.[88] In a 2018 decision, Judge James Browning in the District Court of New Mexico said he ruled "with reluctance" in favor of a police officer who slammed an unarmed man to the ground for yelling at the police.[89] Judge Browning ruled that, although the force used by the officer was excessive, subtle differences with an earlier case that Browning viewed as "clearly established" precedent required the grant of immunity.[90]

C. Bivens and the Federal Tort Claims Act

Limited civil remedies exist for individuals to seek redress against federal officials for misconduct. In the 1971 case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court recognized that, in limited circumstances, victims of a constitutional violation by a federal agent have a right to recover damages against that agent in federal court, despite the absence of any statute conferring such a right.[91] The plaintiff in *Bivens* sued federal narcotics agents, claiming an unconstitutional search of his home.[92] The Court held that the plaintiff could pursue monetary damages, reasoning that when federally protected rights have been invaded, a plaintiff is entitled to a remedy—whether that

[85] Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

[86] Lawrence Hurley & Andrew Chung, *Before the Court: A United Front Takes Aim at Qualified Immunity*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-opposition/ [https://perma.cc/7FWF-H47A].

[87] *Id.* These organizations provided legal support for the petitioner in *Baxter*, a homeless man arrested during a break-in. *Id.* He sued the police, alleging excessive force by setting a police dog on him after his hands were already raised. *Id.*

[88] *Id.*

[89] McGarry v. Bd. of Cnty. Comm'rs for Cnty. of Lincoln, 294 F. Supp. 3d 1170, 1201 n.16 (D.N.M. 2018).

[90] *Id.*

[91] Novak, REGULATING, *supra* note 44, at 2.

[92] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

remedy is judicially or statutorily created.[93] However, since *Bivens* was decided, any expansion of the *Bivens* doctrine has been considered a "disfavored judicial activity" by the Court.[94]

The FTCA, enacted nearly three years after the *Bivens* decision, similarly provides a remedy for those who suffer from misconduct at the hands of federal officials.[95] The Act allows plaintiffs to sue the United States for monetary damages for certain types of state torts committed by its employees.[96] The FTCA does not create a federal cause of action against the United States; rather, the FTCA waives the United States' sovereign immunity for certain types of claims under state tort law.[97] Unlike a *Bivens* claim, which is brought against an individual official, an FTCA action is brought against the United States.[98] Such a suit can only proceed once the plaintiff has exhausted all administrative remedies in the relevant federal agency.[99]

In 1980, the Court clarified that the FTCA does not preempt a *Bivens* claim, meaning *Bivens* remedies are still available to plaintiffs who may bring FTCA claims.[100] In reaching this conclusion, the Court emphasized that a *Bivens* remedy is more effective than the FTCA in that the FTCA "is not a sufficient protector of citizens' constitutional rights."[101] The Court reasoned that: (1) a *Bivens* remedy serves as a deterrent by allowing a plaintiff to seek damages against individual officers; (2) courts may award punitive damages in a *Bivens* suit, whereas they cannot in an FTCA action; (3) plaintiffs cannot opt for a jury trial in an FTCA action, but they can for a *Bivens* claim; and (4) an action under the FTCA exists only if the state in which the alleged misconduct occurred has a law that prohibits such conduct, whereas no law is necessary for a *Bivens* action.[102] This legal background provides a backdrop for understanding *Martinez v. Sasse* and establishing the circumstances surrounding the Eighth Circuit's decision.

---

[93] *Id.* at 396–97.

[94] Ziglar v. Abbasi, 582 U.S. 120, 135 (2017).

[95] Gaffney, *supra* note 45, at 5 n.44.

[96] Novak, REGULATING, *supra* note 44, at 3.

[97] Gaffney, *supra* note 45, at 6.

[98] *Id.*

[99] One of these procedural requirements includes providing the government an initial opportunity to evaluate the plaintiff's claim and decide whether to settle the case before proceeding to federal court. 28 U.S.C. § 2675(b) (1966).

[100] Carlson v. Green, 446 U.S. 14, 23 (1980).

[101] *Id.* at 20, 23.

[102] *Id.* at 20–23.

IV. INSTANT DECISION

In *Martinez*, the Eighth Circuit Court of Appeals ruled that an act to "repel" did not violate the Fourth Amendment under clearly established law, holding that Officer Sasse was entitled to qualified immunity.[103] In an opinion written by Judge Steven Colloton, the court rejected Martinez's argument that Officer Sasse effectuated a seizure by pushing Martinez to the ground before locking the doors to the facility.[104] In reaching this conclusion, the court found that Sasse's actions did not violate "clearly established law" in the context of Fourth Amendment seizures.[105] In particular, the court was unpersuaded by the cases Martinez relied on: *Torres v. Madrid*; *Atkinson v. City of Mountain View*; and *Acevedo v. Canterbury*.[106] The court explained that both *Torres* and *Acevedo*—at the time of Martinez's altercation in 2018—failed to demonstrate that Sasse's actions in repelling Martinez constituted a seizure.[107] Notably, the court distinguished *Atkinson* from the instant case.[108] In *Atkinson*, the Eighth Circuit found that a seizure occurred when a police officer slammed a citizen into the side of a pickup truck and handcuffed him.[109] The court explained that the *Atkinson* court addressed force used to apprehend a person but did not discuss force used to "repel" a person.[110] It also relied on *Meggs v. City of Berkeley*, a Ninth Circuit case, to distinguish an officer's force used to "repel" from force used to apprehend.[111] Based on those distinctions, the court held that the cases cited by Martinez failed to produce a "robust consensus of authority" clearly establishing that the use of force to repel is a seizure under the Fourth Amendment.[112]

The court noted that it addressed a similar question in *Quraishi v. St. Charles County*.[113] In *Quraishi*, tear gas was used to disperse news

[103] Martinez v. Sasse, 37 F.4th 506, 510 (8th Cir. 2022).

[104] *Id.* at 509.

[105] *Id.* at 509–10.

[106] In *Torres*, the United States Supreme Court held that police seized a suspect for the instant that police bullets struck her, even though the suspect temporarily eluded capture after that. Torres v. Madrid, 141 S. Ct. 989, 993–94 (2021). In *Acevedo*, the court held that, where an officer punched a man in the face and knocked him to the ground, the officer's blow constituted a seizure because it briefly immobilized the person. Acevedo v. Canterbury, 457 F.3d 721, 722–24 (7th Cir. 2006); *Martinez*, 37 F.4th at 509–10.

[107] *Martinez*, 37 F.4th at 509–10.

[108] *Id.* at 510 (citing Quraishi v. St. Charles Cnty., 986 F.3d 831, 840 (8th Cir. 2021)).

[109] *Id.*

[110] *Id.*

[111] *Id.* at 509–10; Meggs v. City of Berkeley, 246 F. App'x 402 (9th Cir. 2007).

[112] *Id.*

[113] *Id.* (citing *Quraishi*, 986 F.3d at 840).

Missouri Law Review, Vol. 88, Iss. 4 [], Art. 8

reporters from a site of public unrest and protest.[114] The court in *Quraishi* held that it was not clearly established that tear-gassing by police was a seizure, because the reporters' freedom to move was not restricted and they were simply dispersed.[115] The court in *Martinez* found the instant case to be different, reasoning that the distinction between force to apprehend and force to repel is "not so readily apparent that every reasonable officer would have understood it."[116] The court ultimately reversed the district court's order denying Sasse's motion for judgment on the pleadings and remanded the case with directions to dismiss the Fourth Amendment claim against Sasse.[117]

V. COMMENT

Martinez v. Sasse held that when an officer shoves a person to the ground in an act to "repel" rather than "apprehend" the person, there is no Fourth Amendment violation because the distinction is not readily apparent to a reasonable officer.[118] To arrive at this conclusion, the court relied on *Meggs v. City of Berkeley*, a Ninth Circuit case, to distinguish an officer's force used to "repel" from force used to apprehend.[119] The court used this arbitrary distinction to reject two of Martinez's proffered cases,[120] declaring them unpersuasive because they addressed only the force used to apprehend a subject.[121] Martinez highlighted that *Atkinson* favorably cited *Acevedo*, a Seventh Circuit case in which the court found an unlawful seizure when an officer punched a man's face and briefly immobilized him.[122] Admitting that *Acevedo* "may lend support to Martinez's theory," the court still refused to assign credit to the argument because, in the court's view, *Acevedo* was merely the decision of a sister court and did not demonstrate "clearly established law."[123] Nevertheless, defying its own reasoning, the court relied on the *Meggs* decision from a different "sister court" to assert that force used to "repel" did not constitute a seizure under the Fourth Amendment.[124]

---

[114] *Id.* (citing *Quraishi*, 986 F.3d at 840).
[115] *Id.* (citing *Quraishi*, 986 F.3d at 840).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 509–10; Meggs v. City of Berkeley, 246 F. App'x 402 (9th Cir. 2007).
[120] Torres v. Madrid, 141 S. Ct. 989 (2021); Atkinson v. City of Mt. View, 709 F.3d 1201 (8th Cir. 2013).
[121] *Martinez*, 37 F.4th at 509–10.
[122] *Id.* at 510.
[123] *Id.*
[124] *Id.* at 509–10; *Meggs*, 246 F. App'x at 402.

It is unclear why the court favored Ninth Circuit precedent over Seventh Circuit precedent, considering the Eighth Circuit routinely looks to relevant case law from all circuits.[125] Additionally, it is unclear why the court ignored that in *Valiavicharska v. Celaya*, the Northern District Court of California distinguished *Meggs*.[126] The court in *Celaya* noted that the officers in *Meggs* were entitled to qualified immunity because there was "overwhelming evidence that Meggs repeatedly threatened to break the officers' line, and that several times he attempted to do so."[127] Additionally, the plaintiff in *Meggs* did not demonstrate that he "had a clearly established constitutional right to be free from the baton pushes and single strike administered to prevent him from breaking the police skirmish line."[128] The *Celaya* court distinguished its facts from *Meggs*, explaining that a reasonable trier of fact could find that the plaintiff did not pose a threat to the officers because she was not trying to get past the barricade.[129] The Northern District of California further explained that courts "are not prevented from denying qualified immunity merely because no prior case prohibits the use of the precise force at issue in this case."[130] In short, the *Celaya* court clarified that an officer's actions, even if categorized as intended to "repel," may still be unreasonable in some factual scenarios.[131] The Eighth Circuit should have mirrored the analysis of the Northern District of California in *Celaya*, but it declined to do so.

In *Martinez*, the Eighth Circuit interpreted the Ninth Circuit's holding in *Meggs* narrowly and offered no explanation for why Officer Sasse's force to "repel" was not a seizure.[132] The court's interest in *Meggs* is even more curious, considering that the *Meggs* opinion mentions the

[125] *See* Varrone v. Bilotti, 123 F.3d 75, 79 (2d Cir. 1997) ("The law was 'clearly established' if the circuit's decisions 'clearly foreshadow' a particular ruling on the issue. Decisions of other circuits also may indicate whether the law was clearly established.") (citations omitted); Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994) ("In ascertaining whether a particular right has been 'clearly established' within the meaning of *Harlow*, this court has not required binding precedent from the Supreme Court or the Seventh Circuit. In the absence of controlling authority on point, we seek to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.") (citations omitted).

[126] Valiavicharska v. Celaya, CV 10-4847 JSC, 2011 WL 6370059, at *9 (N.D. Cal. Dec. 19, 2011).

[127] *Id.* (quoting Meggs v. City of Berkeley, No. C 01-4033, 2005 WL 483445, at *6–7 (N.D. Cal. Mar. 2, 2005), *aff'd*, 246 Fed. App'x 402 (9th Cir. 2007) (unpublished)).

[128] *Id.*

[129] *Id.* at *9.

[130] *Id.* at *10 (quoting Headwaters Forest Def. v. Cnty of Humboldt, 276 F.3d 1125, 1131 (9th Cir. 2002)).

[131] *Id.*

[132] Martinez v. Sasse, 37 F.4th 506, 509–10 (8th Cir. 2022).

Missouri Law Review, Vol. 88, Iss. 4 [], Art. 8

word "repel" only once.[133] At a minimum, the court's decision in *Martinez* and its reliance on *Meggs* leaves several questions unanswered. What constitutes force to repel? Are there any circumstances where an official's actions to "repel" *could* effectuate a seizure, or are the two mutually exclusive in the Eighth Circuit's view? Does it matter if the individual being repelled poses no threat to officers? The district court in *Celaya* indicated that there is a distinction to be found in the latter, noting that an individual posing a threat could inform an officer's use of force and is also a factor to be considered in weighing the interest of the government.[134] However, the court in *Martinez* offered no answer to these questions.[135] By failing to offer any guidance, the Eighth Circuit failed to instruct future parties in qualified immunity cases.

The court's determination in *Martinez*, finding that Officer Sasse's actions did not violate the Fourth Amendment, is troublesome. In essence, the court's decision permits officers to escape liability under the protection of qualified immunity when they shove a person to the ground without warning, so long as the force used can be characterized as "repelling." The court has given no guidance regarding this characterization and litigants will be left with sparse authority to argue.

Even if the court's legal reasoning is presumed sound, its decision promotes bad policy. First, the court seems unbothered by the realities of its ruling, noting that the distinction between force used for momentary repulsion and force used for dispersion that impels retreat "is not so readily apparent that a reasonable officer would have understood it."[136] Whether a law is clearly established is informed by the notion that "every reasonable official would have understood that what [s]he is doing is unlawful."[137] This means that, in all practicality, the court holds that any amount of force used to repel will never become clearly established law.[138] Additionally, it provides further credence to Justice Sotomayor's sentiment that Fourth Amendment rights are "hollow" if officials are permitted to shove people to the ground simply because he or she may be unaware that doing so would be unlawful.[139] While it is true that courts are bound to congressional determinations and Supreme Court holdings, the court in *Martinez* could have found "clearly established law" from other circuits to discourage officials from exercising force to repel non-violent individuals.

[133] Meggs v. City of Berkeley, 246 Fed. App'x 402, 403 (9th Cir. 2007).
[134] *Celaya*, 2011 WL 6370059 at *5, *9.
[135] *See generally id.*
[136] *Martinez*, 37 F.4th at 510.
[137] *Id.* at 509 (quoting D.C. v. Wesby, 583 U.S. 48, 63 (2018)).
[138] *Id.*
[139] Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

Despite the court's ruling on qualified immunity, Martinez's FTCA claims remained alive because failing to meet qualified immunity was not fatal to an FTCA claim.[140] This is the path that similar litigants will have to take moving forward, basing their reasoning on the court's finding in *Martinez*. Unfortunately, there are several consequences to requiring plaintiffs to litigate FTCA claims against officials in these circumstances, as opposed to constitutional claims. The FTCA imposes several restrictions on the type and amount of damages that plaintiffs can recover.[141] For instance, plaintiffs generally cannot recover punitive damages or any prejudgment interest against the United States.[142] Further, an award of attorney's fees is typically barred by the FTCA.[143]

Qualified immunity is responsible for creating the FTCA, but for plaintiffs like Martinez who feel like they have been "wronged," the FTCA may be an unsatisfactory recourse. If she chooses to move forward with her FTCA claims, Martinez must exhaust all administrative remedies within a two-year time limit.[144] If Martinez cannot achieve an administrative settlement, the right to judicial determination is "preserved and the claimant may file suit in federal court."[145] However, if she does not file suit within six months of the date that the agency mails its denial, her claim will be "forever barred" against the United States.[146] This strict timeline severely hampers a plaintiff like Martinez's ability to receive a judicial determination of her injuries.

On one hand, perhaps the *Martinez* court could be lauded for strictly following Eighth Circuit precedent and the doctrine of qualified immunity. On the other hand, the court could be chastised for prioritizing precedent from the Ninth Circuit over other circuit precedent favorable to Martinez. In reaching its conclusion, the court failed to take a step towards "clearly establishing" the unlawfulness of Officer Chase and Officer Sasse's

[140] Gaffney, *supra* note 45, at 3.

[141] *See, e.g.*, 28 U.S.C. § 2674 (1988).

[142] Carlson v. Green, 446 U.S. 14, 22 (1980) ("[P]unitive damages in an FTCA suit are statutorily prohibited.").

[143] Anderson v. United States, 127 F.3d 1190, 1191–92 (9th Cir. 1997) ("Congress has not waived the government's sovereign immunity for attorneys' fees and expenses under the FTCA."); Bergman v. United States, 844 F.2d 353, 355 (6th Cir. 1988) ("It is clear that the FTCA does not waive the United States' immunity from attorneys' fees."); Joe v. United States, 772 F.2d 1535, 1537 (11th Cir. 1985) ("The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act.").

[144] Douglas v. United States, 814 F.3d 1268, 1279 (11th Cir. 2016) (affirming dismissal of FTCA claims that plaintiff had "failed to fully exhaust").

[145] Jeffrey Axelrad, *Federal Tort Claims Act Administrative Claims: Better Than Third-Party ADR For Resolving Federal Tort Claims*, 52 ADMIN. L. REV. 1331, 1344 (2000).

[146] 28 U.S.C. § 2401(b) (2011).

Missouri Law Review, Vol. 88, Iss. 4 [], Art. 8

conduct. Courts play a significant role in shaping what is considered "clearly established law." With this court's decision, the hurdle for plaintiffs to surpass qualified immunity remains a difficult one.

VI. CONCLUSION

The controversial doctrine of qualified immunity draws criticism from scholars and the general public because of the frequency with which it is utilized and the gravity of the circumstances from which it shields officials. *Martinez* demonstrates some of the nuanced difficulties that plaintiffs face in attempting to overcome the hurdle of qualified immunity in even the most blatantly egregious cases.[147] FTCA suits offer an "alternative" for plaintiffs unable to overcome qualified immunity challenges, but FTCA claims are unlikely to provide satisfactory redress to plaintiffs who have been wronged. The *Martinez* court ostensibly did its best to follow the law concerning the doctrine of qualified immunity. However, the judiciary will continue to produce shocking and confusing decisions that only add to the difficulties faced by plaintiffs in these cases unless the legislature takes action to refine the doctrine. The Eighth Circuit missed an opportunity to build "clearly established law" and set better guidelines for law enforcement officials. Plaintiffs who claim their constitutional rights have been violated desire and deserve more predictable litigation avenues moving forward.

[147] *See generally* Martinez v. Sasse, 37 F.4th 506 (8th Cir. 2022).

https://scholarship.law.missouri.edu/mlr/vol88/iss4/8