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In recent years, numerous highly publicized police shootings have ignited a vigorous national debate over police use of deadly force. The Fourth Amendment’s prohibition against unreasonable seizures bars the police from using deadly force unless officers have probable cause to believe that a suspect poses an imminent threat of serious physical harm to the police or third parties. Section 1983 of the Civil Rights of Act of 1871 allows


2 See U.S. CONST. amend. IV (“The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.”); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (applying Fourth Amendment to state officials through Fourteenth Amendment Due Process Clause); see also Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding police may not use deadly force on fleeing suspect without probable cause suspect posed threat of serious physical harm to police or others). In Garner, when assessing the reasonableness of a “seizure” effectuated by the use of deadly force, the Supreme Court weighed the nature of the intrusion into the suspect’s Fourth Amendment rights against the importance of the
citizens to sue police officers in federal court for Fourth Amendment violations stemming from unreasonable use of deadly force. However, under the doctrine of qualified immunity, a police officer who unreasonably utilizes deadly force in violation of the Fourth Amendment is immune from § 1983 suit so long as the officer’s conduct did not violate the plaintiff’s “clearly established” constitutional rights of which a reasonable officer should have known. In Kisela v. Hughes; the Supreme Court was tasked with determining whether an officer who responded to a call about a woman hacking a tree with a kitchen knife and found her standing near her roommate wielding a large knife violated her “clearly established” Fourth Amendment government interests involved. See Garner, 471 U.S. at 7-8. The Court focused on the gravity of the intrusion into a citizen’s personal liberty that deadly force necessarily entails. Id. at 9 (“The intrusiveness of a seizure by means of deadly force is unmatched . . . [t]he suspect’s fundamental interest in his own life need not be elaborated upon.”).

3 See 42 U.S.C. § 1983. Section 1983 provides:

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 any 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 . . . .

Id. When Section 1983 was enacted in 1871 during Reconstruction, Congress was primarily concerned with providing judicial redress against a different variety of deadly force—the brutal tactics the Klu Klux Klan employed against newly freed slaves. See Monroe v. Pape, 365 U.S. 167, 175-80 (1961) (chronicling statements lawmakers made during debates on § 1983); see also McDonald v. City of Chicago, 561 U.S. 742, 857 (2010) (documenting racially motivated lynchings and other atrocities committed by Klan in aftermath of Civil War). Section 1983 was enacted for three primary purposes: to redress unconstitutional state laws, to provide a federal forum for constitutional violations committed by state officials when there was no remedy available under state law, and to supply a federal remedy for constitutional violations committed by state officials when a state court remedy was available in theory but not in actuality. See Pape, 365 U.S. at 173-74.

4 See Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (recognizing government officials are immune from § 1983 liability unless official’s conduct “violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known.”). While there does not need to be a case “directly on point” in order for a constitutional right to be “clearly established,” existing precedent must define the constitutional right such that qualified immunity shields all officials from § 1983 liability except those that are “plainly incompetent or . . . knowingly violate the law.” See Malley v. Briggs, 475 U.S. 335, 341(1986) (holding officers are immune from liability for defective warrants if “reasonably competent officer[s] would have concluded that a warrant should issue.”).

rights by shooting her four times. Over a scathing dissent penned by Justice Sotomayor, seven justices concluded that Officer Kisela was entitled to qualified immunity because there was no binding Ninth Circuit precedent that clearly established shooting the plaintiff under those circumstances violated her right to be free from excessive force.

On May 21, 2010, University of Arizona Police Department Corporal Andrew Kisela and officer-in-training Alex Garcia received a dispatch reporting that a woman was hacking a tree with a knife. Upon arriving on the street where the woman was reportedly attacking the tree, officers were flagged down by the person who called the police to report the incident. The caller provided officers with a description of a woman that was "screaming and acting erratically" while hacking a tree with a knife. Moments later, a third officer arrived on the scene, and the officers "almost immediately" noticed a woman, later identified as Shannon Chadwick ("Chadwick"), standing behind a five-foot chain link fence with a locked gate in a nearby front yard.

Both parties vigorously contested what exactly occurred over the next minute or so. Shortly after officers noticed Chadwick, the police saw a woman who matched the description of the alleged tree hacker, later identified as the plaintiff Amy Hughes ("the plaintiff"), exit the house with a twelve-inch kitchen knife in hand and walk down the driveway towards Chadwick. There was conflicting testimony regarding the plaintiff’s

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6 See id. at 1153 (analyzing whether reasonable officer in defendant’s position would have known shooting plaintiff violated her constitutional rights).
7 See id. (holding defendant was entitled to qualified immunity because no precedent clearly established shooting plaintiff was illegal).
8 See Hughes v. Kisela, No. 11-366, 2013 U.S. Dist. LEXIS 202101, at *2-3 (D. Ariz. Dec. 20, 2013) (describing how officers were notified of plaintiff’s bizarre behavior). The dissent made much of the fact that the dispatch was classified as a “check welfare” call and did not report any criminal activity. See Kisela, 138 S. Ct. at 1157 (Sotomayor, J., dissenting) (arguing plaintiff holding kitchen knife did not justify use of deadly force).
9 See Kisela, 2013 U.S. Dist. LEXIS 202101, at *2-3 (chronicling sequence of events officers encountered).
10 See id. at 3 (relaying witness’s communications with officers).
11 See id. (recreating scene that confronted officers upon arrival).
demeanor after exiting the house: Chadwick claimed the plaintiff was “calm and content,” while the third officer asserted that she appeared “agitated” and repeatedly told Chadwick to “give it to me.” Regardless, the plaintiff moved towards Chadwick and came within five to six feet of her. All three officers drew their guns and ordered the plaintiff to drop the knife at least twice. Chadwick said something to the effect of “Take it easy,” but the plaintiff continued to ignore both Chadwick and the officers. The chain link fence in the front yard blocked Kisela’s line of fire, so he dropped to the ground, aimed his service weapon, and shot the plaintiff four times through the fence, non-fatally wounding her.

In 2011, the plaintiff filed a § 1983 suit against Corporal Kisela in his individual and official capacity in federal district court in Arizona, alleging that Kisela used excessive force in violation of the Fourth Amendment. The district court judge granted Kisela’s renewed motion for

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14 See Hughes v. Kisela, 841 F.3d 1081, 1084 (9th Cir. 2017) (emphasizing that Chadwick was never in fear of Hughes); Kisela, 2013 U.S. Dist. LEXIS 202101, at *3-4 (outlining Officer Kunz’s observations); see also Brief for Petitioner, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 17-467) (“A witness later described [Hughes] as having been in the middle of the street ‘screaming and crying very loud, holding a long knife that was like a butcher’s knife... maybe a foot long,’ and looking like ‘she was about to stab herself with the knife or do something crazy.’”).

15 See Kisela, 138 S. Ct. at 1151 (recounting plaintiff approaching Chadwick). Kisela focused on the fact that the length of the kitchen knife paired with the plaintiff’s distance from Chadwick placed Chadwick squarely within the “‘kill zone’...where she could have attacked Chadwick in less than half a second.” See Reply in Support of Petition for Writ of Certiorari, at 5, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (No. 17-467) (focusing on potentially deadly threat Hughes posed to Kisela).

16 See Kisela, 138 S. Ct. at 1151 (explaining reason for shooting plaintiff). Kisela claimed that he saw the plaintiff raise the knife as though she were going to stab Chadwick. See Hughes v. Kisela, 841 F.3d. 1081, 1084 (9th Cir. 2016) (describing conflicting testimony regarding knife in plaintiff’s hand). The two other responding officers did not corroborate this claim. Id. While Kisela asserted that officers instructed the plaintiff to drop the weapon multiple times, Chadwick only recalled hearing “two commands in quick succession.” Id.

17 See Kisela, 138 S. Ct. at 1151 (applying summary judgment standard and concluding Chadwick’s comment was directed at both officers and the plaintiff).

18 See id. (detailing shooting). After the incident, officers learned that the plaintiff and Kisela were roommates, and that at the time of the shooting, the plaintiff was upset over a twenty dollar debt Chadwick owed her. Id. at 1151-52. At the time of the incident, the plaintiff was taking medication for bipolar disorder, and Chadwick did not believe that the plaintiff understood the police officers’ commands. See Kisela, 841 F.3d at 1084. This information had little bearing on the legality of Kisela’s decision to shoot the plaintiff because a reasonable officer in his position would not have been privy to that information when initially arriving on the scene. Id.

summary judgment after concluding that his use of force was objectively reasonable. The judge also opined that even if shooting the plaintiff was unreasonable, Kisela would have been entitled to qualified immunity from suit because his actions did not violate a clearly established constitutional right that a reasonable officer would have known. On appeal, a Ninth Circuit panel reversed the district court's grant of summary judgment, holding that there were legitimate factual disputes regarding both whether Kisela's conduct complied with the Fourth Amendment, and whether he was entitled to qualified immunity. Over a vigorous dissent joined by seven circuit judges, a splintered Ninth Circuit denied Kisela's petition for a claim and denying motion as to § 1983 claim). The plaintiff's complaint asserted a state law negligence claim and a federal civil rights claim under 42 U.S.C. § 1983. Id. at *2-3. When Kisela moved to dismiss both claims, his motion were converted into a motion for summary judgement pursuant to Rule 56 "because the parties ha[d] submitted affidavits and other materials outside the pleadings." Id. at *1; see also Fed. R. Civ. P. 56. Kisela argued that he was entitled to summary judgment because shooting the plaintiff under the circumstances was reasonable and did not run afoul of the Fourth Amendment, and alternatively, that he was entitled to qualified immunity. See Kisela, No. 11-366, 2012 U.S. Dist. LEXIS 64230, at *7. The court denied the defendant's motion without prejudice, noting that the facts alleged in the complaint, if true, would not have entitled Kisela to qualified immunity because his act of shooting the plaintiff would have violated her "clearly established" Fourth Amendment right to be free from unreasonable seizures. See id. at *9-10 ("[I]t should have been clear to any reasonable officer that, under circumstances alleged in the complaint, firing at [the plaintiff] was objectively unreasonable.")

20 See Kisela, 2013 U.S. Dist. LEXIS 202101, at *17-18 (concluding "the evidence presented does not raise a genuine issue of material fact or support a finding of excessive force"). Applying the objective reasonableness Fourth Amendment standard espoused by the Supreme Court in Graham and Harris, the district court judge concluded that "even considering Plaintiff's emotional state, it does not appear that the force used by Defendant was objectively unreasonable." Id. at 17; see also Scott v. Harris, 550 U.S. 372, 383 (2007) ("[I]n determining the reasonableness of...which a seizure is affected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'") (internal citations omitted). The judge pointed out that when assessing the reasonableness of a police seizure, courts must take into account the fact that officers often act in rapidly devolving and unpredictable situations. See Kisela, 2013 U.S. Dist. LEXIS 202101, at *15-16.

21 See Kisela, 2013 U.S. Dist. LEXIS 202101, at *17-18 (concluding Kisela would have been entitled to qualified immunity from suit). Despite the fact the district court judge did not have to reach the qualified immunity issue because of his conclusion regarding the objective reasonableness of Kisela's conduct, he noted that Kisela would have been entitled to qualified immunity because under "the standard of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," it appears that Defendant's conduct was reasonable." See Kisela, 2013 U.S. Dist. LEXIS 202101, at *18.

22 See Hughes, 841 F.3d. at 1081 (determining Kisela was not entitled to summary judgment when viewing facts in light most favorable to non-moving plaintiff).
rehearing *en banc*, and Kisela appealed to the Supreme Court. In a sharp rebuke of the Ninth Circuit, the Court issued a *per curiam* opinion summarily reversing the Court of Appeals’ decision because “even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.”

In the aftermath of the Civil War, Congress enacted the Civil Rights Act of 1871 to provide a mechanism for enforcing the Fourteenth Amendment against state and local government officials. Section I of the

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23 See Hughes v. Kisela, 862 F.3d. 775 (9th Cir. 2017) (denying defendant’s petition for rehearing *en banc*).

24 See Kisela, 138 S. Ct. 1148, 1152-54 (2018) (admonishing Ninth Circuit for failing to adhere to binding precedent when engaging in qualified immunity analysis). The Court noted that this was not the first time it had warned the Ninth Circuit not define “clearly established rights” too broadly when applying the doctrine of qualified immunity. Id. at 1152 (“This Court has ‘repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.’”) (quoting San Francisco v. Sheehan, 135 S. Ct. 1765, 1775–76 (2015)).


Section 1983 was enacted as part of a large statute popularly known as the Ku Klux Act. *Id.* The act was a federal response to Southern government officials and the Ku Klux Klan’s trenchant resistance to the implementation of Reconstruction, as well as a rash of unpunished criminal offenses committed against former slaves in the South. *Id.* at 171. President Grant implored Congress to enact measures designed to neutralize the Klan’s reign of lawless terror in the South, declaring:

> A condition of affairs now exists in some States ... rendering life and property insecure ... The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . .

*Id.* at 172-73. When analyzing the legislative history of § 1983 in *Monroe v. Pape*, the Supreme Court identified three overarching goals of the statute: overriding state laws that violated the constitutional rights of individuals, providing a federal remedy where state law protections were inadequate, and providing a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.* at 173-74. The third justification stemmed from the fact that in many instances, Southern states’ criminal laws were not enforced against those who committed violent offenses against freed African Americans and their supporters. *Id.* Congressman Eli Perry succinctly summarized this lack of even-handed enforcement in the 1871 debates on the Act, observing:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and
Act, now codified as 42 U.S.C. § 1983, gave citizens a direct federal cause of action against “persons” who violate constitutional rights while acting under the color of state law.24 Despite the statute’s broad language, from 1871 to 1920, there were only twenty-one § 1983 actions filed, and until the 1960s, §1983 actions continued to constitute a small fraction of the federal docket.25 As the number of constitutional rights applicable to state actors through the Fourteenth Amendment expanded, and the Supreme Court’s interpretation of § 1983 liberalized, the number of § 1983 suits skyrocketed.26 Today there are thousands of § 1983 suits filed annually, forming ten percent

machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, app. at 78 (1871).

26 See 42 U.S.C. § 1983. Section 1983 provides:

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 any 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....


28 See Pape, 365 U.S. at 183, 187-88 (holding that § 1983 applied to unlawful activities committed by officials vested with state authority even if their conduct violates state law); see also Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690-91 (1977) (holding municipalities are “persons” that can incur liability under § 1983). In 1961, the Supreme Court’s decision in Monroe v. Pape commenced a sharp uptick in the number of § 1983 actions by clarifying that the statute provided an independent federal cause of action supplemental to any available state remedies. See Pape, 365 U.S. at 183. Additionally, the Monroe Court clarified that the “under color of state law” language citizens to sue successfully state officials for conduct that violated state law as long as the official was acting with the apparent authority of the state at the time of the incident in question. Id. at 187-88. Only seventeen years later, the Court accelerated this trend by determining that municipalities can be subject to § 1983 liability. See Monell, 436 U.S. at 690-91. Municipal coffers provided an added incentive for potential plaintiffs to file § 1983 suits against municipal employees like police officers. Id.; see also Thurman v. Rose, 575 F. Supp. 1488, 1491 (N.D. Ind. 1983) (“Today, the swelling tide of § 1983 actions threatens to engulf the federal courts, and has no doubt forced the federal judiciary to rethink some of the premises underlying the arguments in support of turning § 1983 into a uniform “font” of federal tort law.”).
of the federal civil docket, and the statute serves as an important vehicle for redressing constitutional injuries and holding government actors, like police officers, accountable for illegal conduct."

As the number of federal civil rights lawsuits increased, the Supreme Court applied the doctrine of qualified immunity to shield government officials from §1983 liability. Qualified immunity seeks to strike a balance between the public interest in deterring illegal acts committed by government actors and compensating the victims of such conduct, with the competing public interest in ensuring that meritless lawsuits are not allowed to unduly burden government officials by subjecting them to costly, time-consuming litigation. In order to achieve these objectives, the Supreme Court refined qualified immunity analysis in Harlow v. Fitzgerald by refusing to conduct an inquiry into the government actor's subjective good faith and holding that qualified immunity shields government officials performing discretionary functions from suit as long as the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." After Harlow, courts

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30 See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (articulating contemporary qualified immunity standard). Although the Harlow Court articulated the qualified immunity test that was ultimately applied in § 1983 suits, the Harlow decision only applied qualified immunity to a Bivens claim against Nixon administration officials for allegedly violating the plaintiffs' of First Amendment and statutory rights. Id. at 806; see also Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 391 (1971) (recognizing cause of action against federal officials for violation of Fourth Amendment). Bivens actions are the functional equivalent of § 1983 suits, except the suits are filed against federal government actors for constitutional violations. Id. Qualified immunity was expressly applied to § 1983 suits two years after Harlow. See Davis v. Scherer, 468 U.S. 183, 193-94 (1984) (applying qualified immunity in § 1983 suit).

31 See Harlow, 457 U.S. at 814-17 (discussing competing public policies underlying scope of qualified immunity).

32 See Harlow, 457 U.S. at 818 (refining qualified immunity standard). The Harlow Court rejected the prior qualified immunity test, which required engaging in a subjective inquiry into official's good faith, because many courts treated an official's subjective intent as a factual question that must be resolved at trial. Id. at 816 ("[A]n 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."). Allowing cases to proceed to trial solely to resolve questions regarding an official's subjective intent largely defeated the entire purpose of qualified immunity because even if the official was ultimately found not liable by a jury, the protracted and
assessing whether an official was entitled to qualified immunity at the summary judgement stage had to conduct a threshold inquiry to determine whether the right that was allegedly violated was "clearly established" by existing law: if the right was not clearly established, the case would be dismissed, because then a reasonable official would not have had reason to know his actions were unlawful.\textsuperscript{1} The qualified immunity test requires determining whether a reasonable official would have known his conduct clearly violated the plaintiff's constitutional rights—the doctrine is intended to immunize "all but the plainly incompetent or those who knowingly violate the law" from § 1983 suits.\textsuperscript{2}

Police use of deadly force is constrained by the reasonableness requirement of the Fourth Amendment.\textsuperscript{3} In order to avoid summary judgment, plaintiffs suing police officers for excessive force under § 1983 must show both that the officer's actions violated the plaintiff's Fourth Amendment rights and that the right was "clearly established."\textsuperscript{4} In determining whether a Fourth Amendment violation occurred, courts must expensive litigation process would still distract officials from their governmental duties, inhibit discretionary action, and deter capable people from seeking government positions. \textit{Id.} at 816-17. For qualified immunity to serve its purpose, the affirmative defense must be capable of terminating "insubstantial claims" prior to discovery. \textit{Id.} at 816-18; see also Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Because qualified immunity is 'an immunity from suit rather than a mere defense to liability... it is effectively lost if a case is erroneously permitted to go to trial.'") (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

\textsuperscript{33} See Harlow, 457 U.S. at 818-19 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.").

\textsuperscript{34} See Malley, 475 U.S. at 344-45 (discussing intention of doctrine). Here, the court held that police officers applying for warrants are entitled to qualified immunity if reasonable officer could have believed that there was probable cause to support warrant. \textit{Id.}

\textsuperscript{35} See Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("While it is not always clear just when minimal police interference becomes a seizure... there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). Police officers are only permitted to employ deadly force if they have probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others. \textit{Id.} at 11.

\textsuperscript{36} See Pearson v. Callahan, 555 U.S. 223, 236-37 (2009) (reversing \textit{Saucier} inquiry and allowing lower courts to decide which qualified immunity prong should be addressed first). In \textit{Saucier}, the Court mandated that district court judges must first determine whether the plaintiff facially alleged a violation of any constitutional right at all before analyzing whether the constitutional right was clearly established. \textit{See Saucier v. Katz}, 533 U.S. 194, 200-201 (2001). Eight years later, the Court shifted course and overturned the \textit{Saucier} mandated sequence, concluding the lower courts should be allowed to decide which inquiry to conduct first in specific cases. \textit{See Pearson}, 555 U.S. 223, 236-37.
assess the reasonableness of the use of force from the perspective of a reasonable officer on the street, and weigh the gravity of the intrusion into the individual's constitutionally protected interests against the "countervailing government interests" at stake." For an officer's conduct to violate a "clearly established" Fourth Amendment right, the conduct must violate a right that is specifically defined by existing precedent to the extent that a "reasonable offi[cer] in the defendant's shoes would have understood that he was violating" the right. While the Ninth Circuit Court of Appeals has evaluated police use of deadly force in a variety of contexts, the Supreme Court has explicitly warned "the Ninth Circuit in particular not to define clearly established [Fourth Amendment] law at a high level of generality" because doing so can result in officers being improperly denied the protections of qualified immunity. Thus, determining whether an officer may invoke the shield of qualified immunity is an inherently fact-specific inquiry that requires comparing the facts of the case to existing precedent and ascertaining whether the caselaw would have made an objectively reasonable officer in the defendant's position aware that his conduct violated

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37 See Graham v. Connor, 490 U.S. 386, 396-97 (1989) (assessing Fourth Amendment reasonableness of police use of force when effecting arrest). Whether an officer utilized excessive force in violation of the Fourth Amendment requires that a court pay close attention to the facts of each case, by weighing factors including the seriousness of the crime under investigation, whether the suspect poses and imminent threat to the safety of officers or third parties, and whether the suspect is actively resisting arrest or fleeing. Id. at 396-97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). See also Scott v. Harris, 550 U.S. 372, 379-81 (2007) (concluding it was "quite clear" police did not violate Fourth Amendment when shooting suspect fleeing in high speed car chase that endangered lives of bystanders).

38 See Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014) (stressing that officer must violate right that is clearly and specifically defined to forfeit qualified immunity).

39 See Ashcroft v. al-Kidd, 563 U.S. 731, 742(2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.") (internal citations omitted); see also Blanford v. Sacramento Cnty., 406 F.3d 1110, 1117-19 (9th Cir. 2005) (holding officers who shot man that was wielding sword, behaving erratically, and seeking to enter residence were entitled to qualified immunity). But see Deorle v. Rutherford, 272 F.3d 1272, 1286 (9th Cir. 2001) ("Officer not entitled to qualified immunity because no reasonable officer could have believed shooting unarmed suspect in face with lead-filled beanbag was reasonable."); Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) (holding FBI sniper shooting armed individual in back from a significant distance as he walked away constituted Fourth Amendment violation).
the plaintiff’s Fourth Amendment rights. The rational underlying the “clearly defined” requirement is that individual officers and police departments should not be subjected to costly litigation and liability for conduct without fair notice that the conduct is illegal.

In Kisela v. Hughes, the Supreme Court declined to explore whether Corporal Kisela shooting the plaintiff constituted excessive force in violation of the Fourth Amendment and immediately commenced qualified immunity analysis. The Court stressed that Kisela could only lose the protections of qualified immunity if existing precedent specifically defined the plaintiff’s right to be free from unreasonable and excessive force to the extent that a

40 See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted) (articulating how specifically precedent must define right for it to be deemed “clearly established”). In Anderson, Justice Scalia noted:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. But see id. at 648 (Stevens J., dissenting) (arguing Court improperly endorsed “a double standard of reasonableness . . . the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable.”). Officers are not required to use the least intrusive or violent level of force as long as the force deployed is reasonable under the circumstances. See Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (“Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment . . . [i]n the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission.”).

41 See Hope v. Pelzer, 536 U.S. 730, 733-34 (2002) (recognizing importance of providing fair notice of illegality to police officers before imposing § 1983 liability); Malley, 475 U.S. at 341 (“[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.”); Moore v. Pederson, 806 F.3d 1036, 1052 (11th Cir. 2015) (emphasizing that “fair and clear notice to government officials is the cornerstone of qualified immunity”); Soto v. Bzdel, 214 F. Supp. 2d 69, 73 (D. Mass. 2002) (reiterating government officials are immune from suit unless they have fair notice certain conduct is illegal).

42 See Kisela, 138 S. Ct. at 1152 (“Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes.”). Prior to Pearson, the Saucier inquiry would have forced the Court to determine whether a Fourth Amendment violation occurred before addressing whether the right was clearly established. See Pearson, 555 U.S. at 231 (overturning Saucier and allowing lower courts to choose prong of analysis to perform first); Saucier, 533 U.S. at 200-01 (directing lower courts to determine whether facts alleged amounted to constitutional violation before determining whether right was clearly established); see also DONALD L. DOERNBERG & EVAN TSEN LEE, FEDERAL COURTS: A CONTEMPORARY APPROACH 636-637 (5th Ed. 2013) (observing Saucier sequence led courts to rule on constitutional questions that could have been avoided).
reasonable officer in Kisela’s position would have understood that shooting the plaintiff violated the right." The Court seemed to tilt disputed facts regarding the situation Corporal Kisela faced when arriving on scene in favor of the police, emphasizing the plaintiff’s erratic behavior, failure to comply with officers’ commands, and the seriousness of the threat she posed to Chadwick. Moreover, the Court viewed the excessive force cases the Ninth Circuit relied on to support its conclusion that Kisela was not entitled to qualified immunity as supporting the opposite conclusion, that a reasonable officer in Kisela’s position would not have known that shooting the plaintiff was unreasonable and excessive. Finally, the Court criticized the Ninth Circuit for relying on Glenn v. Washington County, because the case was decided a year after Corporal Kisela shot the plaintiff and thus could not have given Kisela notice that using deadly force in the circumstances he was confronted with was illegal. Thus, because existing precedent did not establish that shooting the plaintiff in an attempt to protect Chadwick constituted excessive force, the Court concluded that Corporal Kisela was entitled to qualified immunity from the § 1983 suit and overturned the Ninth Circuit’s reversal of summary judgment.

Justices Sotomayor and Ginsberg viewed the record in a starkly different light than the seven justice per curiam majority. The dissenting

43 See Kisela, 138 S. Ct. at 1152-53 (emphasizing Fourth Amendment right to be free from excessive force must be specifically defined by existing caselaw).
44 See id. at 1153 (“This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.”). But see Mattos v. Agarano, 661 F.3d 433, 439 (9th Cir. 2011) (noting at summary judgment, courts must draw all reasonable factual inferences in favor of non-moving party).
45 See Kisela, 138 S. Ct. at 1153-54 (explaining why cases cited by Court of Appeals support finding that Kisela was entitled to qualified immunity).
46 673 F.3d 864, 874-80 (reversing summary judgment for officers where officers shot intoxicated teenager armed with pocket knife with “beanbag” rounds fired from shotgun).
47 See Kisela, 138 S. Ct. at 1154 (noting that Glen could not “have given fair notice to [Kisela] because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious.”).
48 See Kisela, 138 S. Ct. at 1152 (holding that Kisela was entitled to qualified immunity).
49 See id. at 138 S. Ct. at 1154-56 (Sotomayor, J., dissenting). Justice Sotomayor contended:

The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared “composed and content,” . . . held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and
justices took particular issue with what they perceived as the Court's failure to properly view disputed facts in a "light most favorable" to the Plaintiff, the non-moving party, as is generally required at the summary judgement phase. Viewing the facts in a light most favorable to the Plaintiff, Justice Sotomayor contended that shooting the plaintiff was unreasonable because officers were not investigating a crime, did not witness the plaintiff commit any crimes, she "never acted in a threatening manner," and she seemed to not to notice the officers' presence. The dissent also pointed out that Kisela could have attempted to employ less lethal measures to subdue the plaintiff and protect Chadwick before resorting to deadly force. Shifting focus to whether Kisela violated the plaintiff's "clearly established" Fourth Amendment rights, the dissent accused the Court of applying a higher standard that was tantamount to improperly requiring that the exact conduct at issue have been previously deemed illegal. When addressing Ninth Circuit cases regarding police use of deadly force, the dissent relied heavily

See Kisela, 138 S. Ct. at 1155 (internal citations omitted).

See Kisela, 138 S. Ct. at 1154-56 (Sotomayor, J., dissenting) (contending facts sufficient to provide reasonable jury with basis for finding Kisela "needlessly resort[ed] to lethal force"). See also Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (holding at summary judgement "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor") (quoting Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 255 (1986)).

See Kisela, 138 S. Ct. at 1158 (characterizing disputed facts in light most favorable to Hughes).

See id. at 11157 (highlighting expert testimony that asserted Kisela could have used Taser). See Headwaters Forest Def. v. Cty. of Humboldt, 240 F.3d 1185, 1204 (9th Cir. 2000) (holding that when suspect does not pose threat of immediate danger to others police must "consider 'what other [less intrusive] tactics if any were available' to effect their arrest") (quoting Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994)). But see Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (recognizing officers do not have to choose least intrusive means available when attempting to subdue dangerous suspects).

See Kisela, 138 S. Ct. at 11158 (noting that precedent must only provide officers with "fair notice" that conduct was unlawful); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) (declaring that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"). In Hope v. Pelzer, the Court determined that reasonable corrections officers should have known that punishing a prisoner by shackling him to a "hitching post" in the blazing Alabama sun for hours violated the Eighth Amendment despite the fact that there was not a previous case directly on point. Id. at 743-47.
on *Deorle v. Rutherford* in support of its conclusion that a reasonable officer in Kisela’s position would have known that shooting the plaintiff was unreasonable because she had not committed a serious crime, was not warned that she would be shot if she did not comply, was not a flight risk, and “presented no objectively reasonable threat to the safety of officers or others.” After citing several decisions that purportedly established that the “Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife and not threatening anybody with it,” Justice Sotomayor criticized the Court’s reliance on *Blanford v. Sacramento County,* and sought to distinguish the *Blanford* plaintiff and the Civil War era cavalry sabre he wielded from the plaintiff and her knife. Finally, the dissent pointedly accused the majority of exacerbating a “disturbing trend” in which the Court has almost exclusively used the drastic measure of summary reversal to grant officers qualified immunity, “transforming the doctrine into an absolute shield” from liability for police officers and eviscerating constitutional protections.

Rather than needlessly deciding a constitutional issue and determining whether Kisela shooting the plaintiff violated the Fourth

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54 272 F.3d. 1272, 1282 (9th Cir. 2001) (holding shooting unarmed man in face with lead-filled “bean bag” shot was objectively unreasonable and violated Fourth Amendment). In *Deorle*, at least twelve police officers responded to the house of a distraught man was behaving erratically and screaming at officers. *Id.* at 1276. Although the man brandished several items that could have been used as weapons including a hatchet, unloaded crossbow, and wooden board, he dropped all the items when commanded to do so by officers. *Id.* With no warning, the defendant officer shot the man in the face with a lead filled beanbag shoot from a twelve gauge shotgun because the man was advancing towards the officer at a “steady gait.” *Id.* at 1277. The force of the beanbag shot fractured the man’s skull, put out his left eye, and left lead shot embedded in his skull. *Id.* at 1278.

55 See *Kisela*, 138 S. Ct. at 1158 (Sotomayor J., dissenting) (contending *Deorle* gave Kisela fair warning shooting Hughes was unlawful). Glossing over the fact that the plaintiff was “armed with a large knife” and appeared ready to use it as a weapon when she was shot, Justice Sotomayor noted that kitchen knives can be used for “safe, benign purposes.” *Id.* at 1159.

56 406 F.3d. 1110 (9th Cir. 2005).

57 See *Kisela*, 138 S. Ct. at 1161 (arguing man armed with sword in *Blanford* posed more serious threat of harm than plaintiff).

58 See *Kisela*, 138 S. Ct. at 1160-62 (Sotomayor J., dissenting). Justice Sotomayor declared:

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.

See *id.* at 1162.
Amendment, the Court focused its inquiry on the other prong of qualified immunity analysis—whether Kisela violated a clearly established Fourth Amendment right of which a reasonable officer would have known. In light of the Pearson Court’s rejection of the rigid two-pronged Saucier sequence, the Court conformed to precedent and the doctrine of constitutional avoidance by determining whether it was clearly established that shooting the plaintiff under the circumstances constituted excessive force before deciding whether the plaintiff’s constitutional rights were violated. The crux of the disagreement between the majority and the dissenting justices hinged on the question of whether existing precedent clearly established that Kisela shooting the plaintiff constituted excessive force. The dissenting justices contention that Deorle clearly established shooting Hughes violated the Fourth Amendment was misguided because of the fundamental factual difference between the two cases: the plaintiff was standing six feet away from a defenseless woman while carrying a “large kitchen knife” she had reportedly just been hacking a tree with, whereas in Deorle, an officer shot an unarmed and erratically behaving man in the face with a lead filled bean bag shot as he approached the officer. The difference between the gravity

59 See Kisela, 138 S. Ct. at 1152 (“Here the Court need not, and does not, decide whether Kisela violated the Fourth Amendment.”).

60 See Pearson v. Callahan, 555 U.S. 223, 236-37 (2009) (rejecting Saucier inquiry and allowing lower courts to decide which qualified immunity prong should be addressed first); see also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”). But see Kisela, 138 S. Ct. at 1157-58 (Sotomayor J., dissenting) (analyzing whether Kisela’s conduct violated Fourth Amendment and noting majority “sidestep[ed] the [constitutional] inquiry altogether”).

61 See Kisela, 138 S. Ct. at 1152 (“S[pecificity] is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.”) (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)).

62 See Kisela 138 S. Ct. at 1158-59 (Sotomayor J., dissenting) (arguing “[t]he majority struggles to distinguish Deorle, to no avail”). Justice Sotomayor’s focus on the fact that a twelve-inch kitchen knife may be used for innocuous purposes ignores the fact that a civilian witness informed police that the plaintiff was hacking a tree with the knife, screaming, and acting erratically. Id; see also Kisela, 2013 U.S. Dist. LEXIS 202101, at *2-3. This reported behavior paired with the plaintiff’s failure to comply with officers’ orders, or even acknowledge their presence, was sufficient to make a reasonable officer believe that the plaintiff posed an imminent threat of serious injury or death to Chadwick. Moreover, Justice Sotomayor was incorrect in asserting that the Court improperly inferred that Hughes was “within striking distance” of Chadwick: standing six feet from a person while wielding a foot-long knife makes it possible for the knife wielder to take a single step and stab the person, unquestionably placing the other individual within “striking distance.” See Kisela,
of the potential threat the knife-wielding plaintiff posed to Chadwick and the unarmed Deorle plaintiff posed to the officer is so readily apparent that a reasonable officer in Kisela’s position could not have understood Deorle as proscribing using deadly force to protect Chadwick from the plaintiff’s knife. The dissent’s expansive reading of Deorle contravened prior warnings from the Supreme Court to the Ninth Circuit regarding construing the Deorle decision too broadly when determining whether law is clearly established and would have subjected officers to liability for conduct that they would not necessarily have known was illegal. The Court also recognized significant differences between the facts in the instant case and several other cases cited as support for denying Kisela qualified immunity, and criticized the Ninth Circuit for its dubious reliance on a case decided after the incident as support of the proposition that Kisela had fair notice that shooting the plaintiff was illegal. As acknowledged by the Court, Blanford
v. Sacramento County was the most factually similar Ninth Circuit excessive force case because the Blanford plaintiff was also armed with a knife-like weapon, ignored officers commands to drop the weapon, and officers reasonably believed, albeit mistakenly, that the Blanford plaintiff posed as an imminent threat to a third party.

Determining whether precedent clearly established that Kisela’s use of deadly force was illegal decided whether he was entitled to qualified immunity and a quick summary judgement, or subject to protracted litigation in which his conduct would ultimately be evaluated by a jury. Justice Sotomayor’s dissent raises the concern that the Court’s qualified immunity analysis in excessive force cases imposes too heavy of a burden on § 1983 plaintiffs by requiring that there have been a “factually identical case to satisfy the ‘clearly established’ standard.” However, while the Court has unquestionably stressed the need for specifically defining excessive force jurisprudence in order for the right to qualify as “clearly established,” this requirement of specificity is integral to ensuring qualified immunity functions to ensure that officers are only subjected to § 1983 suits if they have fair notice that the conduct in question is illegal. Subjecting police officers to § 1983 liability for using deadly force they reasonably believed was lawful in an attempt to protect themselves or other others from imminent and serious physical harm would effectually punish officers for conduct they

66 See Kisela, 138 S. Ct. at 1153-54 (observing similarities between situations officers confronted in Blanford and Kisela). Indeed, the instant case arguably presented officers with a more compelling reason for utilizing deadly force than in Blanford, because in that case, officers did not know whether the house the plaintiff attempted to enter while wielding a Civil War era sabre was occupied. See Blanford v. Sacramento County., 406 F.3d 1110, 1116 (9th Cir. 2005). By contrast, in the instant case, Corporal Kisela knew the plaintiff was within a few feet of her potential victim and reasonably believed she posed a threat to Chadwick. See Kisela, 138 S. Ct. at 1153.

67 See Kisela, 138 S. Ct. at 1152 (acknowledging qualified immunity protects officers whose conduct does not violate “clearly established” constitutional rights reasonable officers would have known).

68 See id. at 1161 (Sotomayor J., dissenting) (arguing Court has erected more stringent standard for the “clearly established” qualified immunity prong by requiring precedent where nearly identical conduct was unlawful).

69 See Kisela, 138 S. Ct. at 1153 (“Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness.”); see also Malley, 475 U.S. at 341 (emphasizing requirement of fair notice conduct is unlawful and declaring qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”); Davis, 468 U.S. at 183 (“[O]fficials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”).
had no reason to believe was illegal, and potentially dissuade the police from quickly and decisively using deadly force in situations when just a seconds hesitation can prove fatal. Moreover, while Justice Sotomayor’s preference for allowing a jury to assess the reasonableness of police use of deadly force is in sync with caselaw that cautions against prematurely encroaching on the province of the jury, Sotomayor’s broad conception of “clearly established law” would severely undercut qualified immunity because in order for the doctrine to serve its purpose, qualified immunity must be capable of terminating unjustified suits in their infancy.

In defining the contours of qualified immunity as applied to deadly force suits brought under § 1983, the Court necessarily has to strike a balance between compensating grievously injured victims of police violence and deterring unlawful police conduct, with protecting officers from costly litigation and ensuring that officers will not hesitate to quickly and forcefully react in situations where individuals pose immediate risks of serious harm to the police or others. While some have criticized the Court’s recent qualified immunity jurisprudence as providing the police with nearly blanket

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70 See Kisela, 138 S. Ct. at 1152 (reiterating officers must have notice use of force was illegal); see also Dan Boylan, Number of police officers killed in line of duty up sharply, WASHINGTON TIMES (Dec. 27, 2018) https://www.washingtontimes.com/news/2018/dec/27/144-police-officers-died-in-line-of-duty-this-year/ (documenting nearly twelve percent increase in law enforcement officers killed on duty in 2018); Aamer Madhani, Ferguson effect: 72% of U.S. cops reluctant to make stops, USA TODAY (Jan. 11, 2017) available at https://www.usatoday.com/story/news/2017/01/11/ferguson-effect-study-72-us-cops-reluctant-make-stops/96446504/ (“More than three-quarters of U.S. law enforcement officers say they are reluctant to use force when necessary.”).

71 See Kisela, 138 S. Ct. at 1162 (Sotomayor J., dissenting) (“Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.”); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (cautioning district courts against improperly granting summary judgment and “denigrat[ing] the role of the jury”). If qualified immunity cannot end insubstantial suits quickly, then officers are subjected to costly and time-consuming litigation, and the benefits of the doctrine are lost. See also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (“[Qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”); Harlow, 457 U.S. at 818 (requiring that district courts make threshold determination of currently applicable law and whether it was clearly established before allowing discovery).

immunity for shooting civilians,\(^7\) the Court has protected officers from incurring civil liability for conduct that is not obviously illegal and reduced the possibility that officers will fail to quickly employ force when presented with potentially lethal situations. It is a tragedy any time officers shoot and kill or injure a person that they reasonably, but mistakenly, believe poses an imminent threat of deadly harm.\(^8\) However, by the same token, when officers have probable cause to believe a suspect poses a imminent threat of serious physical danger to others, just a moment of hesitation can prove equally as tragic.\(^9\) In *Kisela v. Hughes*, the Supreme Court signaled that officers who use deadly force in reasonable conformity with existing Fourth Amendment jurisprudence do not have to fear costly § 1983 suits and continued a trend whereby § 1983 excessive force suits are increasingly disposed of at summary judgement when the officer’s conduct does not violate clearly and specifically established law.\(^{10}\) This trend will likely continue unabated because recently confirmed Justice Brett Kavanaugh’s view on qualified

\(^{73}\) See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124 (2009) ("Qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power."); Alan K. Chen, *The Facts About Qualified Immunity*\(^*\), 55 EMORY L.J. 229, 230-33 (2006). The Court’s recent increasing willingness to dispose of cases at summary judgment appears aimed at providing officers with something closer to absolute immunity. *Id.*

\(^{74}\) See, e.g., Pollard v. City of Columbus, 780 F.3d 395, 403 (6th Cir. 2015) (holding officers entitled to qualified immunity for killing man they mistakenly believed was armed); Blanford, 406 F.3d 1110, 1114 (shooting sword-wielding man as he entered house officers did not know belonged to his parents and paralyzing him); Slattery v. Rizzo, 939 F.2d 213, 216-17 (4th Cir. 1991)(Powell, J., sitting by designation)(concluding officer was entitled to qualified immunity when he mistakenly believed that beer bottle in suspect's hand was gun).


\(^{76}\) See *Kisela*, 138 S. Ct. at 1153.
immunity appears to align with the Supreme Court’s recent qualified immunity cases."

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77 See City of Escondido v. Emmons, 202 L.Ed.2d 455, 460 (U.S. 2019) (per curiam) (remanding because Court of Appeals defined “clearly established right” too generally); Hedgpeth v. Rahim, 893 F.3d 802, 809 (D.C. Cir. 2018) (concluding officer was entitled to qualified immunity for forcible arrest); Flythe v. District of Columbia, 791 F.3d 13, 21-22 (D.C. Cir. 2015). The court reversed summary judgment for officer because “[it] believe[d] that a reasonable jury could conclude that [the decedent] never threatened Officer Eagan with a knife” and the shooting was thus unreasonable. Id.; Hundley v. District of Columbia, 494 F.3d 1097, 1102 (D.C. Cir. 2007) (reversing due to inconsistent verdicts with respect to excessive force claim).