Nebraska Law Review

Volume 100 | Issue 3 Article 4

6-2022

The New Qualified Immunity Quandary

Justin C. Van Orsdol
University of Georgia School of Law

Justin C. Van Orsdol*

The New Qualified Immunity Quandary

ABSTRACT

With increased media coverage of excessive force cases, we may someday achieve meaningful reform of the qualified immunity doctrine. But with Congress's inability to accomplish major legislation in the current political climate, it is doubtful that qualified immunity will be reformed, much less abolished, anytime in the near future. Unless—or until—Congress figures out a way to meaningfully reform qualified immunity, we are left with the patchwork of decisions from the federal appellate courts. Qualified immunity cases and scholarship are riddled with wildly varying approaches to what constitutes "clearly established law" and whether courts should return the mandatory sequencing in Saucier v. Katz. *Qualified immunity, for better or worse, is the "gift" that keeps on giving.*

These issues aside, it is no secret that qualified immunity protects "all but the plainly incompetent." Should it, however, protect those who—for competency or other reasons—choose not to raise the defense? Enter a new quandary: sua sponte qualified immunity. As more § 1983 cases crowd the federal docket and as the Supreme Court's disdain for these cases grows, some appellate courts have been raising the issue of qualified immunity sua sponte to either avoid constitutional issues or simply in an attempt to clear their dockets.

I propose that this practice is ripe for Supreme Court's review and the correct approach is for appellate courts not to raise qualified immunity sua sponte. I argue that failure if the Supreme Court fails to invalidate sua sponte qualified immunity, plaintiffs seeking vindication of constitutional rights under § 1983 will effectively be left without recourse.

TABLE OF CONTENTS

* J.D. 2020, University of Georgia School of Law; M.S.A. 2014, California State University of Bakersfield; B.S. 2009, California State University of Bakersfield; A.S. 2007, Antelope Valley College. I wish to extend a special thank you to editors of this volume of the *Nebraska Law Review*—especially Alicia Christensen, Chelsey Borchardt, and Emily Newcomb—for their superb communication during the submission process and for their excellent editing work.

"We do not lead others into the Light by stepping into the darkness with them."—Melody Beattie.[1]

I. INTRODUCTION

The case against qualified immunity continues to build.[2] Even with "growing calls by courts, as well as by a number of commentators and advocacy organizations across the political spectrum, to reconsider qualified immunity or do away with the defense altogether,"[3] it

1. Melody Beattie, *Resisting Negativity*, MELODY BEATTIE (Mar. 22, 2021), https://melodybeattie.com/resisting-negativity/ [https://perma.cc/5TN7-5ZC8].
2. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (discussing multiple issues with qualified immunity including: (1) the lack of basis in common law, (2) failure to achieve its intended policy goals, and (3) rendering the Constitution hollow).
3. Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 311–12 (2020) (footnotes omitted) (collecting court cases, news commentary, and political organization sources stating the same). Surprisingly, both conservative and liberal judges have questioned and spoken out against the doctrine, albeit for different reasons. *Compare* Zadeh v. Robinson, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willet, J., concurring) ("[T]his entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations."), *and* Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) ("[Q]ualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based." (quoting Brief of the Cato Institute as Amicus Curiae Supporting Peti-

is unclear whether a legislative solution—either federally or via the states—will ever pass given the current political climate.[4] Expecting any meaningful action from the Supreme Court seems futile.[5] Moreover, when the Court has acted, it has strengthened qualified immu-

tioners at 2, Pauly v. White, 137 S. Ct. 548 (2017) (No. 17-1078)), *with* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, AM. CONST. SOC'Y (Jan. 12, 2018), https://www.acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights/ [https://perma.cc/UM7A-E2NF] ("Of all the restrictions that the Court has imposed on [§ 1983], however, the one that has rapidly become the most harmful to the enforcement of constitutional rights is the doctrine of qualified immunity.").

4. Nick Sibilla, *House Passes New Bill To Abolish Qualified Immunity for Police*, FORBES (Mar. 4, 2021, 10:55 AM), https://www.forbes.com/sites/nicksibilla/2021/03/04/house-passes-new-bill-to-abolish-qualified-immunity-for-police/?sh=31c11c652daf [https://perma.cc/6ZHR-4XDN] (noting that the U.S. House of Representative approved the George Floyd Justice in Policing Act (H.R. 1280) "[o]n a largely party-line vote" and that a "nearly identical version of the bill passed the House last summer but never got a floor vote in the Senate"); Ayanna Alexander, *Legislatures Targeted in Attempt To Make It Easier To Sue Cops*, BLOOMBERG L. (Oct. 6, 2020, 12:36 PM), https://news.bloomberglaw.com/social-justice/legislatures-targeted-in-attempt-to-make-it-easier-to-sue-cops [https://perma.cc/QAD7-UPVH] (discussing Colorado's recently passed law removing qualified immunity but quoting Barry Friedman, founding director of New York University School of Law's Policing Project as noting that "[t]here's a strong police lobby against changing those rules and many people who are elected to do something about this will be perceived as being anti-police"); Orin Kerr (@OrinKerr), TWITTER (Mar. 28, 2021, 5:15 AM), https://twitter.com/orinkerr/status/1376100667421384707?s=11 [https://perma.cc/7KTG-FR29] (discussing New York's new law removing qualified immunity); Bryn Stole, *Maryland House of Delegates Passes Sweeping Policing Legislation*, BALT. SUN (Mar. 11, 2021, 7:08 PM), https://www.baltimoresun.com/politics/bs-md-pol-house-police-reform-20210312-6jbvejibyfddjf4xtx5evtavli-story.html [https://perma.cc/YKH4-JYRE] (describing Maryland's Police Reform and Accountability Act).

5. Whether the Supreme Court's inaction will persist is more up in the air with the passing of Justice Ginsburg and Justice Breyer's retirement. Both Justices had been sympathetic to critiques against qualified immunity. Schwartz, *supra* note 3, at 313; *see* Richardson v. McKnight, 521 U.S. 399, 409–10 (1997) (distinguishing private and public prison guards in the qualified immunity context); Eli Hager & Beth Schwartzapfel, *How Losing RBG Could Shape Criminal Justice for Years to Come*, MARSHALL PROJECT (Sept. 24, 2020, 6:00 AM), https://www.themarshallproject.org/2020/09/24/how-losing-rbg-could-shape-criminal-justice-for-years-to-come [https://perma.cc/PZQ7-ENCN] (noting Justice Ginsburg joined in Justice Sotomayor's dissent in *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018), in which Justice Sotomayor wrote that qualified immunity "tells officers that they can shoot first and think later"). Perhaps we could see a unique coalition between Justices Sotomayor and Thomas, both of whom have been skeptical about qualified immunity. *See* Devin Dwyer, *'Qualified Immunity' for Police Getting Fresh Look by Supreme Court After George Floyd Death*, ABC NEWS (June 4, 2020, 3:02 AM), https://abcnews.go.com/Politics/police-immunity-rule-fresh-supreme-court-george-floyd/story?id=71044230 [https://perma.cc/VGJ3-4877] (noting Justice Sotomayor's 2018 dissent criticized qualified immunity as "gutting the deterrent effect of the Fourth Amendment" and explaining that Justice Thomas "has also been publicly skeptical of the policy").

nity, as it views the immunity as a shield to government officials from damages liability.[6]

To be sure, there has been a substantial uptick in the number of certiorari petitions for qualified immunity cases,[7] thanks in part to Justice Thomas' concurrence in *Ziglar v. Abbasi* questioning the doctrine.[8] The Court's recent denial of certiorari in *Hamner v. Burls*, however, has created yet another quandary in the qualified immunity doctrine: whether appellate courts can (or should) raise qualified immunity sua sponte? Put differently, is qualified immunity an affirmative defense or a jurisdictional issue?

Based on the Court's qualified immunity decisions and current makeup, I predict the Court would conclude that qualified immunity may be raised sua sponte because the Court would view it as a juris-

6. White v. Pauly, 137 S. Ct. 548, 551–52 (2017) ("In the last five years, this Court issued a number of opinions reversing federal courts in qualified immunity cases . . . both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'" (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009))); City & County of San Francisco v. Sheehan, 575 U.S. 600, 611 n.3 (2015), ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))); Brosseau v. Haugen, 543 U.S. 194, 195–99 (2004) (per curiam) (granting review only on the clearly established prong and applying the *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), strict factual similarity requirement); Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (reformulating the standard so that qualified immunity applies unless "*every* 'reasonable official would have understood that what he is doing violates [established law]" (emphasis added) (quoting *Anderson*, 483 U.S. at 640.)); Mullenix v. Luna, 577 U.S. 7, 18 (2015) (failing to cite *Hope v. Pelzer*, 536 U.S. 730 (2002), and reversing "[b]ecause the constitutional rule applied by the Fifth Circuit was not 'beyond debate'" (quoting Stanton v. Sims, 571 U.S. 3, 11 (2013))); *see also* Karen M. Blum, *Qualified Immunity: Time To Change the Message*, 93 NOTRE DAME L. REV. 1887, 1887 (2018) ("If messages sent by the Supreme Court to the lower federal courts were in the form of tweets, there would be a slew of them under #welovequalifiedimmunity.").

7. Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/D7WH-8696] ("[C]ivil rights plaintiffs are increasingly filing petitions for certiorari with the Supreme Court, explicitly asking for the Court to reconsider the doctrine . . . . " (citing Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST. (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity [https://perma.cc/9ECD-MTKB])); *see also* Schwartz, *supra* note 3, at 310 (stating "the Supreme Court has been downright bullish about qualified immunity doctrine in recent years," finding for the government in all of the twenty qualified immunity cases considered between 2005 and 2020 (footnote omitted) (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 88–90 (2018))).

8. Schwartz, *supra* note 3, at 313; Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017) (Thomas, J., concurring) ("I write separately to express my view . . . and my concerns about our qualified immunity precedents.").

dictional issue. This Article proceeds in three parts to explain why that conclusion would be wrong, given the purposes of § 1983.[9] In Part II, I give a brief history of *Hamner*, detailing how the Eighth Circuit decided to raise qualified immunity sua sponte. Part III discusses why this issue merits the Supreme Court's attention. Specifically, I explain the divergence among circuit courts, explore the potential frequency for sua sponte qualified immunity, and forecast the consequences if the Court continues to avoid the issue. Part IV examines the rationale for and against sua sponte qualified immunity. Ultimately, I argue that the case against sua sponte qualified immunity is stronger and that the Supreme Court should ultimately prohibit the practice. Part IV also includes a discussion of how the Prison Litigation Reform Act (PLRA) affects the argument. I conclude by explaining that though the Court would likely reach a different conclusion than I do here, it should at least provide clear and definitive guidance on this issue.

II. HAMMERING OUT THE BURLS: THE CASE OF *HAMNER V. BURLS*

Charles E. Hamner, like many *pro se* prisoner plaintiffs, has an extensive litigation history.[10] While in custody of the Arkansas Department of Corrections (ADC), one of Hamner's claims managed to get the attention of the Eighth Circuit Court of Appeals. Hamner filed a lawsuit under 42 U.S.C. § 1983 alleging that in retaliation for filing grievances, prison officials transferred him in administrative segregation—holding him there for 203 days.[11] After alerting prison authorities that another inmate's planned attack to a guard in March of 2015, Hamner was allegedly transferred because of "security concerns," an explanation that came five months into his nearly seven-month administrative segregation.[12] There, Hamner was confined to his cell for twenty-three hours a day, isolated, and generally subjected to worse conditions than those of general population.[13] Hamner, who suffers from multiple mental health problems, claimed he was deprived of his

9. 42 U.S.C. § 1983 (providing a cause of action against any person for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

10. *See, e.g.*, Hamner v. Griffin, No. 18-CV-00060, 2019 WL 3713738, at *4 (E.D. Ark. July 11, 2019) (denying Hamner's § 1983 claim for failure to administer medication due to lack of exhaustion under the Prison Litigation Reform Act), *aff'd sub nom.* Hamner v. Griffin, 815 F. App'x 97 (8th Cir. 2020); Hamner v. Kelley, No. 16-CV-00369, 2017 WL 1097222, at *3 (E.D. Ark. Feb. 28, 2017) (denying Hamner's claims for equal protection and first amendment violations), *report and recommendation adopted*, No. 16-CV-00369, 2017 WL 1100431 (E.D. Ark. Mar. 22, 2017); Hamner v. Page, No. 19-CV-00183, 2019 WL 2550517, at *3–5 (E.D. Ark. June 10, 2019) (ruling Hamner failed to state valid claims for failure to protect, failed to plead a viable due process claim, and improperly joined claims).

11. Hamner v. Burls, 937 F.3d 1171, 1174 (8th Cir. 2019).

12. *Id.*

13. *Id.* at 1174–75.

prescribed daily medication, which caused him to have hallucinations, anxiety, panic attacks, and suicidal ideations, and that prison officials were aware of the lapse in treatment.[14] Hamner later claimed the authorities who assigned him to the administrative segregation unit knew of his condition and need for the medication, but they subjected him to these conditions as retaliation for previous grievances.

The district court allowed Hamner's retaliation claim to proceed, and Hamner added claims under the Eighth Amendment, alleging that prison authorities knew of his medical needs but were deliberately indifferent to the gaps in his treatment.[15] After the district court dismissed all counts for failure to state a claim, Hamner appealed.

Despite the fact that the parties had not briefed the issue and neither the magistrate nor district judge had discussed qualified immunity,[16] the Eighth Circuit raised the issue of qualified immunity sua sponte and found that the prison authorities were entitled to qualified immunity because they did not violate Hamner's clearly established rights.[17] The Eighth Circuit requested supplemental briefing on the qualified immunity issue.[18] Hamner argued defendants waived or forfeited the defense by not raising it in their motion to dismiss his due process or Eighth Amendment claims, only raising qualified immunity in their answer to Hamner's retaliation claims.[19] Prison authorities argued they were unable to raise qualified immunity on Hamner's due process claim because the district court dismissed it before they were served,[20] and the court concluded that "even where an appellee did not argue qualified immunity as an alternative ground for affirmance, it was appropriate to resolve the appeal on that basis where the defense was established on the face of the complaint."[21]

Hamner later filed a petition for a writ of certiorari, which was submitted to Justice Gorsuch and later denied.[22] The Supreme Court's

14. *Id.*
15. *Id.* at 1175, 1177. The district court dismissed Hamner's due process allegations, finding his complaint failed to state a claim implicating a protected interest. *Id.* at 1175.
16. *See generally* Hamner v. Burls, No. 17-CV-79, 2018 WL 2033406, at *2–3 (E.D. Ark. Apr. 9, 2018), *report and recommendation adopted*, No. 17-CV-79, 2018 WL 2024613 (E.D. Ark. May 1, 2018), *aff'd on other grounds*, 937 F.3d 1171 (8th Cir. 2019), *as amended* (Nov. 26, 2019) (dismissing Hamner's claims because they did not implicate a liberty interest, he failed to exhaust administrative remedies, and he failed to allege facts that defendants were aware of his need for mental health treatment or medication).
17. *Hamner,* 937 F.3d at 1175–76.
18. *Id.* at 1176.
19. *Id.*
20. *Id.*
21. *Id.* (citing Story v. Foote, 782 F.3d 968, 970 (8th Cir. 2015)).
22. Hamner v. Burls, 141 S. Ct. 611 (2020) (mem.); *see also Docket for No. 19-1291*, SUP. CT., https://www.supremecourt.gov/docket/docketfiles/html/public/19-1291.

decision not to hear the case leaves us with yet another quandary in qualified immunity's byzantine history: whether it is appropriate for courts to raise qualified immunity sua sponte?

III. SPLITTING HAIRS

I can only speculate as to why the Supreme Court denied certiorari on this important issue,[23] but one potential argument is that the issue of sua sponte qualified immunity is not contentious enough to demand the Court's attention. Thus, before answering whether the Eighth Circuit's approach in *Hamner* was appropriate, it is important to understand whether there is a divide among circuit courts that requires Supreme Court attention.[24] And, if so, whether there is a substantial reason for the Court to answer this question.

A. Does a Circuit Split Exist?

In opposition to Hamner's petition for certiorari, respondents argued his petition did not warrant review because "the vast majority of the circuits exercise case-by-case discretion in a fairly homogenous manner: generally enforcing forfeitures, but occasionally excusing them where immunity is exceptionally clear, where not reaching it would unduly protract litigation, or in other exceptional circumstances."[25] In contrast, Hamner argued there is a nine to three split amongst the circuit courts on whether qualified immunity should or

html [https://perma.cc/YYZ9-WF3B] (last visited Apr. 10, 2021) (noting the plaintiff filed a petition for writ of certiorari with Justice Gorsuch).

23. Aside from the Court's usual practice of constitutional avoidance, the betting money is on the Court's propensity to allow fewer and fewer cases from proceeding against law enforcement and government officials. *See* Noah Feldman, Opinion, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG (Jan. 9, 2017, 2:08 PM), https://www.bloomberg.com/opinion/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits [https://perma.cc/P69L-UYGM] ("There's little doubt of the message to the lower courts: The Supreme Court wants fewer lawsuits against police to go forward."); *see also* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141 (2010) (explaining the "well-established doctrine of constitutional avoidance, under which courts avoid deciding constitutional issues unless absolutely necessary" (footnote omitted)).

24. *See How To Get Your Case to the Supreme Court—or, in the Alternative, How To Keep It from Getting There*, A.B.A. (Nov. 1, 2013), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2013_14/2013-fall-get-your-case-to-supreme-court-or-not/ ("Unless a case involves a fundamental issue like the constitutionality of the Affordable Care Act, the justices generally will not think a case is worth their review unless it implicates a lower court 'split.'").

25. Brief in Opposition at 19, Hamner v. Burls, 141 S. Ct. 611 (2020) (No. 19-1291), 2020 WL 4904850, at *19.

can be raised sua sponte—with nine circuits never raising qualified immunity sua sponte, even in PLRA cases.[26] So, who was right?

1. Circuits Holding Against Sua Sponte Qualified Immunity

The First, Third, Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits hold qualified immunity is unavailable if government officers do not raise and preserve the issue below. In *Guzmán-Rivera v. Rivera-Cruz*,[27] for example, the First Circuit explicitly confronted this issue. Guzmán-Rivera was serving a 119-year sentence for murder when his father uncovered proof of his innocence.[28] Guzmán and his family filed a § 1983 case against Justice Department officials, alleging they failed to reinvestigate his case "with adequate speed and to move for his release after his innocence had been established."[29] Guzmán had previously won two appeals, in which the First Circuit found in his favor on statute of limitations and absolute immunity defenses.[30] On second remand, the district court denied defendants' motion for summary judgment based on qualified immunity, reasoning that defendants had waived the immunity because they had ample opportunity to raise the defense throughout the appellate process.[31] The First Circuit agreed, holding that "[q]ualified immunity is an affirmative defense, and the 'burden of pleading it rests with the defendant.'"[32] Concerned primarily with dilatory tactics and use of judicial resources, the First Circuit held that qualified immunity is waived if not raised in a diligent manner.[33]

The Third Circuit confronted this issue in *Bines v. Kulaylat*.[34] There, a prisoner filed a § 1983 suit for inadequate medical care during his incarceration. The defendant, Dr. Kulaylat, eventually filed a motion for summary judgment but failed to include any argument on qualified immunity.[35] On appeal to the Third Circuit, Dr. Kulaylat raised the issue of qualified immunity for the first time. The court declined to review the issue because it was not raised in the district

26. Reply in Support of Certiorari at 3, Hamner v. Burls, 141 S. Ct. 611 (2020) (No. 19-1291), 2020 WL 5659238, at *3 ("Nine circuit courts never raise qualified immunity *sua sponte*, even in PLRA cases, and three sometimes do.").

27. 98 F.3d 664 (1st Cir. 1996).

28. *Id.* at 666.

29. *Id.*

30. Guzmán-Rivera v. Rivera-Cruz, 29 F.3d 3 (1st Cir. 1994); Guzmán-Rivera v. Rivera-Cruz, 55 F.3d 26 (1st Cir. 1995).

31. *See Guzmán-Rivera-Cruz*, 98 F.3d at 666.

32. *Id.* at 667 (quoting Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

33. *Id.* at 668.

34. 215 F.3d 381, 383 (3d Cir. 2000).

35. *Id.* at 385.

court but left open the possibility that an exception may arise "where failure to consider the issue would result in manifest injustice."[36]

The Fourth Circuit has been the most explicit on sua sponte qualified immunity. In *Suarez Corporation Industries v. McGraw*,[37] four direct-marketing companies, including Suarez Corporation Industries (SCI), were charged with violating West Virginia's Consumer Credit and Protection Act.[38] After SCI published a two-page advertisement in a local paper criticizing Attorney General Darrell McGraw for bringing the charges, McGraw announced he would proceed solely against SCI.[39] SCI filed a § 1983 suit claiming the attorney general's decision was retaliation for exercising its First Amendment rights.[40] McGraw filed a motion to dismiss on the ground of absolute immunity, but after SCI filed an amended complaint, McGraw's second motion to dismiss only referenced his first motion to dismiss and altogether failed to mention the immunity defense.[41] On appeal, McGraw urged the Fourth Circuit to consider his qualified immunity claim if the absolute immunity claim failed, but the court declined based on prior decisions that refused "to consider *sua sponte* a defense of qualified immunity in a § 1983 action when it was not properly preserved below."[42]

Over in the Sixth Circuit, *Summe v. Kenton County Clerk's Office* centered on two candidates for county clerk.[43] After Chief Deputy County Clerk Summe lost the election to Rodney Eldridge, Eldridge directed all deputy clerks to reapply for their positions and, ultimately, terminated Summe along with six others who supported her in the election.[44] Summe filed a § 1983 action against Eldridge for "unlawful patronage dismissal in violation of the First Amendment."[45] On the defendant's motion for summary judgment, the district court sua sponte raised the issue of qualified immunity in favor of the defendants.[46] On appeal, the Sixth Circuit affirmed the district court on other grounds but declined to decide the qualified immunity issue because Eldridge waived the defense by failing to raise it in his motion for summary judgment.[47]

36. *Id.* (citing Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1115 (3d Cir. 1993)).
37. 125 F.3d 222, 224 (4th Cir. 1997).
38. W. VA. CODE § 46A-6-104 (1974).
39. *Suarez Corp. Indus.*, 125 F.3d at 224.
40. *Id.* at 225.
41. *Id.* at 224.
42. *Id.* at 226 (citations omitted).
43. 604 F.3d 257, 261 (6th Cir. 2010).
44. *Id.* at 263.
45. *Id.* at 264.
46. *Id.* at 269.
47. *Id.* at 269–70.

Similarly, the Seventh Circuit held in *Narducci v. Moore* that "the district court was entitled to find that [defendants] waived the qualified immunity defense in the summary judgment proceedings because they failed to raise the issue before their reply brief."[48] The defendants in *Narducci* had urged the Seventh Circuit to find the district court's refusal to consider qualified immunity sua sponte was plain error, but the Seventh Circuit was clear that "[the defendants] were required to bring that issue to the district court's attention," especially because they had over five years to present the issue.[49]

Following suit, the Tenth Circuit came to same conclusion in *Greer v. Dowling*, in which a prisoner filed a § 1983 action based on Religious Land Use and Institutionalized Persons Act (RLUIPA), First Amendment, due process, and equal protection violations.[50] On appeal, the Tenth Circuit concluded that the defendants conceded and waived qualified immunity because it "is an affirmative defense that defendants must invoke in district court."[51]

Additionally, in *Moore v. Morgan*, the Eleventh Circuit held that a magistrate judge improperly inserted the qualified immunity defense when the parties had not properly raised it.[52] There, an Alabama prisoner filed a § 1983 suit against the county sheriff and commissioners, alleging inadequate medical treatment. However, the defendants did not plead qualified immunity in their answer or in their dispositive motions.[53] The case went to trial, where the magistrate judge sua sponte requested briefing on qualified immunity and found in favor of the defendants.[54] But, because the defendants "never raised this affirmative defense," the circuit court held "that it was waived."[55] The defendants asserted that the magistrate judge properly considered the issue "by implied consent of the parties" under Rule 15(b) of the *Federal Rules of Civil Procedure*,[56] but the Eleventh Circuit found nothing to suggest the plaintiff explicitly or implicitly consented to the qualified immunity issue since "[n]either the issue, nor the words, of qualified immunity was ever raised before or during trial."[57]

48. 572 F.3d 313, 324 (7th Cir. 2009).
49. *Id.* at 324–25.
50. 947 F.3d 1297, 1301 (10th Cir. 2020).
51. *Id.* at 1303.
52. 922 F.2d 1553, 1554 (11th Cir. 1991).
53. *Id.* at 1554.
54. *Id.* at 1555.
55. *Id.* at 1557.
56. *Id.* "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." FED. R. CIV. P. 15(b).
57. *Moore*, 922 F.2d at 1557–58.

Last, in *Robinson v. Pezzat*,[58] the D.C. Circuit had occasion to confront sua sponte qualified immunity. There, police officers shot the plaintiff's dog during the execution of a search warrant.[59] Robinson filed a § 1983 suit alleging violations of her Fourth Amendment rights for an illegal seizure of property when the officers killed her dog.[60] The district court granted the officer's motion for summary judgment, concluding that Robinson's testimony as to whether the dog presented an imminent threat was uncorroborated, and Robinson appealed.[61] The court found the lower court had erred in determining credibility, a function of the jury, and that the record demonstrated a genuine dispute of material fact.[62] In reversing the lower court, the D.C. Circuit rejected the defendants' qualified immunity defense. The court stated that the claim, raised for the first time on appeal, "comes too late. . . . [T]he [defendants] argued only that Robinson suffered no constitutional injury; it never argued that the officers were entitled to qualified immunity."[63]

2. Circuits Permitting Sua Sponte Qualified Immunity

Outside of the Eighth Circuit, both the Second and Ninth Circuits permit sua sponte qualified immunity. The Second Circuit considered the issue in *Dean v. Blumenthal*,[64] a § 1983 suit filed by a Republican Party candidate for Connecticut attorney general. Dean alleged her incumbent opponent's policy preventing campaign contributions violated her First and Fourteenth Amendment rights.[65] The district court granted Blumenthal's motion to dismiss, finding that Dean failed to demonstrate a liberty or property interest.[66] The Second Circuit affirmed the district court, but it did so on the grounds of sua sponte qualified immunity. Relegated to a footnote, the court explained it had "discretion to consider waived arguments" because the general prohibition against considering issues first raised on appeal was prudential, allowing the court to "exercise this discretion . . . where the argument presents a question of law."[67] The court also pointed to the fact that the issue was discussed during oral argu-

58. 818 F.3d 1 (D.C. Cir. 2016).
59. *Id.* at 4–5.
60. *Id.* at 3.
61. *Id.* at 6.
62. *Id.* at 8–9.
63. *Id.* at 11.
64. 577 F.3d 60 (2d Cir. 2009). Notably, then-Judge Sotomayor was originally on the panel, but the remaining two judges decided the matter after she was elevated to the Supreme Court. *Id.* at 62.
65. *Id.* at 63.
66. *Id.* at 64.
67. *Id.* at 67 n.6 (quoting Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004)).

ment "in response to Dean's argument that the Eleventh Amendment did not bar her damages claim."[68]

The Ninth Circuit has employed identical reasoning, holding courts may raise qualified immunity sua sponte because it presents an exceptional circumstance and "the issue presented is purely one of law and either does not depend on the factual record developed below or the pertinent record has been fully developed."[69] The Ninth Circuit, like the Second and Eighth, holds that sua sponte qualified immunity is a discretionary decision, permissible when plaintiffs will not be prejudiced by the court's consideration of the issue and where it has been addressed during oral argument.[70]

3. Recessions and Backtracking

Some may argue that a 9–3 split is no reason for the Supreme Court to weigh in here. Normally, "when a [circuit] split is particularly lopsided . . . the Court may reason that if it lets the issue percolate further, the outlier court[s] may change [their] rule[s] via the en banc process or otherwise."[71] With sua sponte qualified immunity, just the opposite has happened, and now the split seems to be even deeper. For example, the Fourth Circuit has edged over into permitting discretionary sua sponte qualified immunity since *Suarez*,[72] and the Eleventh Circuit appears to have backtracked on its disapproval of district courts raising the issue sua sponte.[73] The incongruent decisions cited above and the recent shifts among some of the circuits suggest that a split does indeed exist, both on whether district courts or appellate courts can raise qualified immunity sua sponte.

B. Avoiding Anathema: Why This Merits the Supreme Court's Attention

Assuming that a split exists, does that alone really warrant the Court's review of sua sponte immunity? Professor Joanna C. Schwartz states, "[Q]ualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who

68. *Id.*
69. Graves v. City of Coeur D'Alene, 339 F.3d 828, 845 n.23 (9th Cir. 2003) (quoting Marx v. Loral Corp., 87 F.3d 1049, 1055 (9th Cir. 1996)).
70. *See* Cmty. House, Inc. v. City of Boise, 623 F.3d 945, 968 (9th Cir. 2010).
71. *How To Get Your Case to the Supreme Court*, *supra* note 24.
72. *See* Ridpath v. Bd. of Govs. Marshall Univ., 447 F.3d 292, 305–06 (4th Cir. 2006); Noel v. Artson, 297 F. App'x 216, 219 (4th Cir. 2008).
73. *See* Lillo v. Bruhn, 413 F. App'x 161, 162 (11th Cir. 2011) ("[T]here was no error on the part of the district court when it *sua sponte* raised the issue of qualified immunity . . . ."); Shepard v. Davis, 300 F. App'x 832, 836 n.7 (11th Cir. 2008) (concluding the qualified immunity defense was not waived since the defendant had not yet filed an answer and reaching the merits on the issue "because qualified immunity issues should be addressed at the earliest opportunity").

act unconstitutionally and in bad faith."[74] Sua sponte immunity, along with other recent developments in qualified immunity doctrine means it is increasingly unlikely that plaintiffs with § 1983 claims will be heard on the merits.[75] A determination of whether government officials should be provided yet another layer of protection through sua sponte qualified immunity is therefore an important question worth the Court's resources in its own right. After all, examining a potential roadblock that could erode the congressional intent behind § 1983 and its counterpart in § 1988—"vindicating constitutional rights and deterring constitutional violations"[76]—is certainly a worthwhile endeavor.

But how often would courts even have the opportunity to use sua sponte qualified immunity? Shocker: the number of cases in which courts could potentially raise qualified immunity sua sponte is sizable.[77] According to Schwartz's comprehensive empirical study, the issue arises with enough frequency to merit the Court's attention,[78] and "even when defendants could raise qualified immunity at the motion to dismiss stage, they often chose not to do so."[79] In fact, a survey 979 cases from the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Pennsylvania revealed only thirty-three percent included a qualified immunity argument.[80] Additionally, in the 374 motions for summary judgment amongst the same district courts, nearly twenty-five percent of defendants failed or chose not to raise qualified immunity.[81] Assuming these findings are applicable nationally, the door to appellate courts raising qualified immunity is not just ajar—it has been blown off the hinges. Not to mention that civil rights cases, especially from prisoners, continue to increase.[82] Given "the appellate courts' growing tendency, influenced by guidance from the Su-

74. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11 (2017) (footnote omitted).

75. Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013) (referring to *Hope v. Pelzer*, 536 U.S. 730 (2002), which established that "fair warning" that conduct was unconstitutional satisfies the clearly-established-law prong of the qualified immunity test, a holding that has since been almost entirely ignored).

76. Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 829 (2016).

77. Between 1979 and 2013, there were 462,982 cases involving § 1983 filed in federal district courts. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 11 tbl.2 (2015).

78. *See generally* Schwartz, *supra* note 74.

79. *Id.* at 56 (footnote omitted).

80. *Id.* at 34.

81. *Id.* at 35.

82. *Federal Judicial Caseload Statistics 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/7YRB-56TD] (last visited Apr. 10, 2021) (noting that in district courts "petitions

preme Court, to grant . . . immunity,"[83] it is not a stretch to imagine that § 1983 plaintiffs' chances of success would drop from abysmal to nearly impossible strictly depending on where the case was filed.[84] If that was not enough, the odds are against plaintiffs who petition the Supreme Court for review, since the Court is three and half times more likely to grant certiorari petitions from defendants in § 1983 cases.[85] At bottom, because a circuit split exists and because the opportunity for courts to employ sua sponte qualified immunity is vast, the Supreme Court should examine the issue in the immediate future.

IV. IS SUA SPONTE QUALIFIED IMMUNITY PROPER?

Should the Supreme Court take up the issue of sua sponte qualified immunity, the question is whether they should deny or affirm the practice. Second, if affirmed, should sua sponte qualified immunity be mandatory or discretionary? Further, should there be any factors or conditions courts should consider before employing sua sponte qualified immunity?

A. Support for Sua Sponte Qualified Immunity

Proponents of sua sponte qualified immunity tout that appellate courts can bypass the general rule of not considering issues raised for the first time on appeal because this rule is "prudential, not jurisdictional."[86] These proponents also suggest that sua sponte qualified immunity is in keeping with the purpose of the defense, aligns with the doctrine of constitutional avoidance, and promotes judicial economy.

---

related to civil rights increased 5 percent (up 822 petitions)" but decreased at the appellate level).

83. Andrea Januta et al., *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, REUTERS INVESTIGATES (Dec. 23, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/ [https://perma.cc/BL7D-Q5H4].

84. *See id.* ("[W]ide regional variations exist in the rate at which officers win immunity appeals.").

85. *See id.* (reporting that from 2005 through 2018, 121 petitions were submitted for cases involving police use of force and qualified immunity, "65 submitted by police and 56 submitted by civilians," and finding that the data confirmed "a 'disturbing trend' in which the Supreme Court intervened more often at the request of officers than civilians" (quoting Justice Sotomayor)); *see also* Mark Joseph Stern, *The Empty Waistband*, SLATE (Apr. 24, 2017, 6:05 PM), https://slate.com/news-and-politics/2017/04/justice-sotomayor-takes-aim-at-police-brutality-in-salazar-limon-v-houston-dissent.html [https://perma.cc/BSP6-G9BJ] (quoting Justice Sotomayor's dissent in *Salazar-Limon v. Houston*, 137 S. Ct. 1277 (2017), regarding the Court's "disturbing trend . . . namely, that the [C]ourt routinely intervenes to protect police officers from lawsuits but rarely intervenes 'where courts wrongly afford officers the benefit of qualified immunity'"). In pro se prisoner cases, it is not hard to imagine that the balance is even more skewed.

86. Dean v. Blumenthal, 577 F.3d 60, 67 n.6 (2d Cir. 2009) (quoting Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004) (per curiam)).

1. Frustration of Purpose

One of the main goals of qualified immunity is to encourage officials to do their job without the threat of litigation or liability.[87] Proponents of qualified immunity believe that liability concerns can "unduly inhibit officials in the discharge of their duties"[88] and posit that the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[89] Thus, because of the risk that public officials will not be able to perform their job duties as necessary, the law affords them such immunity.[90]

For those who believe this goal is worth protecting and that threat of legal action significantly affects how public officials go about their work, allowing appellate courts to raise qualified immunity sua sponte would effectuate this goal and further protect public officials.[91] Proponents, however, take things a step further and argue that the purpose of the doctrine is frustrated when only the party seeking immunity may raise the defense or lose it.[92] There may be reasons why a defendant neglects to raise qualified immunity. For example, in *Hamner*, qualified immunity was not raised because the defendant's attorney moved to dismiss based upon Rule 12(b)(6) for failure to state a claim

87. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."); Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 383 (2018) ("*Ziglar* is an especially officer-protective qualified immunity decision because it seems to treat qualified immunity as a general no-liability rule *whenever* the law bearing on liability is unsettled and no matter *why* liability is uncertain.").

88. Camreta v. Green, 563 U.S. 692, 705 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

89. *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

90. *But see* John Cameron McMillan Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 533 (1987) ("[C]oncern that public entities will be unable to function absent immunity has not proven to be historically accurate where imposition of liability has been allowed for other governmental activities." (footnote omitted)).

91. *See, e.g.,* Montin v. Peterson, No. 4:08-CV-3083, 2009 WL 1844480, at *5 (D. Neb. June 22, 2009) (granting defendants sua sponte summary judgment on qualified immunity grounds).

92. Dittmer v. Bradshaw, No. 12-81309-CV, 2015 WL 471371, at *7 n.2 (S.D. Fla. Feb. 4, 2015) ("The purpose of qualified immunity is to protect 'a right to be free from the burdens of litigation [which] suggests that it should be decided at an early stage,' and '[t]his purpose is not served when a ruling on [qualified] immunity is unnecessarily postponed.'" (alterations in original) (quoting Bouchard Transp. Co. v. Fla. Dep't of Env't Prot., 91 F.3d 1445, 1448–49 (11th Cir. 1996))).

upon which relief could be granted.[93] When a party only files a motion to dismiss for failure to state a claim and does not file an answer, some would reason that there is no meaningful time or place to assert a qualified immunity defense.[94] The theory goes that, although defendants would have an opportunity to later appeal a ruling on qualified immunity grounds, this protracted litigation penalizes and burdens public officials.[95] In short, the argument is that preventing appellate courts from engaging in sua sponte qualified immunity adds an extra barrier that frustrates the purpose behind the defense.

To be sure, if it were a bright line rule that defendants could never plead an affirmative defense in a motion to dismiss, maybe this argument would be valid. However, "both federal and state courts have permitted affirmative defenses to be raised by motion to dismiss for failure to state a claim instead of requiring that they be set forth affirmatively by responsive pleading."[96] In fact, federal courts specifically permit a Rule 12(b)(6) motion to raise a governmental immunity defense,[97] and such defenses "frequently serve as the basis for successful motions to dismiss under Rule 12(b)(6) because a complaint commonly avers . . . the status of the defendant. "[98] Qualified immunity, in particular, has been raised in motions to dismiss. One such example of qualified immunity raised in a 12(b)(6) motion is one of the most famous civil procedure cases that nearly every first-year law student reads: *Ashcroft v. Iqbal*.[99] Accordingly, the argument that public officials should not have to suffer the burdens of protracted litigation

93. Brief for Respondents at 7, Hamner v. Burls, 141 S. Ct. 611 (2020) (No. 19-1291), 2020 WL 4904850, at *7.

94. Ellsworth v. U.S. Bank, N.A., 908 F. Supp. 2d 1063, 1083 (N.D. Cal. 2012) ("Ordinarily, an affirmative defense may not be raised on a motion to dismiss." (citing Scott v. Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984))).

95. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("[T]he 'consequences' with which we were concerned in *Harlow* are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982))).

96. Rhynette Northcross Hurd, Note, *The Propriety of Permitting Affirmative Defenses To Be Raised by Motions To Dismiss*, 20 MEMPHIS STATE U. L. REV. 411, 413 (1990) (footnote omitted).

97. *See generally* Cooper v. Rutherford Cnty., 531 S.W.2d 783 (Tenn. 1975) (finding sovereign immunity was properly raised in a motion to dismiss).

98. Hurd, *supra* note 96 (footnote omitted); Haley v. City of Boston, 657 F.3d 39, 47 (2d Cir. 2011) ("[T]he defense sometimes can be raised and evaluated on a motion to dismiss." (citing Siegert v. Gilley, 500 U.S. 226, 232–33 (1991))). *But see* Gomez v. Toldeo, 446 U.S. 635, 640 (1980) (holding that the burden of pleading qualified immunity rests on the defendant and may not always be recognized from the face of the complaint).

99. 556 U.S. 662, 672 (2009) ("The District Court's order denying petitioners' motion to dismiss turned on an issue of law and rejected the defense of qualified immunity.").

for failing to raise qualified immunity in their motion to dismiss is—at best—misguided. After all, the Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[100] Failing to raise qualified immunity in a motion to dismiss is a gamble, and defendants who do so must risk waiving the defense, just as they would with other affirmative defenses, allowing discovery or an investigation to "play out and let the chips fall where they may."[101]

2. Constitutional Avoidance

Another argument in favor of sua sponte qualified immunity is the well-established principle of constitutional avoidance.[102] Indeed, the usual adjudicatory rules of the Supreme Court (and federal courts generally) suggest that it should refrain from resolving constitutional issues because the "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."[103] Proponents argue that sua sponte qualified immunity furthers the Court's preferred practice of constitutional avoidance by allowing courts to avoid entanglement in constitutional questions.

Sua sponte qualified immunity can help avoid constitutional questions, but it is not necessary to do so. *Saucier v. Katz* set out the two steps to deciding a qualified immunity claim: (1) whether "the facts alleged show the officer's conduct violated a constitutional right" and (2) "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case" at the time of the act,[104] a procedure the Court revised in *Pearson v. Callahan*.[105] In, *Pearson*, the Court reconsidered *Saucier* and concluded that the sequence should not be mandatory, permitting the district courts "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand."[106] This means that even if

100. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (citations omitted).
101. Sean Scully, *Philly's Cop Beating: No Rodney King*, TIME (May 14, 2008), http://content.time.com/time/nation/article/0,8599,1779357,00.html [https://perma.cc/GVC6-Q75J].
102. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . . ." (quoting Blair v. United States, 250 U.S. 273, 279 (1919))).
103. Camreta v. Green, 563 U.S. 692, 705 (2011) (quoting Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 445 (1988)).
104. Saucier v. Katz, 533 U.S. 194, 201 (2001).
105. 555 U.S. 223 (2009).
106. *Id.* at 236.

the case is remanded, the district court could decide the qualified immunity question without finding there was a violation of the plaintiff's constitutional right(s).[107] Additionally, sua sponte qualified immunity does not necessarily guarantee courts will avoid constitutional questions. An appellate court could just as easily decide the issue on constitutional grounds under *Pearson*. The Supreme Court, however, has articulated that "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones."[108] That decision may benefit from further discovery[109] to better determine whether the case warrants turning a small case into a large one.[110]

Moreover, when it comes to qualified immunity, constitutional avoidance may be doing more harm than good. One of the main tenants of § 1983 is to vindicate constitutional rights.[111] Even a finding that a plaintiff's constitutional rights have been violated but still finding in favor of the defendant because those rights were not clearly established, serves a laudable goal and could perhaps fix the problems of "constitutional stagnation"[112] that *Pearson* created by reining in some

107. This would likely be done through a motion for summary judgment after the benefit of discovery.

108. *Camreta*, 563 U.S. at 707.

109. Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 655 (1989) ("*Mitchell* [Mitchell v. Forsyth, 472 U.S. 511 (1985)] and *Anderson* [Anderson v. Creighton, 483 U.S. 635 (1987)] thus suggest that *Harlow* did not erect a complete prohibition to discovery before resolution of the qualified immunity issue in section 1983 cases. Rather, the public official's entitlement to immunity must be analyzed prior to the onset of discovery only where possible."); Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the* Federal Rules of Civil Procedure: *The Supreme Court Takes a Look at Heightened Pleading Standards in* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 72 N.C. L. REV. 1085, 1087 (1994) (noting that the Supreme Court "reject[ed] an argument that a more relaxed pleading requirement would expose municipalities to needless discovery in § 1983 suits").

110. Note, it is not my personal opinion that any § 1983 case is either small or large. Certainly, each litigant likely believes their case is large. Some cases, however, will naturally have a larger impact based on the factual findings or legal conclusion of the case—which could have downstream ramifications for other litigants. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

111. Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 993 (2020) ("[T]he Court recognized that section 1983 was a necessary tool in fully vindicating rights that historically were underenforced, and it gave citizens a way to invoke courts' assistance in achieving that goal.").

112. Hannah Beard, Note, *How* Ziglar v. Abassi *Sheds Light on Qualified-Immunity Doctrine*, 96 WASH. U. L. REV. 883, 890 (2019) (noting that the "risk of constitutional stagnation is more significant than the *Pearson* Court anticipated" because the discretionary sequencing "impacts the 'rate' at which constitutional rights are 'clearly established' through precedents" (footnotes omitted) (quoting Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity*

rather ludicrous § 1983 decisions.[113] As the Supreme Court recognized in *Camreta v. Green*, the "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo."[114]

Additionally, it is not entirely clear whether courts are properly bypassing the constitutional question based on the Supreme Court's guidance in *Pearson*. As Hannah Beard explains, the Supreme Court suggested that it is only appropriate to decide qualified immunity on the clearly-established prong when ten factors are satisfied.[115] To be clear, the Court did not mandate a discussion of the ten factors;[116] it only mentioned in dicta that "there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong" and "[i]n some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all."[117] The *Pearson* Court recognized that, when it is obvious that a right is not clearly established, the first step under *Saucier* has no effect on the outcome, and courts with "heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exer-

Actions and Implications of Pearson v. Callahan, 62 STAN. L. REV. 523, 525, 556 (2010))).

113. *See e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1320 (11th Cir. 2019) (holding that a child's right not to be accidently shot while an officer attempted to shoot a family dog was not clearly established); Hernandez v. United States, 785 F.3d 117, 120 (5th Cir. 2015) (holding a Mexican child shot by a border patrol agent while the child was "on Mexican soil" did not have a clearly established right not to be shot under these circumstances), *vacated and remanded sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017); Norris v. Hicks, No. 20-11460, 2021 WL 1783114, at *4–8 (11th Cir. May 5, 2021) (per curiam) (holding that a police captain who led a no-knock raid at the wrong house with flash grenades was entitled to qualified immunity because he did not violate any clearly established right due to an honest mistake); Frasier v. Evans, 992 F.3d 1003, 1015–16 (10th Cir. 2021) (holding that an officer who subjectively believed he was acting illegally (and was told in training that citizens have a right to film officers) by detaining someone who was filming him did not violate the plaintiff's clearly established First Amendment rights); Ramirez v. Guadarrama, 844 F. App'x 710, 711–12 (5th Cir. 2021) (per curiam) (reversing the denial of qualified immunity where officers tasered a suicidal man who had doused himself in gasoline causing him to catch fire and die several days later).

114. Camreta v. Greene, 563 U.S. 692, 705–06 (2011) (citing County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)).

115. *See* Beard, *supra* note 112, at 888–89 (listing the ten factors from *Pearson*).

116. Aaron Belzer, Comment, *The Audacity of Ignoring* Hope*: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENVER U. L. REV. 647, 683 (2012) ("[T]he Supreme Court has given little guidance about when to follow the permissive *Saucier* sequence and when it is appropriate for a lower court to bypass the constitutional question and proceed directly to the clearly established prong.").

117. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

cise."[118] However, this suggests a court should engage in at least some discussion of the rationale for bypassing the constitutional prong, despite "scarce judicial resources."[119] But many—if not most—courts have abandoned giving any justification as to why they are deciding the qualified immunity issues on the clearly established prong.[120]

3. Judicial Economy and Avoiding Procedural Roundabouts

Proponents of sua sponte qualified immunity might also argue it would reserve judicial resources and avoid procedural roundabouts. The argument goes that the end result would be the same and permitting appellate courts to raise and decide qualified immunity on appeal saves both the parties' and the court's time by eliminating remand and the inevitable appeal.

While the standard procedure is that affirmative defenses are either raised or forfeited, this is not an inflexible rule.[121] Courts have held that particular affirmative defenses implicate such important interests of judicial efficiency and finality that it is appropriate for a court, in its discretion, to raise the defense sua sponte.[122] For example in 2002, the Eleventh Circuit held that the statute of limitations on a federal habeas petition under 28 U.S.C. § 2254 could be raised sua sponte by the court, even if the government did not raise the affirmative defense.[123] Further, some affirmative defenses "implicate[ ] values beyond the interests of the parties,"[124] including "concerns of 'finality, docket control, and judicial efficiency.'"[125] Thus, some courts have reasoned that "in those situations where the court determines in its discretion that the transcendent interests served by that defense warrant it,"[126] affirmative defenses like qualified immunity may be raised sua sponte. In other words, when a defense promotes judicial efficiency, conserves judicial resources, and lends finality to judg-

118. *Id.* at 236–37.

119. *Id.*

120. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 53–60 (2015) (recognizing "the post-*Pearson* empirical realities of the new qualified immunity" and drawing on administrative law principles to argue that courts should be required to give reasons when exercising *Pearson* discretion).

121. *See* FED. R. CIV. P. 8(c)(1).

122. *See, e.g.*, Jackson v. Sec'y for Dep't. of Corrs., 292 F.3d 1347, 1349 (11th Cir. 2002); Hill v. Braxton, 277 F.3d 701, 706 (4th Cir. 2002); Hines v. United States, 971 F.2d 506, 508 (10th Cir. 1992).

123. *Jackson*, 292 F.3d at 1349.

124. *Hill*, 277 F.3d at 706 (quoting Acosta v. Artuz, 221 F.3d 117, 123 (2nd Cir. 2000)) (discussing the one-year limitation on a writ of habeas corpus under 28 U.S.C.A. § 2244(d)(1)).

125. *Acosta*, 221 F.3d at 122–23 (quoting *Hines*, 971 F.2d at 508).

126. *Hines*, 971 F.2d at 509.

ments within a reasonable time, then it is a defense worthy of being protected by the court's own motion.[127]

Qualified immunity, however, is not an affirmative defense that implicates values beyond the interests of the parties. Certainly, a defendant might later appeal if an appellate court remands and district court denies the defendant qualified immunity. But such a result is not guaranteed.[128] As I explain below,[129] qualified immunity is an issue that benefits from a developed factual record because "it is a defense that almost always turns on some questions of fact."[130] After discovery,[131] the question of whether the defendant is entitled qualified immunity can be dramatically altered,[132] such that neither party chooses to appeal.[133] Alternatively, the parties could settle, either because of facts uncovered in discovery or simply due to litigation expenditures.[134] Moreover, even if the case was appealed, the appellate courts would be better situated to determine whether a defendant is entitled to qualified immunity based on the record developed in the district court. In short, remanding for the district court to develop the record is not a waste of judicial resources but, rather, an investment in developing more rationalized § 1983 caselaw.

---

127. *See Acosta*, 221 F.3d at 123.

128. This may be because the reversal rate on qualified immunity cases is "just over twenty-two percent—[which] indicates that qualified immunity decisions are no less likely to be reversed on appeal than other cases." Alex Bodaken, *Beating Qualified Immunity on Appeal*, 57 AM. CRIM. L. REV. 98, 103 (2020) (footnote omitted). Whether those odds are worth the cost of appeal or interlocutory appeal could drive a defendant's (or more likely their employer's) calculus.

129. *See infra* subsection IV.B.2.

130. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1957 (2018). Additionally, discovery can benefit either party. *See, e.g.*, King v. Bd. of Cnty. Comm'rs, No. 8:16-CV-2651-T-33TBM, 2017 WL 1093647, at *8 (M.D. Fla. Mar. 23, 2017) (finding that defendants were not entitled to qualified immunity at the motion to dismiss stage "[b]ut, with the benefit of discovery, they may be able to establish that they are entitled to qualified immunity later in the proceedings").

131. Many district courts often permit limited discovery to rule on a qualified immunity claim. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 208 n.106 (1993) (collecting cases where courts deferred and ordered limited discovery on qualified immunity).

132. *See* Chen, *supra* note 130, at 1952–53. ("[T]he parties' accounts of the facts are frequently going to differ, which suggests that discovery will often be required, and necessarily permitted.").

133. *See, e.g.*, Unger v. Gaines, No. 99-16889, 2000 U.S. App. LEXIS 27345 (9th Cir. Oct. 20, 2000) (mem.) ("By choosing not to appeal the district court's denial of the motion to dismiss, Gaines waived the right to object to any discovery at all."); Maxey v. Fulton, 890 F.2d 279, 283 (10th Cir. 1989) (same).

134. *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1882 (2018) ("[Q]ualified immunity and attorneys' fees drive Section 1983 litigation. . . . The risk of an attorneys' fees award drives defendants to settle claims that are unlikely to succeed on the merits.").

One caveat to this is when qualified immunity is evident on the face of the complaint and the facts are undisputed and straightforward (i.e., when any discovery would be minimal or nonexistent).[135] In cases like this, it would be unnecessary and inefficient for appellate courts to evaluate whether qualified immunity was sufficiently raised by the governmental entity in the district court. Likewise, in cases where precedent applies with obvious clarity to the conduct at issue, it makes more sense for the court to rule on the defendant's qualified immunity defense rather than remand.[136] Still, certain circuits rarely or never utilize the "obvious clarity" method, making such cases rare and circuit-dependent.[137]

B. The Case Against Sua Sponte Qualified Immunity

The case against allowing courts to sua sponte consider qualified immunity, however, stands on more solid ground. Allowing sua sponte qualified immunity would: (1) create a transformative expansion of qualified immunity, turning appellate courts into courts of first review; (2) violate the adversarial process; and (3) have the effect of tainting the public's perception of the judiciary.

1. Transformative Expansionism and Breakdown of the Procedural Process

Permitting courts, especially appellate courts, to raise qualified immunity sua sponte transforms the doctrine into a jurisdictional element. While qualified immunity has been described as "an immunity from suit rather than a mere defense to liability,"[138] the Supreme Court has also categorized the doctrine as an affirmative defense that must be raised by the defendant.[139] Generally, federal courts lack au-

135. *See* Story v. Foote, 782 F.3d 968, 970 (8th Cir. 2015) ("It is unnecessary and inefficient to address whether Story adequately pleaded a constitutional violation if the defense of qualified immunity is established on the face of the complaint." (citing Pearson v. Callahan, 555 U.S. 223, 236–37 (2009))).

136. *See* Lowe v. Raemisch, 864 F.3d 1205, 1208 (10th Cir. 2017) ("Because the prior case must involve materially similar conduct or apply with obvious clarity, qualified immunity generally protects all public officials except those who are 'plainly incompetent or those who knowingly violate the law." (quoting White v. Pauly, 137 S. Ct. 548, 551 (2017))).

137. *See* Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1296 (2012) ("[U]nlike the Eleventh Circuit's obvious-clarity inquiry, which explicitly allows plaintiffs to look beyond case law, the Fifth Circuit's objective-reasonableness inquiry does not expressly allow for a more expansive approach to sources of clearly established law.").

138. Plumhoff v. Rickard, 572 U.S. 765, 771–72 (2014) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

139. Gomez v. Toldeo, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant." (first citing FED. R.

thority to consider waived defenses,[140] though the Supreme Court has allowed sua sponte consideration of forfeited defenses.[141] But if qualified immunity is an affirmative defense, then failure to raise it in the district court would be waiver rather than forfeiture.[142] I say this because failure to raise "the most common immunity defense asserted in actions brought under 42 U.S.C. 1983"[143] could be nothing less than "knowing, intelligent, and voluntary."[144] Government officials, who are almost always represented by counsel,[145] are certainly intelligent enough to know when and how to raise qualified immunity.[146] Further, federal civil procedure affords government officials multiple opportunities to raise the defense, such that they would not suffer "manifest injustice"[147] when courts recognize their waiver or forfei-

---

CIV. P. 8(c); and then 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES § 1271 (1st ed. 1969)).

140. *See* Wood v. Milyard, 566 U.S. 463, 470–72 (2012) ("An affirmative defense, once forfeited, is 'exclu[ded] from the case,' and, as a rule, cannot be asserted on appeal." (citations omitted) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES § 1278 (3d ed. 2004))); Day v. McDonough, 547 U.S. 198, 217 (2006); Weinberger v. Salfi, 422 U.S. 749, 764 (1975); McCoy v. Mass. Inst. of Tech. 950 F.2d 13, 22 (1st Cir. 1991).

141. *See Wood*, 566 U.S. at 473 ("[C]ourts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.").

142. *See* United States v. Olano, 507 U.S. 725, 733 (1993) ("Wheras forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))); *see also* Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 474 (1978) (same); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214–15 (1977) ("The significant difference between waiver and forfeiture is that a defendant can forfeit his defenses without ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them.").

143. 1A MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 9A.01[A] (2009); *see also* David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 45 (2010) (noting that qualified immunity "is the most significant and most problematic defense to [§ 1983] claims" (footnote omitted)).

144. Westen, *supra* note 142, at 1214 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *But see* Barna v. Bd. of Sch. Dirs., 877 F.3d 136, 149–50 (3d Cir. 2017) (finding that defendants' failure to raise a qualified immunity defense was forfeited and not waived because it was inadvertent).

145. *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L. REV. 229, 265 (2020) (noting that "police departments across the country indemnify virtually all of their officers from all judgments and settlements in § 1983 litigation," which is usually handled via insurance).

146. *See, e.g.*, Walls v. Bowersox, 151 F.3d 827, 833 (8th Cir. 1998) ("Our scrutiny of counsel's performance is deferential, and we presume counsel's conduct to be 'within the range of competence demanded of attorneys under like circumstances.'" (quoting Starr v. Lockhart, 23 F.3d 1280, 1284 (8th Cir. 1994))).

147. Bines v. Kulayat, 215 F.3d 381, 385 (3d Cir. 2000).

ture at an early stage of litigation.[148] Given the current more conservative makeup of the Court, it is likely that the distinction between waived and forfeited defenses matters less for sua sponte qualified immunity.[149]

More importantly, an appellate court's invocation of sua sponte qualified immunity would weaken important procedural constraints on appellate review and invite unwelcome litigation strategies. Review of a waived qualified immunity defense undermines the Supreme Court's clear rule that federal appellate courts "ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."[150] Typically, the Supreme Court strives to maintain tight constraints on the appellate review process and has "approved the *sua sponte* consideration of forfeited, nonjurisdictional affirmative defenses in a small number of narrow, carefully defined contexts."[151] Additionally, each case "must squarely implicate the institutional interests of the judiciary for such action to be permissible."[152] Appellate courts are "court[s] of review"—not courts "of first view"—and must maintain respect for the trial court's "processes and

148. The distinction between waiver and forfeiture may depend, in part, on timing. *See* 2 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:27 (4th ed. 2020) (noting that on interlocutory appeal, qualified immunity was waived when first raised in a motion for summary judgment but could be reinstated during trial (citing Guzmán-Rivera v. Rivera-Cruz, 98 F.3d 664 (1st Cir. 1996))).

149. *See* Wood v. Milyard, 566 U.S. 463, 476–77 (2012) (Scalia, J., concurring) ("[T]here is no principled reason to distinguish between forfeited and waived limitations defenses when determining whether courts may raise such defenses *sua sponte*." (citation omitted)). Justice Scalia declined to join in the Court's holding that "a court of appeals has discretion to consider *sua sponte* a forfeited limitations defense." *Id.* at 477. While purely conjecture, it is safe to assume that Justice Thomas, who joined Justice Scalia's concurrence, still has the same view and that Justices Kavanaugh, Gorsuch, Alito, and Barret would likely follow suit. *See, e.g.*, Jeremy Bowers, Adam Liptak & Derek Willis, *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (July 3, 2014), https://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html [https://perma.cc/92NR-KCRM] (noting that Chief Justice Roberts and Justices Scalia, Alito, and Thomas tended to vote together between eighty-six and ninety-one percent of the time); Adam Feldman, *Empirical SCOTUS: Interesting Meetings of the Minds of Supreme Court Justices*, SCOTUSBLOG (June 15, 2020, 2:15 PM), https://www.scotusblog.com/2020/06/empirical-scotus-interesting-meetings-of-the-minds-of-supreme-court-justices/ [https://perma.cc/Q3NE-DW7L] (showing the similar ideologies of Justices Thomas, Alito, Gorsuch, Kavanaugh, and Chief Justice Roberts).

150. *Wood*, 566 U.S. at 473 (citation omitted); *accord.* Angarita v. St. Louis County, 981 F.2d 1537, 1548 (8th Cir. 1992) (finding that when an appellant did not raise the issue of good faith qualified immunity at the district court, it was not preserved for argument on appeal at the Eight Circuit).

151. Maalouf v. Islamic Republic of Iran, 923 F.3d 1095, 1109 (D.C. Cir. 2019).

152. *Id.* at 1110.

time investment."[153] But permitting sua sponte qualified immunity disregards the entire course of the trial courts adjudication.[154]

Authorizing sua sponte qualified immunity also promotes gamesmanship, encouraging defendants to seek a merits adjudication from the trial court and, if they fail to get traction, to suggest the defense on appeal as a fallback strategy. Further, it would "invite strategic use" of late-asserted affirmative defenses as a dilatory tactic "by defendants who stand to benefit from delay."[155] Declining to entertain waived issues, such as a qualified immunity defense, "is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal."[156] Appellate adjudications made prior to development of the record can compromise accuracy. For example, an appellate court's invocation of sua sponte qualified immunity could deprive a plaintiff, like in *Hamner*, of the ability to seek leave to replead or to conduct discovery that might uncover evidence which would defeat a qualified immunity defense—like records suggesting that a defendant knew they were violating a clearly established right or federal law.[157] After all, satisfying the test for qualified immunity often "depends on facts peculiarly within the knowledge and control of the defendant."[158]

At bottom, even if a failure to raise qualified immunity amounts to a forfeiture, it is not an appellate court's place to consider it. A waived or forfeited qualified immunity claim "does not implicate the 'exceptional conditions' that justify [appellate] review of newly raised issues."[159] Additionally, it creates a litigation environment rife with procedural maladies that could easily be avoided.

---

153. *Wood*, 566 U.S. at 473–74.

154. Teamsters Loc. Union No. 455 v. NLRB, 765 F.3d 1198, 1201 (10th Cir. 2014); *accord.* Summe v. Kenton Cnty. Clerk's Off., 604 F.3d 257, 269–70 (6th Cir. 2010) (ignoring the qualified immunity defense because the party did not raise it during his summary judgment motion despite having ample time to develop and argue the defense); Arreola-Castillo v. United States, 889 F.3d 378, 384 (7th Cir. 2018) (refusing to "effectively discount the district court's efforts").

155. *See* Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 668 (1st Cir. 1996).

156. *Wood*, 566 U.S. at 473.

157. *See Guzman-Rivera*, 98 F.3d at 667 ("Delay generated by claims of qualified immunity may work to the disadvantage of the plaintiff. Witnesses may become unavailable, memories may fade, attorneys fees accumulate, and deserving plaintiffs' recovery is delayed." (citation omitted)); Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals.").

158. Gomez v. Toledo, 446 U.S. 635, 641 (1980).

159. WBY, Inc. v. DeKalb County, No. 16-10490, 2017 U.S. App. LEXIS 10678, at *11 (11th Cir. June 16, 2017); *see also, e.g.*, Lewis v. Kendrick, 944 F.2d 949, 953 (1st Cir. 1991) (disregarding qualified immunity because no claim was made at the district court level); Calabretta v. Floyd, 189 F.3d 808, 818 & n.34 (9th Cir. 1999) (refusing to raise the qualified immunity issue because, "[g]enerally, an appellate

2. Violation of the Adversarial Role

Another implication of sua sponte qualified immunity is that instead of neutrally adjudicating claims and defenses, it encourages courts to render one-sided aid to parties by identifying and developing defenses for government officials who failed to raise them in the first place.[160] Sua sponte qualified immunity violates the central tenets of the adversarial model.[161] It also creates a problematic expansion of the judiciary's role because qualified immunity is already a judicially-imposed restriction on statutorily-authorized civil rights actions under § 1983.[162]

One of the central features of the American adversarial system is the "party presentation of evidence and arguments" before "neutral and passive decision makers."[163] Some have even argued this adversarial system is constitutionally mandated, which if true makes sua sponte qualified immunity not only improper but potentially unconstitutional.[164] The key to making the system adversarial is that judges

---

court will not consider arguments not first raised before the district court unless there was exceptional circumstances" (quoting Marx v. Loral Corp., 87 F.3d 1049, 1055 (9th Cir. 1996))); Walsh v. Mellas, 837 F.2d 789, 800–01 (7th Cir. 1988) (finding that when defendants fail to raise affirmative defenses, they forfeit their right to assert the same defense on appeal).

160. *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation. . . . '[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" (quoting Greenlaw v. United States, 554 U.S. 237, 243 (2008))).

161. *See id.* ("[Courts] do not, or should not, sally forth each day looking for wrongs to right . . . and normally decide only questions presented by the parties." (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring))).

162. *See* Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti*,* 77 BROOK. L. REV. 1329, 1345–46 (2012) (explaining that qualified immunity doctrine is a judicially imposed restraint on civil rights litigation, rendering it "nearly useless as a mechanism for enforcing due process disclosure duties" (citing Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009); Imbler v. Pachtman, 424 U.S. 409, 420 (1976))).

163. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 272 (2002). The adversary system has four central components: "(1) a neutral and passive decision maker, (2) party presentation of the evidence and arguments, (3) trials structured to induce and sustain the clash of the parties' opposing evidence and arguments, and (4) equal opportunities for the parties to present and argue their cases." *Id.* at 273 n.143 (citing WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 83–88 (2d ed. 1999)).

164. *See generally* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57–58, 66 (1998) ("The fundamental characteristics of the adversary system [ ] have a constitutional source, however, in our administration of civil justice."); Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992) ("The fundamental characteristics of the adversary system [ ] have a constitutional source . . . .").

have no part in the investigation or development of the facts or legal arguments "but instead decide[ ] on the basis of facts and arguments, pro and con adduced by the parties."[165] In short, our judicial system assumes that represented parties "know what is best for them, and are responsible for advancing the facts and argument entitling them to relief."[166]

The adversarial feature serves important structural functions in the litigation process. First, it consolidates power in the parties rather than with judges.[167] This is important because "sua sponte decisions are inconsistent with the adversary system's commitment to party control of litigation."[168] Second, it enforces impartiality by avoiding the risk of premature commitment to one side that often arises when courts stray from a passive role.[169] Third, it avoids the appearance of bias.[170] Fourth, it affords litigants autonomy and control over the litigation, which increases acceptance of judicial decisions.[171] This has the added benefit of efficiently concentrating judicial resources on the issues raised by the parties.[172] Further, "[f]or purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised on particular times."[173] Last, and most importantly, the adversarial system advances the fundamental precept of

165. Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006) (quoting McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991)); *see also* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

166. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)).

167. *See Our Constitutionalized Adversary System*, *supra* note 164, at 85–87 (describing the issues that would arise "under the judicial control that is characteristic of an inquisitorial judge").

168. Milani & Smith, *supra* note 163, at 282.

169. STEPHAN LANDSMAN, THE AMERICAN APPROACH TO ADJUDICATION 2 (1st ed. 1988) ("The central precept of the adversary process is that out the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.").

170. *See* Milani & Smith, *supra* note 163, at 284 n.207 ("When litigants direct the proceedings, there is little opportunity for the judge to pursue her own agenda or to act on her biases.").

171. *Id.* at 286 (arguing that the court should avoid raising issues itself but allow parties to brief and argue an issue, and "[i]n so doing, courts will enhance the chances that litigants and society will believe that the losing party was given a fair opportunity to present his case" (footnote omitted)).

172. *See* Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1050 (1998) ("Courts are able to save time by relying on litigants to present arguments in cases. They can then focus their energies on evaluating these arguments.").

173. Henderson v. Shinseki, 562 U.S. 428, 434 (2011) (citation omitted).

litigation—the search for the truth.[174] After all, "our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."[175]

Invoking sua sponte qualified immunity, however, would permit appellate courts to abandon these principles of the adversarial system in favor of a more inquisitorial approach. The inquisitorial approach however blurs the lines between advocates and decisionmakers.[176] While sua sponte qualified immunity certainly offers expediency and could in and of itself save judicial resources, this shortcut is unwise because it creates a slippery slope. As Judge Silberman of the D.C. Circuit noted in a dissent:

> Should we be willing to overlook counsel's failure to raise a clearly winning argument—even in civil cases—if by doing so we can save the expense of a new trial (or other societal costs)? Or is this a rule for criminal cases only? And if it is the latter, is that because the courts have some unstated responsibility to help the government in its prosecution of defendants? I think not—we have only the duty to apply the law neutrally in both criminal and civil cases. When judges think of themselves as bearing responsibility for the results dictated by a neutral application of the law, whether in the civil or criminal field, they tend to exceed appropriate bounds of judicial restraint. By compromising its neutrality, I think the court does so here. That "cost" far exceeds the costs of a new trial . . . .[177]

While the adversarial model is far from perfect, the inquisitorial model that sua sponte qualified immunity relies upon comes with far too large a price tag to justify any potential expediency.[178] Some things just are not meant to be compromised—neutrality being one.[179]

---

174. *See* Penson v. Ohio, 488 U.S. 75, 84 (1988) ("This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'" (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569, 569 (1975))); Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

175. Mackey v. Montrym, 443 U.S. 1, 13 (1979) (emphasis added).

176. *See Henderson*, 562 U.S. at 434; Maalouf v. Islamic Republic of Iran, 923 F.3d 1096, 1109 (D.C. Cir. 2019) ("Allowing courts to *sua sponte* raise affirmative defenses as a matter of course would 'erod[e] the principle of party presentation so basic to our system of adjudication.'" (alteration in original) (quoting Arizona v. California, 560 U.S. 392, 413 (2000))).

177. United States v. Pryce, 938 F.2d 1343, 1355 (D.C. Cir. 1991) (Silberman, J., dissenting) (footnote omitted).

178. Some courts have noted that expediency is not even guaranteed. *See supra* notes 172, 173 and accompanying text.

179. *See* Robert A. Major, Jr., Note, *Criminal Procedure*, 53 TEX. L. REV. 1065, 1075 (1975) (noting that a judge's sua sponte imposition of an insanity defense "may severely compromise the neutrality of the court" (citing Stuart E. Eizenstat, *Mental Competency To Stand Trial*, 4 HARV. R.R.-C.L. L. REV. 379, 385 (1969))). In fact, the Supreme Court has noted that where "courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights." Greenlaw v. United States, 554 U.S. 237, 244 (2008) (citing Castro v. United States, 540 U.S. 375, 381–83 (2003)).

Moreover, expediency and efficiency are in the eye of the beholder. While a circuit court's use of sua sponte qualified immunity might quickly dispose of a case at the appellate level, the long-term ramifications could create a greater burden on the judiciary. For example, in *Hamner*, when the Eighth Circuit utilized sua sponte qualified immunity, it caused the need for supplemental briefing, which further delayed the case. It also caused the parties to exceed the word-count permitted under the circuit's rules and pre-empted an issue normally resolved at the district court—assuming the defendants would have raised the issue at all.[180] Ironically, the Eighth Circuit may have inadvertently created more work for itself than what was previously before it. Had the Eighth Circuit waited, the defendants could have raised the defense later in a motion for summary judgment, which would have allowed the district court to cull through a more thoroughly developed record and, depending on the evidence, could have prevented a later appeal.

If parties face the consequences of forfeited or waived defenses, they will be encouraged to raise qualified immunity in district court, if they chose to raise it at all.[181] "Litigants and federal courts are all better off when parties consolidate their defenses" because it is more efficient and conserves court resources.[182] Regardless, efficiency should not overshadow the more pressing values promoted by the adversarial process.[183]

3. Exceeding Congressional Intent

Sua sponte qualified immunity also exceeds any arguable implicit mandate for the defense. Qualified immunity is a judicially imposed limit on a statutorily authorized action that, as a defense, is "for the official to claim."[184] The creation of qualified immunity through the courts is itself concerning, and courts should carefully navigate its im-

---

Thus, if scales are to be tilted, they should be tilted toward the disadvantaged party, which is generally the plaintiff in § 1983 cases.

180. *See* Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Petitioner at 13, Hamner v. Burls, 141 S. Ct. 611 (2020) (No. 19-1291).

181. *See* Leyse v. Bank of Am. Nat'l Ass'n, 804 F.3d 316, 322 n.5 (3d Cir. 2015).

182. East Coast Test Prep LLC v. Allnurses.com, Inc., No. 15-3705, 2016 WL 5109137, at *3 (D. Minn. Sept. 19, 2016).

183. *See, e.g.*, *In re* Ill. Marine Towing, Inc., 498 F.3d 645, 652 (7th Cir. 2007) ("[T]he interest of judicial efficiency should not trump the right of claimants to choose their respective fora and the corresponding right to a jury trial that a state proceeding may provide." (citation omitted)); Travelers Ins. Co. v. St. Jude Hosp., 37 F.3d 193, 197 n.9 (5th Cir. 1994) ("[J]udicial efficiency and economy . . . do not trump Travelers' right to bring this action . . . .").

184. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Some have argued that qualified immunity itself contradicts legislative intent. *See* Jameson M. Fisher, Note, *Shoot at Me Once: Shame on You! Shoot at Me Twice: Qualified Immunity. Qualified Immunity Applies Where Police Target Innocent Bystanders*, 71 MERCER L. REV.

plementation. As the Supreme Court cautioned, "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition."[185] "Since the statute on its face does not provide for any immunities,"[186] the scope of the defense is defined by its historical common law limits,[187] and thus this justification for the doctrine does not reach appellate court-raised immunity for officials.

That said, the Supreme Court has expanded qualified immunity over the years—for example, in *Harlow v. Fitzgerald*, the Court reshaped the procedural aspects of the doctrine previously set forth in *Saucier v. Katz*.[188] However, just because the Court has on occasion expanded qualified immunity does not mean that the expansion was proper or that further expansion is also proper.[189] Sua sponte qualified immunity is an evolution that far exceeds the scope of congressional intent, which in turn poses an interesting dilemma for the current makeup of the Supreme Court to wrestle with—especially considering its strong preference to both protect government officials at the earliest stage of the litigation and abstain from "judicial activism."[190]

This is not to say appellate courts can never raise waived or forfeited affirmative defenses. Indeed, as explained above, appellate

---

1171, 1172 (2020) ("As a judicially created doctrine contradicting legislative intent, qualified immunity already has an unstable justification.").

185. Malley v. Briggs, 475 U.S. 335, 342 (1986).

186. *Id.*

187. Imbler v. Pachtman, 424 U.S. 409, 421 (1976) ("[O]ur earlier decisions on § 1983 immunities were not products of judicial fiat . . . . Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.").

188. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Saucier v. Katz, 533 U.S. 194 (2001); *see* Wyatt v. Cole, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (discussing the Court's expansion of qualified immunity under *Harlow*).

189. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.").

190. *See* Ivan Bodensteiner, *Recent Developments in Civil Rights*, 24 IND. L. REV. 675, 681 (1991) ("The Supreme Court has clearly indicated its preference for resolving the qualified immunity issue on a motion for summary judgment . . . ."); Barna v. Bd. of Sch. Dirs., No. 3:12-CV-638, 2013 WL 5663072, at *6 (M.D. Pa. Oct. 15, 2013) ("The Supreme Court has indicated that, preferably, the issue of qualified immunity 'ordinarily should be decided by the court long before trial.'" (quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991))); *see also In re* Birmingham Nashville Exp., Inc., 221 B.R. 194, 198 n.7 (Bankr. M.D. Tenn. 1998) ("The court is mindful of the United States Supreme Court's warnings against judicial activism. It is the province of the judiciary to interpret the laws as written in accordance with their plain meaning." (citing Sorenson v. Sec'y of Treasury, 475 U.S. 851, 864 (1986); Crooks v. Harrelson, 282 U.S. 55, 60 (1930))).

courts should be allowed to raise defenses that "squarely implicate the institutional interests of the judiciary," such as sua sponte consideration of timeliness defenses in habeas actions to accommodate "considerations of comity, federalism, and judicial efficiency to a degree not present in ordinary civil actions" that "eclipse the immediate concerns of the parties."[191] Qualified immunity, however, does not fit this standard.[192]

C. Effect of the Prison Litigation Reform Act

Another wrinkle in *Hamner* was that as a prisoner, the plaintiff was subject to the PLRA.[193] A primary purpose of the PLRA is "to reduce the burden of prisoner litigation on the courts."[194] The PLRA accomplishes this purpose by imposing various hurdles such as administrative exhaustion of remedies,[195] the physical injury requirement,[196] and limitations on attorney fees.[197] One of the better-known PLRA hurdles is its screening provision—the statute on which the district courts rely to dismiss prisoner claims sua sponte for failure to state a claim.[198] This may explain why the Eighth Circuit in *Hamner*,[199] along with several others,[200] have been quick to adopt sua sponte qualified immunity, at least in PLRA cases.

---

191. Hill v. Braxton, 277 F.3d 701, 705 (4th Cir. 2002); *see* Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Petitioner, *supra* note 180, at 12.
192. WBY, Inc. v. DeKalb County, No. 16-10490, 2017 U.S. App. LEXIS 10678, at *11 (11th Cir. June 16, 2017) ("[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal." (quoting Wood v. Milyard, 566 U.S. 463, 470 (2012))).
193. 42 U.S.C. § 1997e.
194. Jones v. Bock, 549 U.S. 199, 223 (2007). The PLRA has certainly accomplished this purpose, whether that is a positive thing is beyond the scope of this Article. *See, e.g.,* David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 16, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states# [https://perma.cc/DP3C-6S7K] (noting a sixty percent decline in prisoner suits between 1995 and 2006).
195. 42 U.S.C. § 1997e(a).
196. 42 U.S.C. § 1997e(e) (This section is often referred to as the physical injury requirement, but it can be satisfied by the commission of a sexual act as well.).
197. 42 U.S.C. § 1997e(d).
198. *See* 28 U.S.C. § 1915A(a).
199. Oddly, the Eighth Circuit never cited to the PLRA in its decision. Perhaps because Hamner was not appearing pro se. Hamner v. Burls, No. 5:17-CV-79, 2018 WL 2024613 (E.D. Ark. May 1, 2018); Hamner v. Burls, 937 F.3d 1171 (8th Cir. 2019) (Hamner appeared pro se before the Eastern District of Arkansas but was later represented by counsel on appeal to the Eighth Circuit).
200. Nine courts of appeals—all that have confronted this issue—have held that the PLRA authorizes courts to raise qualified immunity sua sponte. The D.C. Circuit, for example, much like the Eighth Circuit, has held it may raise qualified immunity sua sponte to affirm a § 1915 or § 1915A dismissal entered on other grounds.

28 U.S.C. § 1915A's screening process states, in part:

> (a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for Dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.[201]

In essence, § 1915A provides an additional shield for government officials in § 1983 suits—particularly under subsection (b)—because qualified immunity is one kind of immunity from monetary relief. Given § 1915A's application to suits against officer and employee defendants as well as governmental entities, its immunity provision "must [apply to] qualified immunity" as well as governmental immunities. Otherwise, that provision would have no application in those suits.[202] Section 1915A and 42 U.S.C. § 1997e also authorize post-service sua sponte dismissal.[203] Though these statutes do most of their work pre-service, nothing textually limits § 1915A's application to that period; it only requires courts to screen complaints "as soon as practicable after docketing" and mandates sua sponte dismissal "at any time."[204] In the case of an amended complaint like in *Hamner*, which was deemed served upon its docketing,[205] that review necessa-

---

See Redmond v. Fulwood, 859 F.3d 11, 13 (D.C. Cir. 2017). Likewise, the Fourth, Sixth, and Eighth Circuits have held the same. *See* Martin v. Duffy, 858 F.3d 239, 250–51, 251 n.3 (4th Cir. 2017); Small v. Brock, 963 F.3d 539, 543 (6th Cir. 2020); Story v. Foote, 782 F.3d 968, 969–70 (8th Cir. 2015). The Third, Fifth, Ninth, Tenth, and Eleventh Circuits have each held district courts can raise qualified immunity sua sponte to dismiss PLRA suits. *See* Doe v. Delie, 257 F.3d 309, 312 & n.1, 322 n.13 (3d Cir. 2001); Clay v. Allen, 242 F.3d 679, 680, 682 (5th Cir. 2001) (per curiam); Chavez v. Robinson, 817 F.3d 1162, 1167–69 (9th Cir. 2016); Banks v. Geary Cty. Dist. Ct., No. 15-3308, 2016 U.S. App. LEXIS 6878, at *8–9 (10th Cir. Apr. 14, 2016); Manzini v. Fla. Bar, No. 12-13559, 2013 U.S. App. LEXIS 4797, at *11–13 (11th Cir. Mar. 11, 2013) (per curiam). Additionally, the Seventh Circuit, in dicta, has endorsed this view. *See* Gleash v. Yuswak, 308 F.3d 758, 760 (7th Cir. 2002) ("Both § 1915(e)(2)(B)(iii) and § 1915A(b)(2) *require* the judge to consider official immunity, which is an affirmative defense." (citation omitted)); Walker v. Thompson, 288 F.3d 1005, 1010 (7th Cir. 2002) (same).

201. 28 U.S.C. § 1915A(a)–(b).

202. *Chavez,* 817 F.3d at 1168.

203. 28 U.S.C. § 1915(e)(2) ("[T]he court shall dismiss the case *at any time* . . . ." (emphasis added)); 42 U.S.C. § 1997e(c)(1) ("The court shall on *its own motion* . . . dismiss any action brought . . . ." (emphasis added)).

204. 28 U.S.C. § 1915A(a).

205. *See* FED. R. CIV. P. 5(b)(2)(E).

rily follows service.[206] Section 1915A also requires courts to "identify a cognizable claim," meaning claims do not have to be articulated by the parties and thus implies, or even requires, that courts invoke sua sponte qualified immunity. Moreover, § 1997e mandates immunity-based dismissal "on [the court's] own motion or the motion of a party,"[207] which indicates both that it applies post-service and that it is indifferent to whether defendants themselves raise qualified immunity.

While the PLRA certainly provides district courts the ability to invoke sua sponte qualified immunity for prisoner plaintiffs proceeding *in forma pauperis*, the question remains whether that same ability applies to circuit courts—especially where the prisoner is no longer *in forma pauperis* by paying the appellate filing fee or where the appeal is from a motion to dismiss rather than a § 1915A dismissal. When the prisoner is no longer *in forma pauperis*, or the dismissal stems from a motion to dismiss or motion for summary judgment, § 1915A is no longer applicable. Further, § 1997e is limited to "actions"—not actions and *appeals*.[208] After all, the Court has interpreted individual provisions within the context of the entire statutory scheme, presuming that since Congress specifically authorized sua sponte appellate dismissals under § 1915, the absence of a similar express authority in § 1997e was intentional.[209] No circuit court has cited § 1997e to invoke sua sponte qualified immunity.[210]

206. *See* Echols v. Craig, 855 F.3d 807, 810–11 (7th Cir. 2017) (approving § 1915A screening of a second amended complaint after the defendants' counsel moved to dismiss the two previous complaints).

207. 42 U.S.C. § 1997e(c)(1).

208. *See* 42 U.S.C. § 1997e(a) ("No *action* shall be brought . . . . ") (emphasis added)); *id.* § 1997e(c)(1) ("The court shall on its own motion . . . dismiss any *action* . . . . ") (emphasis added)).

209. *See generally* Sandoz Inc. v. Amgen Inc., 137 S. Ct. 1664, 1677 (2017) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

210. At the time of writing this Article, a Boolean search for "42 U.S.C. § 1997e" /30 "qualified immunity" yielded ten opinions, but in all cases the district court or defendants raised qualified immunity beforehand in a motion to dismiss or motion for summary judgment. (Hurrey v. Unknown Tex. Tech Med. Person "A", No. 2:07-CV-0226, 2010 WL 3895596 (N.D. Tex. Oct. 5, 2010); Saddler v. Tex. Dep't Crim. Just. ID, No. 2:09-CV-0103, 2012 WL 2133673 (N.D. Tex. May 17, 2012); Hurrey v. Unknown Tex. Tech. Med. Person "A", No. 2:07-CV-0226, 2010 WL 3895601 (N.D. Tex. Sept. 15, 2010); Lemons v. Texas Dept. Crim. Just. ID, No. 2:09-CV-0102, 2012 WL 2133700 (N.D. Tex. May 17, 2012); Sparks v. Ingle, No. 17-11685, 2018 U.S. App. LEXIS 746 (11th Cir. Jan. 11, 2018); Ellis v. Todd, No. 8:07-cv-1101-T-17MSS, 2007 WL 4358268 (M.D. Fla. Dec. 10, 2007); Hedges v. Hagan, No. 2:10-CV-0101, 2011 WL 4056292 (N.D. Tex. July 20, 2011); Casas v. Aduddell, No. 2:07-cv-0210, 2009 WL 10703512 (N.D. Tex. Dec. 12, 2009); McGraw v. Heaton, No. 2:16-CV-0152, 2017 WL 1157221 (N.D. Tex. Mar. 9, 2017); Brosh v. Duke, No. 12-cv-00337, 2014 WL 4251807 (D. Colo. Aug. 25, 2014)).

Further, Congress authorized courts to screen and sua sponte dismiss claims that are self-evidently meritless.[211] Unless a plaintiff's claim is novel, it is not susceptible to sua sponte dismissal based upon qualified immunity.[212] This is so because, as explained above, qualified immunity "depends on facts peculiarly within the knowledge and control of the defendant."[213] Should a prisoner plaintiff uncover in discovery that a defendant knowingly violated the law, that defendant would not be entitled to qualified immunity.[214] However, the PLRA may provide circuit courts an opportunity to invoke sua sponte qualified immunity, assuming the plaintiff is proceeding *in forma pauperis* and the appeal stems from a § 1915A dismissal rather than a defendant's motion.[215]

V. CONCLUSION

If the "Court's approach rests on a preference for laying down bright-line rules, as opposed to formulating a more refined doctrine rooted in the reasons that underlie the qualified immunity defense,"[216] then it would likely hold that sua sponte qualified immunity is permissible—especially given its predilection for stronger protections under the doctrine.[217] In any case, the Court should stop avoiding the issue and make a decision one way or the other to "promot[e] stability in the law, predictability of outcomes, control of lower level decision makers, and efficiency in resolving disputes"[218] under § 1983.

What is clear is that in face of the lack of legislation abolishing qualified immunity, it is time for the Supreme Court to shine a cleansing light on the muddled doctrine. Retreating into the shadows through constitutional avoidance does nothing to unravel the quandary that is qualified immunity and only makes the doctrine more tangled and tormented in the lower courts. *Hamner* is just one of the more recent examples of the dangerous side effects of the Court's inaction. Perhaps it was not the best case to resolve the question, but rarely does a case present the perfect factual circumstances to settle

211. Jones v. Bock, 549 U.S. 199, 203–05 (2007).
212. *See* Porter v. Nussle, 534 U.S. 516, 528 (2002) ("[T]he PLRA's dominant concern [is] to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court . . . . " (citation omitted)).
213. Gomez v. Toledo, 446 U.S. 635, 641 (1980).
214. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").
215. *See supra* text accompanying notes 201–08.
216. Wells, *supra* note 87, at 383.
217. *See* Blum, *supra* note 6, at 1887 ("Since *Harlow v. Fitzgerald,* the Supreme Court has confronted the issue of qualified immunity in over thirty cases. Plaintiffs have prevailed in two of those cases . . . .").
218. Wells, *supra* note 87, at 383 (footnote omitted).

deep-seated constitutional questions. For now, the divide continues, and victims of constitutional torts succeed or fail to vindicate their rights, in part, depending on the circuit in which they reside and the ideological makeup of the panel which hears their cases.