Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law*

Qualified immunity creates several obstacles for plaintiffs seeking to recover damages for civil rights violations under Section 1983 of Title 42 of the United States Code.¹ Consider this hypothetical: while walking downtown, Jane Doe stops to watch a peace protest. As she stands on the sidewalk, police officers arrive to break up the crowd. Jane does not try to intervene, but before she can walk away, Officer Smith sprays her in the face with pepper spray. Jane suffers severe physical injuries and decides to seek compensation by filing a Section 1983 claim against Officer Smith, asserting a violation of her Fourth Amendment right to be free from excessive force. In response, Officer Smith moves for summary judgment and dismissal of the action, claiming he is entitled to qualified immunity because he mistook Jane for a protestor and did not believe pepper spray constituted excessive force. To overcome the officer’s motion, Jane must not only prove Officer Smith’s conduct violated her Fourth Amendment right but also that this right was “clearly established” at the time the violation occurred.²

Suppose the court agrees that Officer Smith’s conduct rose to the level of excessive force. Jane would likely still lose her claim because the law surrounding the use of pepper spray remains ambiguous, and she would be unable to identify a precedent to meet the clearly-established-law requirement. Under these circumstances, a court will be inclined to grant qualified immunity because it was not clearly established at the time of the incident that Officer Smith’s conduct constituted a violation of Jane’s Fourth Amendment right.

This simplified hypothetical demonstrates the power of the clearly-established-law requirement: public officials can be shielded from liability even if their actions violated a constitutional right.³ Courts justify this result

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1. 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen . . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”).
3. See, e.g., Mattos v. Agarano, 661 F.3d 433, 448 (9th Cir. 2011) (“[W]e conclude that, although [the plaintiff] has alleged an excessive force claim, the law was not sufficiently clear at the time of the incident to render the alleged violation clearly established. Accordingly, the defendant officers are entitled to the defense of qualified immunity against [the plaintiff’s] § 1983 excessive force claim.”); Karen M. Blum, Qualified Immunity: Further Developments in the Post-Pearson Era, 27 TOURO L. REV. 243, 255–58 (2011) (providing a non-exhaustive list of cases where courts
as balancing the interests of plaintiffs and public-official defendants in Section 1983 litigation,\(^4\) and as ensuring that defendants were clearly on notice that their conduct violated a constitutional right.\(^5\) However, what if Jane Doe wore a clearly identifiable uniform from a restaurant and stood at the restaurant’s back door, smoking a cigarette, at the time she was injured by the pepper spray? What if she only had one leg, immediately threw her hands in the air when she saw the officer, and said, “Please don’t hurt me, I was just passing by and I am not involved at all”? Pepper spraying under these circumstances seems much harder to justify as an honest mistake by the officer. However, a court might still be inclined to grant qualified immunity if Jane could not identify a closely analogous case.

This Note discusses the question of whether Section 1983 plaintiffs can prove a constitutional right was clearly established at the time of a violation by focusing on the idea of an “obvious case.” Defeating a qualified immunity claim and demonstrating that a right was clearly established depends on how generally a court defines the right at issue and on what sources of law are considered to be relevant. Specifically defining a constitutional right will render more cases, statutes, or policies irrelevant to providing the requisite notice and result in granting qualified immunity to more defendants. The Fifth Circuit, for example, adopted a relatively restrictive approach to sources of clearly established law and requires plaintiffs to define a constitutional right with a high level of specificity. Other federal circuits are more willing to accept that in certain instances the existence of a right may present such an obvious case that a public official was on notice even if precedents do not directly address the applicable facts. This Note recommends courts include the concept of an obvious case in the adjudication of Section 1983 claims to more fairly balance the interests of plaintiffs and public-official defendants while maintaining recourse to qualified immunity when a right may be ambiguous or less clearly established.

Part I of this Note discusses the general background of the clearly-established-law requirement, including the evolution of how courts have defined the rights at issue and the sources courts consider to prove clearly established law. Part II addresses the idea of an obvious case, as initially held that a defendant violated a plaintiff’s constitutional right but granted qualified immunity based on the clearly-established-law requirement).

\(^4\) See, e.g., Pearson, 555 U.S. at 231 (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (“[D]amages may offer the only realistic avenue for vindication of constitutional guarantees. On the other hand, permitting damages suits against government officials can entail substantial social costs . . . . Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity . . . .” (citations omitted) (internal quotation marks omitted)).

\(^5\) See, e.g., Hope v. Pelzer, 536 U.S. 730, 739–40 (2002) (“[T]he defendant was entitled to ‘fair warning’ that his conduct deprived his victim of a constitutional right . . . .”).
developed in Hope v. Pelzer, and the Fifth Circuit’s reluctance to incorporate obviousness into the clearly-established-law analysis. Using Nelson v. Correctional Medical Services as a case study, Part II argues that courts should recognize the concept of an obvious case and highlights how the Fifth Circuit’s approach is unable to properly accommodate the consideration of obvious violations in Section 1983 litigation. Part III analyzes Ashcroft v. al-Kidd and its implications for Supreme Court recognition of the obvious-case concept. Part IV contends courts should continue to utilize obviousness as a factor in analyzing clearly established law and identifies areas for future discussion regarding the development of a standard for proving an obvious violation of constitutional rights in Section 1983 claims.

I. Background: The Clearly-Established-Law Requirement

Section 1983 allows for a private right of action against public officials who violate constitutional rights under the color of state law. Accordingly, it serves to compensate victims and deter harmful conduct. Early cases interpreting Section 1983, however, also reflected “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.” The doctrine of qualified immunity developed to balance these interests, and as such, it protects certain defendants from Section 1983 claims to facilitate the conduct of public activities and institutions.

The Supreme Court’s initial formulation of the qualified immunity doctrine contained both subjective and objective elements. In Wood v. Strickland, the Court stated a public official could be shielded from a Section 1983 claim if the official was “acting sincerely and with a belief that he is doing right,” but the Court went on to clarify that “an act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ daily lives than by the presence of actual malice.” The Wood Court reasoned this test would “impose[] neither an unfair burden upon...
[Public officials] requiring a high degree of intelligence and judgment for the proper fulfillment of [their] duties, nor an unwarranted burden in light of the value which civil rights have in our legal system.”\textsuperscript{14}

However, responding to a significant increase in the volume of civil rights litigation\textsuperscript{15} as well as concerns about too many Section 1983 claims going to trial and burdening public officials,\textsuperscript{16} the Court replaced the hybrid test with a purely objective test. Under the objective approach, public officials are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\textsuperscript{17} This requires plaintiffs to prove (1) there was a violation of a constitutional right, and (2) the right was clearly established at the time the violation occurred.\textsuperscript{18}

\textbf{A. Defining the Right at Issue: The Supreme Court’s Problematic Approach}

Implementing the Supreme Court’s objective test for qualified immunity proved difficult because district and circuit courts were unsure about how broadly to define the constitutional right at issue. A broadly defined right, such as freedom from an unreasonable search, would tend to defeat immunity claims because public officials would be presumed to have notice of such rights in a larger number of cases. A specifically defined right, such as freedom from random drug searches in shopping malls, would afford a larger number of defendants with qualified immunity because the more precise definition would apply to a much narrower range of conduct. As Justice Scalia, writing for the majority, noted in \textit{Anderson v. Creighton},\textsuperscript{19} “[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right.”\textsuperscript{20}

This reasoning reflected the concern that qualified immunity might become meaningless if any right could be clearly established so long as it was defined with a high level of generality. Thus, in \textit{Anderson}, the Court

\begin{itemize}
\item \textsuperscript{14} Id. at 322.
\item \textsuperscript{16} See Harlow, 457 U.S. at 815–16 (observing that “[t]he subjective element of the good-faith defense frequently has proved incompatible with [the Court’s] admonition in \textit{Butz} that insubstantial claims should not proceed to trial” and that “substantial costs attend the litigation of the subjective good faith of government officials”).
\item \textsuperscript{17} Id. at 818.
\item \textsuperscript{18} Wilson v. Layne, 526 U.S. 603, 609 (1999) (“A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” (internal quotation marks omitted)).
\item \textsuperscript{19} 483 U.S. 635 (1987).
\item \textsuperscript{20} Id. at 639.
\end{itemize}
stated that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”

In adopting this requirement of specificity, the *Anderson* Court focused on protecting the interests of public-official defendants rather than plaintiffs. The Court offered little discussion or guidance regarding how to avoid undermining Section 1983 plaintiffs’ legitimate interests by defining rights too narrowly. Some circuits responded to the Court’s decision by requiring plaintiffs to prove a constitutional right was clearly established with an impossibly high degree of specificity. Adopting perhaps the most stringent approach, the Eleventh Circuit insisted that only citing to cases with “materially similar” facts could defeat qualified immunity.

Fifteen years after *Anderson*, the Supreme Court appeared to retreat from an overly specific definition of rights in Section 1983 cases in *Hope v. Pelzer*. In *Hope*, the plaintiff alleged prison officials violated his Eighth Amendment rights by handcuffing him to a hitching post for seven hours and denying him water and shelter from the sun. The Eleventh Circuit, applying its materially-similar-case requirement, had found that although punishing the prisoner in this manner violated the Constitution, prison officials were entitled to qualified immunity because no prior case addressed the specific conduct at issue. The Supreme Court reversed and rejected the materially similar standard, finding that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope* refocused the clearly-established-law requirement on “fair warning” and the idea of notice to public officials prevalent in earlier qualified immunity cases. The Court held that “general statements of the law are not

21. Id. at 640. Applying this standard, the *Anderson* Court vacated the Eighth Circuit’s decision and redefined the Fourth Amendment right at issue from whether the “general right . . . to be free from warrantless searches . . . was clearly established” to “whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.” Id. at 640–41, 646. The Court re-characterized the right to encompass the more specific issue of whether it was clearly established that the circumstances the public official confronted did or did not give rise to probable cause. Id. at 640–41.

22. See *id.* at 639–40 (centering the discussion of how specifically to define a right on the need to curtail plaintiffs from “convert[ing] the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights”).

23. See *Lassiter v. Ala. A&M Univ.*, Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir. 1994) (“When considering whether the law applicable to certain facts is clearly established, . . . the facts need not be the same as the facts of the immediate case. But they do need to be materially similar.” (quoting *Adams v. St. Lucie Cnty. Sheriff’s Dep’t*, 662 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), approved en banc, 998 F.2d 923 (11th Cir. 1993)), abrogated by *Hope v. Pelzer*, 536 U.S. 730 (2002)).


27. In the foundational case for qualified immunity, the Court declared that “a police officer is not charged with predicting the future course of constitutional law” and recognized a “good faith” defense for officers who wrongly arrested a plaintiff pursuant to a law later deemed
inherently incapable of giving fair and clear warning” and that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.” As a result, Hope indicated plaintiffs could overcome a qualified immunity claim when a public official’s actions obviously violated a constitutional right, notwithstanding the absence of applicable precedent.

The Anderson and Hope decisions provided contradictory guidance on the determination of clearly established law. In Anderson, the Court required courts to protect the interests of defendants by specifically defining the right at issue. In Hope, the Court suggested a right could be defined generally as long as public officials could be construed to have had fair warning that their conduct violated a constitutional right.

In Brosseau v. Haugen, the Supreme Court attempted to reconcile Hope with Anderson and its earlier decisions. The case involved a claim that a police officer used excessive force when she shot a suspect attempting to drive away from a purported crime scene. The Ninth Circuit had reasoned the officer violated clearly established law by using deadly force when there was no probable cause that the suspect posed a threat of serious physical harm. In reversing this decision, the Supreme Court admonished the Ninth Circuit for mistakenly finding fair warning of a constitutional violation “cast at a high level of generality.” The Brosseau decision suggested the appropriate level of specificity to define a clearly established right was more limited than the approach applied by the Ninth Circuit but more expansive than the Eleventh Circuit’s restrictive approach.

B. Sources of Clearly Established Law: Localized Development

Once a court defines the right at issue, it must determine whether the right was clearly established at the time a public official acted in a Section 1983 claim. Historically, the Supreme Court failed to provide clear guidance concerning appropriate sources of clearly established law. In

unconstitutional. Pierson v. Ray, 386 U.S. 547, 557 (1967). Likewise, the Wood Court reasoned it was unfair to hold public officials liable “for every action which is found subsequently to have been violative of a student’s constitutional rights.” Wood v. Strickland, 420 U.S. 308, 319 (1975).

30. Id. at 194–97.
32. Brosseau, 543 U.S at 199.
33. See Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) (“The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury.”); David R. Cleveland, Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations, 65 U. MIAMI L. REV. 45, 63 (2010) (“The Supreme Court has never spelled out what sources of law may clearly establish the law . . . .”); Michael S. Catlett, Note, Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine, 47 ARIZ. L. REV. 1031, 1036
Hope, the Court held that “[a]lthough earlier cases involving ‘fundamentally similar’ facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.”34 In Wilson v. Layne,35 the Court suggested that plaintiffs could prove clearly established law by identifying a “consensus of cases of persuasive authority.”36 The Court has also indicated that plaintiffs could rely on nonbinding case law and regulations to prove a right was clearly established, but it has never provided a definitive rule.37

As a result, the federal circuit courts have developed different approaches to evaluating whether a right was clearly established. Most notably, the circuits split on the issue of whether courts may consider extra-circuit case law. The Second and Eleventh Circuits limit the analysis to case law from within each circuit.38 The Eighth and Ninth Circuits are willing to consider all available decisional law.39 The Fourth and Sixth Circuits only look to extra-circuit case law in limited circumstances40 and as such are practically as restrictive as the Eleventh Circuit.41 The Fifth Circuit

36. Id. at 617.
37. See Brosseau, 543 U.S. at 199–201 (considering various circuit court opinions to determine if a right was clearly established); Hope, 536 U.S. at 741–42 (analyzing state prison regulations and a report from the Department of Justice); Wilson, 526 U.S. at 616–17 (considering police policy pamphlets and a Sixth Circuit decision in order to determine if a right was clearly established in the Fourth Circuit).
38. See Moore v. Vega, 371 F.3d 110, 114 (2d Cir. 2004) (“Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established.” (citing Townes v. City of New York, 176 F.3d 138, 144 (2d Cir. 1999))); Thomas ex rel. Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) (“As we have stated, only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit.” (citing Hamilton v. Cannon, 80 F.3d 1525, 1532 n.1 (11th Cir. 1996))).
39. See Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001) (“We subscribe to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit.” (citing Tlamka v. Serrell, 244 F.3d 628, 634 (8th Cir. 2001))); Boyd v. Benton Cnty., 374 F.3d 773, 781 (9th Cir. 2004) (instructing courts in the Ninth Circuit to look to “whatever decisional law is available … including decisions of state courts, other circuits, and district courts” (citing Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003)) (internal quotation marks omitted)).
40. See Owens ex rel. Owens v. Lott, 372 F.3d 267, 280 (4th Cir. 2004) (“When there are no such decisions from courts of controlling authority, we may look to ‘a consensus of cases of persuasive authority’ from other jurisdictions, if such exists.” (quoting Wilson, 526 U.S. at 617)); Ohio Civil Serv. Emps. Ass’n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (“In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law.”).
nominally recognizes that courts may treat case law from other circuits as a source of clearly established law but only when extra-circuit case law provides “persuasive authority” of a clearly established right. Consequently, while it has been grouped together with the Eighth and Ninth Circuits, the Fifth Circuit’s approach more closely resembles the restrictive practice in the Fourth and Sixth Circuits.

Circuit courts also divide on the issue of when, if ever, courts may consider policies and regulations as sources of clearly established law. Theoretically, these sources can put public-official defendants on notice that their actions would violate a constitutional right. For example, in Hope, the Supreme Court found that since prison officials violated Alabama Department of Corrections regulations, they should have been aware their conduct was unconstitutional. Similarly, the Second and Eighth Circuits have looked to regulations as sources of clearly established law. Nevertheless, regulations and policies are infrequently cited in Section 1983 litigation, as courts have been reluctant to interpret local guidelines, and even state statutes, in making qualified immunity determinations. The Fifth and Sixth Circuits take approaches that are only slightly varied from (and slightly less narrow than) that of the Eleventh Circuit.

42. McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam), demonstrates the high threshold plaintiffs must meet to prove a persuasive consensus existed. In McClendon, the plaintiff alleged that a police officer violated his clearly established rights when the officer gave a gang member a pistol while knowing that the man had a history of drug violence and was going to confront the plaintiff. Id. at 320. The issue presented was whether this violated the Due Process Clause of the Fourteenth Amendment based on the state-created-danger theory of liability. Id. at 329. In determining whether the state-created-danger theory was clearly established at the time, the Fifth Circuit considered opinions from six other circuit courts recognizing it as a valid theory of liability. Id. at 330–31. While acknowledging these as potentially valid sources of clearly established law, the Fifth Circuit still granted qualified immunity and concluded that recognition by six different circuits did not provide a “consensus of cases of persuasive authority” because it still failed to “establish the contours of an individual’s right.” Id. at 329, 333; see also Williams v. Ballard, 466 F.3d 330, 333 (5th Cir. 2006) (per curiam) (granting qualified immunity because “even if consideration of these [three circuit court] cases made the number of cases sufficient, the lack of consistency among their rules makes ‘the contours of the right’ not ‘sufficiently clear’” (quoting McClendon, 305 F.3d at 331)); Modica v. Taylor, 465 F.3d 174, 188 (5th Cir. 2006) (“[I]n the absence of a prior ruling by the Supreme Court, this court, or a consensus among our sister circuits, we cannot say that the law was clearly established . . . .”).

43. See, e.g., JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 43 (2d ed. 2007) (listing the Fifth Circuit with the Eighth and Ninth Circuits as among those that “agree that persuasive out-of-circuit authority can, under at least some circumstances, clearly establish a constitutional right”); Jeffries, supra note 41, at 859 (“The First, Fifth, Seventh, Eighth, and Tenth Circuits are similarly latitudinarian [like the Ninth].”).


45. See, e.g., Okin v. Vill. of Cornwall-on-Hudson Police Dep’t, 577 F.3d 415, 433–34 (2d Cir. 2009) (“[W]e may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim’s constitutional rights.”); Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) (“Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate’s right was clearly established.”).

46. See, e.g., Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 51–53 (1st Cir. 2010) (choosing to grant qualified immunity based on the second step of the analysis, the clearly-established-law
Circuit indicated local and state policies and regulations are often ambiguous, and any arguable ambiguity leads to the conclusion that a right was not clearly established at the time a public official acted.\textsuperscript{47}

II. The Problem with the Fifth Circuit: A Lack of Obvious Cases

The divergent approaches to defining the right at issue and determining whether a right is clearly established reflect the difficulty of balancing the interests of public officials and plaintiffs. Limiting the qualified immunity analysis to circuit precedent and excluding local policies or rules tends to favor defendants in Section 1983 cases. The Supreme Court, however, suggested that the qualified immunity determination should not be constrained when the existence of a right is “obvious” to a reviewing court. In \textit{Brosseau}, the Court stated, “Of course, in an \textit{obvious case}, [general] standards can ‘clearly establish’ the answer, even without a body of relevant case law.”\textsuperscript{48} While the \textit{Brosseau} Court did not provide substantive guidance on identifying an obvious case, it concluded that handcuffing a prisoner to a hitching post for hours without food or water, as in \textit{Hope}, represented an instance where an Eighth Amendment violation was obvious enough that a court should deny qualified immunity.\textsuperscript{49} In contrast, the Court found that the shooting of a fleeing suspect in \textit{Brosseau} presented an issue that was “far from the obvious one where [general tests] alone offer a basis for decision” and reversed the Ninth Circuit’s denial of qualified immunity.\textsuperscript{50} Accordingly, the Supreme Court introduced the idea that a plaintiff may be able to defeat a qualified immunity claim when it is obvious that a public official’s action violates a constitutional right.

Since \textit{Brosseau}, no majority opinion of the Supreme Court has further clarified the concept of an “obvious case” in Section 1983 litigation. Several subsequent references, however, imply the continued vitality of the doctrine. In \textit{Safford Unified School District # 1 v. Redding},\textsuperscript{51} a case involving school officials strip-searching a female student after she was accused of bringing drugs to school, Justice Stevens, joined by Justice Ginsburg in dissent, argued, “This is, in essence, a case in which clearly established law meets clearly outrageous conduct. I have long believed that [it] does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is

\textsuperscript{47} See \textit{Kinney v. Weaver}, 367 F.3d 337, 370 (5th Cir. 2004) (en banc) (finding that police officials could not rely on certain state policies as sources of clearly established law because the policies had been challenged as violating free speech).


\textsuperscript{49} \textit{Id.} (citing \textit{Hope}, 536 U.S. at 738).

\textsuperscript{50} \textit{Id.} at 199, 201.

\textsuperscript{51} 129 S. Ct. 2633 (2009).
an invasion of constitutional rights of some magnitude.” 52 Likewise, dissenting from a denial of certiorari in another case, Justice Ginsburg, joined by Justice Sotomayor, contended that “[n]o ‘specific authority’ should have been needed” to show that denying admission to a presidential speech based on owning a bumper sticker violated the First Amendment. 53 Justice Ginsburg concluded that “solidly established law ‘may apply with obvious clarity’ even to conduct startling in its novelty.” 54 While these post-Brosseau discussions do not define a coherent standard for an obvious case, they show that members of the Court believe the obvious-case concept should be an element of the qualified immunity analysis in Section 1983 cases.

A. Circuit Court Interpretations of Hope v. Pelzer

All circuits currently recognize the narrow holding of Hope that courts should not require plaintiffs to find a factually identical prior case in order to defeat a claim of qualified immunity. 55 However, the circuits do not consistently recognize that in an obvious case a right may be defined at a higher level of generality and that courts can consider a broader range of sources.

In perhaps the most direct and comprehensive response to Hope, the Eleventh Circuit implemented a three-step framework. 56 First, if a federal statute or constitutional provision applies with “obvious clarity,” a public official may violate a clearly established right “even in the total absence of case law.” 57 Second, if a general statute or constitutional provision does not apply, a court may then consider whether a constitutional principle embodied in prior precedent clearly establishes a right, even if the principle is not tied to particularized facts. 58 Finally, courts may still conduct the Eleventh Circuit’s materially-similar-case analysis and evaluate whether a factually similar case clearly establishes the law. 59 Thus, the first step of the Eleventh Circuit analysis incorporates the idea of an obvious case, and the second step incorporates Hope’s more narrow holding that courts should not limit their analysis to cases with materially similar facts. The Eleventh Circuit has not

52. Id. at 2644 (Stevens, J., concurring in part and dissenting in part) (alteration in original) (internal quotation marks omitted).
54. Id. (quoting Weise v. Casper, 593 F.3d 1163, 1177 (10th Cir. 2010) (Holloway, J., dissenting)).
55. See, e.g., Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 256 (5th Cir. 2005) (“As this court has long held, the term clearly established does not necessarily refer to commanding precedent that is factually on all-fours with the case at bar, or that holds the very action in question unlawful.”) (internal quotation marks omitted)); Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003) (“[O]vercoming a qualified immunity defense does not require a plaintiff to show that either the particular conduct complained of or some materially indistinguishable conduct has previously been found unlawful.”).
56. Vinyard v. Wilson, 311 F.3d 1340, 1350–52 (11th Cir. 2002).
57. Id. at 1350 (emphasis omitted).
58. Id. at 1351.
59. Id. at 1352.
expressly adopted the more expansive interpretation of *Hope* that courts should always consider nontraditional sources of law.60 However, by emphasizing that a right may apply with obvious clarity even in the absence of case law, the Eleventh Circuit’s approach allows for a more expansive survey of clearly established law in obvious cases.61

The Eighth and Ninth Circuits implemented the broadest interpretation of *Hope*, adopting a more expansive approach to sources of clearly established law and recognizing the existence of obvious cases.62 The First, Third, Fourth, Sixth, Seventh, and Tenth Circuits also recognize that a right may be clearly established in certain obvious cases.63 The D.C. Circuit has not expressly addressed the issue of an obvious case, but district courts within the D.C. Circuit have embraced the concept.64 Similarly, at least one Second

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60. See *supra* note 38 and accompanying text.

61. For example, in *Vinyard*, the court considered whether a police officer violated the plaintiff’s Fourth Amendment right when he assaulted her during a drive to jail. *Vinyard*, 311 F.3d at 1347–48. The court reasoned, “Although the ‘obvious clarity’ standard is often difficult to meet, we conclude that the law in 1998 was clearly established . . . .” *Id.* at 1355. The court went on to state that “no factually particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer” that the defendant violated the plaintiff’s clearly established right to be free of the excessive use of force. *Id.*

62. See *Morris v. Zefferi*, 601 F.3d 805, 812 (8th Cir. 2010) (“The district court did not err in finding the unconstitutionality of [the defendant’s] alleged conduct should have been obvious to [the defendant] based both on common sense and prior general case law.”); *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (“Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate’s right was clearly established.”); *Mattos v. Agarano*, 661 F.3d 433, 448 (9th Cir. 2011) (acknowledging the potential existence of an obvious case by asserting that “the violation was not so obvious that we can define clearly established law at a high level of generality” (internal quotation marks omitted)); *Boyd v. Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004) (instructing courts in the Ninth Circuit to look to “whatever decisional law is available . . . including decisions of state courts, other circuits, and district courts” (internal quotation marks omitted)).

63. See *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005) (“[T]he [Supreme] Court has also acknowledged that, in the obvious case, the standards announced in those decisions alone are sufficient to clearly establish the answer.” (internal quotation marks omitted) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004))); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (“In extraordinary cases, a broad principle of law can clearly establish the rules governing a new set of circumstances if the wrongfulness of an official’s action is so obvious . . . .”); *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (noting that a right may be “specifically adjudicated or [be] manifestly apparent from broader applications of the constitutional premise in question”); *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) (“[T]he [Supreme] Court recognized that in an obvious case, [general] standards can clearly establish the answer, even without a body of relevant case law,” (third alteration in original) (internal quotation marks omitted) (citing *Brosseau*, 543 U.S. at 199)); *Estate of Escobedo v. Bender*, 600 F.3d 770, 780 (7th Cir. 2010) (“The [Plaintiff] can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants’ conduct was unconstitutional or by presenting evidence that the Defendant’s [sic] conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court.”); *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010) (“[I]n qualified immunity cases, except in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law.”).

Circuit district court denied qualified immunity in an “obvious” case. Although the Second Circuit has yet to clearly embrace the obvious-case concept in Section 1983 claims, it did recognize that Hope allows for consideration of a more expansive approach to sources of clearly established law.

B. The Fifth Circuit’s Divergent Approach to Hope v. Pelzer

Compared to other circuits, the Fifth Circuit appears to misconstrue the concept of an obvious case and fails to allow for a reasonably expansive analysis of sources of clearly established law. While a relatively small number of generally unpublished appellate and district court decisions cited obviousness as a factor in a qualified immunity decision, the Fifth Circuit has been uniquely reluctant to consider that in obvious circumstances a public official’s conduct may not warrant a grant of qualified immunity.

This divergent approach arises in part from the adoption of a two-step qualified immunity analysis that differs from the test articulated by the Supreme Court. The Court’s analysis proceeds as follows:

First, a court must decide whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right.

Second, if the plaintiff has satisfied this first step, the court must

Bd. of Governors, 650 F. Supp. 2d 40, 63–64 (D.D.C. 2009) (denying qualified immunity because “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question” (quoting Hope, 536 U.S. at 741)); Qutb v. Ramsey, 285 F. Supp. 2d 33, 50 (D.D.C. 2003) (recognizing in the Fourth Amendment context that “[qualified] immunity applies unless clearly established legal standards would have made it obvious to any reasonable officer that the level of force used was unlawful”).

65. See Li v. Aponte, No. 05 Civ. 6237(NRB), 2008 WL 4308127, at *10 (S.D.N.Y. Sept. 16, 2008) (“[The defendant’s] violation of the general standards articulated in Graham is sufficiently ‘obvious’ that [the plaintiff] need not show any more particularized precedent.”).

66. Okin v. Vill. of Cornwall-on-Hudson Police Dep’t, 577 F.3d 415, 433–34 (2d Cir. 2010) (recognizing that the court “may examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim’s constitutional rights” (citing Hope, 536 U.S. at 741–45)).

67. See, e.g., Reyes v. Bridgewater, 362 F. App’x 403, 408 (5th Cir. 2010) (“Indeed, unless the violation is ‘obvious,’ there must be relevant case law that ‘squarely governs’ the situation . . . .” (quoting Brosseau v. Haugen, 543 U.S. at 201)); Graves v. Zachary, 277 F. App’x 344, 349 (5th Cir. 2008) (“[T]he violation of [the plaintiff’s] constitutional rights would have been ‘obvious . . . even without a body of relevant case law.’ Under general precedents . . ., [the defendant] should have known that his use of force was excessive.” (first omission in original) (quoting Brosseau, 543 U.S. at 199)); Mitchell v. Cervantes, No. 3:10-CV-0030-K-BH, 2010 WL 4628003, at *1, *6–7 (N.D. Tex. Oct. 12, 2010) (denying defendant’s motion for summary judgment on qualified immunity grounds because “it was clearly established that prison officials could not maliciously and sadistically apply force to cause harm to a prisoner” and citing Hope for the proposition that a constitutional violation may be obvious); Strittmatter v. Briscoe, 504 F. Supp. 2d 169, 176 (E.D. Tex. 2007) (“While some violations are so obvious as to require no on-point precedent to give officials fair warning, the violation in this case is not that clear.”). While the Fifth Circuit flirted with the idea of recognizing an obvious case in one other case, it did not clearly articulate the concept and applied the traditional approach to defining the right. Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2004) (en banc).
decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.68

In contrast, the Fifth Circuit has implemented a two-step analysis that essentially collapses the Supreme Court’s process, including the clearly-established-law requirement, into the assessment of whether a constitutional violation occurred. The Fifth Circuit’s approach has also introduced the objective-reasonableness inquiry, whereby courts consider whether a public official’s conduct was “objectively reasonable,” even if the law was clearly established at the time:

This Court conducts a bifurcated analysis to assess the defense of qualified immunity. First, Plaintiffs must allege that Defendants violated their clearly established constitutional rights. Constitutional law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. Second, if Plaintiffs have alleged such a violation, this Court must consider whether Defendants’ actions were objectively reasonable under the circumstances. That is, this Court must decide whether reasonably competent officers would have known that their actions violated law which was clearly established at the time:69

In practice, the Fifth Circuit’s analysis reduces the likelihood that qualified immunity can be defeated in obvious cases. In conducting the objective-reasonableness inquiry, the Fifth Circuit requires a finding that “[t]he defendant’s acts are held to be objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the defendant’s conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.”70

Objective reasonableness could encompass the idea of an obvious case, such as in the Eleventh Circuit’s definition of “obvious clarity.”71 The Eleventh Circuit’s obvious-clarity standard, however, emerged as an alternative method for plaintiffs to prove the existence of clearly established

69. Collins v. Ainsworth, 382 F.3d 529, 537 (5th Cir. 2004) (citations omitted) (internal quotation marks omitted).
70. Thompson v. Upshur Cnty., Tex., 245 F.3d 447, 457 (5th Cir. 2001). The Second Circuit expressly introduced this third step as well, which may explain why it too has been reluctant to recognize the existence of an obvious case. See Higazy v. Templeton, 505 F.3d 161, 169–70 (2d Cir. 2007) (“[E]ven where the law is clearly established and the scope of an official’s permissible conduct is clearly defined, the qualified immunity defense also protects an official if it was objectively reasonable for him at the time of the challenged action to believe his acts were lawful.” (internal quotation marks omitted)).
71. See supra notes 56–61 and accompanying text (discussing the Eleventh Circuit’s interpretation of Hope).
law. 72 The Fifth Circuit developed its objective-reasonableness requirement as a further protection for defendants, increasing the likelihood defendants would receive qualified immunity. 73

By implementing the second step of its qualified immunity test in this manner, the Fifth Circuit significantly reduced the possibility that a plaintiff could defeat qualified immunity in obvious cases. 74 One Fifth Circuit decision observed that the objective-reasonableness inquiry appears to be in tension with Hope:

Hope pushes us toward a more general description of the constitutional right at issue both by describing a level of specificity lower than that we have used in the past, and by undermining the case law that originally established the more rigid standard and thereby eroding the foundations of our precedent on this point. 75

No subsequent Fifth Circuit decisions followed or further developed this concern. 76 Furthermore, unlike 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. Thus, in contrast with other circuits, the current Fifth Circuit qualified immunity test

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72. See supra notes 56–61 and accompanying text (explaining the emergence of the obvious-clarity standard).
74. For example, in Hernandez, the Fifth Circuit considered whether the district court correctly denied qualified immunity to case workers who removed a child from his parents and placed him with a foster family despite multiple reports that the foster family had abused children in its care. Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs., 380 F.3d 872, 876–78 (5th Cir. 2004). The Fifth Circuit first addressed the clearly-established-law issue and noted that neither party contested the district court’s ruling that the child’s “constitutional right to personal security and reasonably safe living conditions” was clearly established at the time. Id. at 880. However, the court still reversed, granting qualified immunity based solely on the objective-reasonableness inquiry and its determination that the defendants were not deliberately indifferent. Id. at 884–85. Thus, the Fifth Circuit treated the objective-reasonableness inquiry as an extra burden on the plaintiff, not as an alternative for proving clearly established law.
75. Hart v. Tex. Dep’t of Criminal Justice, 106 F. App’x 244, 249–50 (5th Cir. 2004).
76. No appellate court opinions cite Hart, nor did any adopt its reasoning. Two district court opinions subsequently cited Hart, but one chose to rely on the old standard for clearly established law, essentially ignoring Hart’s argument about Hope. See White v. McMillin, No. 3:09cv120-DPJ-FKB, 2010 WL 2683033, at *7–8 & n.6 (S.D. Miss. July 2, 2010) (stating that prior case law “still offers guidance” and granting qualified immunity). While the other unpublished opinion echoed Hart’s reasoning, it was later reversed by the Fifth Circuit, which found there was no violation of a constitutional right. See Gordon v. Pettiford, No. 5:04cv224-DCB-JCS, 2007 WL 4375294, at *1 (S.D. Miss. Dec. 13, 2007) (“According to the Fifth Circuit, Hope requires a more general description of the constitutional right in question.”), rev’d, 312 F. App’x 595 (5th Cir. 2009).
does not provide a vehicle for considering obviousness when assessing notice and clearly established law.  

C. Case Study—An Obvious Case: Nelson v. Correctional Medical Services

*Nelson v. Correctional Medical Services* highlights why clarifying the concept of an obvious case matters in Section 1983 claims. The Eighth Circuit majority opinion and the dissent differed with respect to what constitutes a source of clearly established law. The plaintiff, a pregnant woman shackled by a prison official during late labor, prevailed largely due to the court’s willingness to consider the obviousness of the constitutional violation by relying on a broad set of factors, including prison regulations and medical opinions. Comparing the *Nelson* court’s approach with how the Eleventh and Fifth Circuits would likely decide the case illustrates the problems with the Fifth Circuit’s narrow interpretation of *Hope*.

*Nelson* presented the issue of whether a prison official violated a prisoner’s Eighth Amendment right to be free from cruel and unusual punishment when she shackled the prisoner’s legs while the prisoner was seven centimeters dilated and in the final stages of labor.  

According to the court, when the defendant, a prison officer, took custody, Nelson’s contractions occurred about every five minutes, and she was in such severe pain she could not walk. The prison nurse told the officer to hurry to the hospital, yet the officer repeatedly took time to shackle the prisoner during the trip to the hospital from the prison, in a wheelchair at the hospital, and then to the bed in the maternity ward. The officer re-shackled Nelson after cervical measurements and insisted the shackles remain while Nelson was nine centimeters dilated and while nurses helped her push the baby through the birth canal. Experiencing acute pain, Nelson eventually needed to be taken to a delivery room, at which point the doctor ordered the permanent removal of the shackles. Nelson produced evidence that “the shackling caused her extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair.” 

As the court stated,

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77. Some Fifth Circuit courts consider the concept of an “obvious risk” in Eighth Amendment deliberate-indifference claims. *E.g., Hernandez*, 380 F.3d at 881; *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 670 (M.D. La. 2007). However, in doing so, these courts transfer the idea of obviousness to the first step of the analysis (whether there was a violation of a constitutional right) and therefore do not give full effect to the concept of an obvious case by allowing for consideration of obviousness in the clearly-established-law determination.


79. *Id.* at 525.

80. *Id.*

81. *Id.* at 526.

82. *Id.*

83. *Id.*
According to Nelson’s orthopedist, the shackling injured and deformed her hips, preventing them from going “back into the place where they need to be.” In the opinion of her neurosurgeon the injury to her hips may cause lifelong pain, and he therefore prescribed powerful pain medication for her. Nelson testified that as a result of her injuries she cannot engage in “ordinary activities” such as playing with her children or participating in athletics. She is unable to sleep or bear weight on her left side or to sit or stand for extended periods. Nelson has also been advised not to have any more children because of her injuries.84

At no point did the officer claim to be in danger or that Nelson posed a flight risk.85

To defeat the officer’s assertion of qualified immunity, the plaintiff argued her right to be free from having her legs shackled during labor was clearly established, based on four pieces of evidence: (1) the general purposes and history of the Eighth Amendment embodied in prior Supreme Court case law; (2) a partially vacated D.C. district court opinion; (3) prison regulations; and (4) the testimony of the defendant.86 The plaintiff was unable to rely on prior Eighth Circuit case law because the specific issue in question had not been previously addressed. As a result, the decision hinged on the extent to which the evidence cited by the plaintiff obviously put the defendant on notice that her actions would violate a clearly established Eighth Amendment right.

Rehearing the case en banc, the Eighth Circuit found the defendant violated clearly established law and denied the officer summary judgment based on qualified immunity.87 The majority cited extensively to Hope—most notably for the proposition that “[t]he obvious cruelty inherent in this practice should have provided [the officer] with some notice that [her] alleged conduct violated [Nelson’s] constitutional protection against cruel and unusual punishment.”88 The dissent (joined by five of the eleven judges) declined to acknowledge that Hope allowed for Section 1983 claims to proceed in obvious cases and contended, “The majority opinion falls far short of demonstrating Nelson sufficiently bore her burden to prove a reasonable prison guard would have understood the restraint of Nelson violated a clearly established constitutional right.”89 The close split between the judges, coupled with the majority’s extensive reliance on Hope, suggests the court would have granted qualified immunity if the Supreme Court, in Hope, had not introduced the concept of an obvious case.

84. Id.
85. Id. at 525.
86. Id. at 528–34.
87. Id. at 536.
88. Id. at 534 (first, third, and fourth alterations in original) (citing Hope v. Pelzer, 536 U.S. 730, 745 (2002)).
89. Id. at 537 (Riley, J., concurring in part and dissenting in part).
The majority opinion incorporates the concept of obviousness by allowing the plaintiff to demonstrate her right was clearly established based on a body of evidence that traditionally would be dismissed as inadequate to provide notice. The majority found, for example, that a partially vacated district court opinion from the D.C. Circuit provided fair warning to the defendant that her conduct violated clearly established law because the opinion previously decided the “precise issue under consideration.” Absent the concept of obviousness developed in Hope, it is likely that a vacated, extra-circuit decision would offer little support for the plaintiff in a qualified immunity analysis. As the dissent concluded, “one unchallenged portion of a vacated district court opinion from outside our circuit is not sufficient here to create a clearly established constitutional right.”

Similarly, the majority found that generally, rather than specifically, defined Eighth Amendment principles embodied in prior Supreme Court cases, namely Hope v. Pelzer and Estelle v. Gamble, put the defendant on notice that her conduct was unconstitutional. The majority reasoned that the official should have known restraining a prisoner under these circumstances would be unconstitutional because there was a “clear lack of an emergency situation” and “a risk of particular discomfort and humiliation.” The dissent, which declined to consider obviousness as a factor, argued that the Supreme Court cases were factually different and therefore that the general principles they articulated were inapplicable.

Both the majority and dissent treated the prison regulations as valid and applicable sources of clearly established law but differed in their analysis of whether the regulations provided notice to the defendant. The majority determined the regulations further put the defendant on notice. By permitting restraints “only when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape,” the regulations notified the defendant that her conduct was illegal. The dissent contended the regulations were too ambiguous to provide notice sufficient to defeat the grant of qualified immunity.

Finally, the majority considered the defendant’s testimony in which she conceded, “If you’ve got a very sickly old woman who’s had three or four strokes, of course you don’t want to put shackles on that inmate. That is just

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90. Id. at 532 (majority opinion).
91. Id. at 538 (Riley, J., concurring in part and dissenting in part).
93. See Nelson, 583 F.3d at 532 (“The general responsibilities of state officers with regard to an inmate’s medical needs were ... clearly established ...”).
94. Id. (quoting Hope v. Pelzer, 536 U.S. 730, 737–38 (2002)).
95. Id. at 539 (Riley, J., concurring in part and dissenting in part) (“Nelson was not being punished, was not made to suffer unnecessarily and wantonly, and was not deprived of basic necessities of life.”).
96. Id. at 533 (majority opinion) (quoting Ark. Dep’t of Corr. Admin. Reg. 403 § V (1992)).
97. Id. at 539 (Riley, J., concurring in part and dissenting in part).
common sense. I do the same thing with pregnant inmates.\textsuperscript{98} The majority interpreted this as evidence that the defendant obviously and unreasonably decided to shackle the prisoner during late labor and birth.\textsuperscript{99} The dissent viewed the officer’s testimony as subjective evidence that should be ignored in determining what a “reasonable officer” would do under similar circumstances.\textsuperscript{100}

Circuits, such as the Eleventh Circuit, that recognize that a right may be clearly established in obvious cases would be more likely to adopt the Nelson majority’s reasoning and look at the totality of the evidence to conclude the law was clearly established at the time. In the Eleventh Circuit, assuming no precedent had previously decided the issue, the outcome would depend on whether the court found general constitutional provisions “so clear and . . . conduct so bad that case law is not needed to establish that the conduct cannot be lawful.”\textsuperscript{101} Based on this standard, which is derived from Hope, the Eleventh Circuit could also find the conduct in Nelson involved sufficiently obvious constitutional violations as to defeat a qualified immunity claim.\textsuperscript{102} At the very least, the Eleventh Circuit standard would allow the plaintiff to present evidence and argue the defendant’s conduct “obviously” violated clearly established law, even though she could not produce a substantial body of case law to support her claims.

In contrast, the Fifth Circuit’s qualified immunity approach does not facilitate a discussion of obvious violations to establish that a reasonable public official had notice that an action would violate a constitutional right. To the extent a Fifth Circuit panel would consider obviousness in Nelson, it would do so in the context of determining whether the “risk was obvious,” such that the conduct amounted to deliberate indifference.\textsuperscript{103} In contrast, the Nelson majority, like the Hope Court, considered whether a combination of

\textsuperscript{98} Id. at 534 (majority opinion).

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 537 n.11 (Riley, J., concurring in part and dissenting in part) (emphasis omitted).

\textsuperscript{101} Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002).


\textsuperscript{103} See supra note 77 (discussing the limited application of Hope in Eighth Amendment claims). Moreover, this would likely not be helpful for Nelson. Given the Fifth Circuit’s high burden to prove deliberate indifference, it probably would hold, as the Eighth Circuit panel did, that the officer did not act with deliberate indifference. Nelson v. Corr. Med. Servs., 333 F.3d 958, 963 (8th Cir. 2008), vacated, 583 F.3d 522 (8th Cir. 2009) (en banc); see Hernandez ex rel. Hernandez v. Tex. Dep’t of Protective & Regulatory Servs., 380 F.3d 872, 882 (5th Cir. 2004) (“We begin by emphasizing that our court has interpreted the test of deliberate indifference as a significantly high burden for plaintiffs to overcome.”).
nontraditional sources could make a violation so obvious that a Section 1983 claim should proceed. The Fifth Circuit requires plaintiffs to prove the defendant’s conduct violated a clearly established right based only on binding precedent or a “persuasive consensus” of authority.104 When conducting this analysis, the Fifth Circuit has demonstrated a propensity to analyze each piece of evidence individually rather than consider whether the totality of practice, including nonbinding cases or testimony, might prove an obvious violation and justify denial of qualified immunity. In McClendon v. City of Columbia,105 for example, the Fifth Circuit found six other circuit court opinions addressing the issue in question inadequate to collectively establish a persuasive consensus and defeat a grant of qualified immunity.106 This approach is similar to the analysis presented in the Nelson dissent and suggests the Fifth Circuit would likewise find the officer in Nelson entitled to qualified immunity.

Thus, because the Eighth and Eleventh Circuits accept that some degree of obviousness should be considered when analyzing the clearly-established-law requirement, the plaintiff in Nelson could prevail on her claim that shackling a prisoner’s legs during the final stages of labor is a sufficiently obvious Eighth Amendment violation to overcome qualified immunity. In the Fifth Circuit, which does not allow for significant consideration of obvious violations of clearly established law, it is likely the court would bar the plaintiff from pursuing her claim.

III. Recent Developments: Does Obviousness Exist After Ashcroft v. al-Kidd?

Whether the Fifth Circuit recognizes obvious cases in the future depends in part on its interpretation of the recent Supreme Court case, Ashcroft v. al-Kidd. The Fifth Circuit suggested al-Kidd supports its restrictive approach to Section 1983 claims. In Morgan v. Swanson,107 the court intimated that the concept of an obvious case may not “survive” al-Kidd, and by implication, that the Fifth Circuit’s narrow interpretation of Hope was correct.108

In al-Kidd, the Supreme Court considered whether U.S. Attorney General John Ashcroft violated Abdullah al-Kidd’s Fourth Amendment rights by detaining him under the federal material-witness statute.109 Al-

104. See supra note 42 and accompanying text (discussing the Fifth Circuit’s approach to sources of clearly established law).
105. 305 F.3d 314 (5th Cir. 2002) (en banc) (per curiam).
106. See supra note 42 (analyzing McClendon).
107. 659 F.3d 359 (5th Cir. 2011) (en banc).
108. See id. at 373 (“[T]his case does not call on us to decide whether the Court’s statements in Hope survive al-Kidd . . . . We leave for another day the question of whether and when a constitutional violation may be so ‘obvious’ that its illegality is clear from only a generalized statement of law.”).
Kidd, an American citizen with no outstanding charges against him, was apprehended to allegedly serve as a material witness in a visa-fraud trial.\footnote{al-Kidd v. Ashcroft, 580 F.3d 949, 952–53 (9th Cir. 2009), rev’d, 131 S. Ct. 2074 (2011).} Federal officials strip-searched al-Kidd several times, held him in a maximum-security facility for two weeks, and only allowed him to leave detention if he agreed to move to Nevada, live with his in-laws for a year, and limit his travel to four states.\footnote{Id. at 953.} Subsequently, al-Kidd lost the opportunity to study abroad, was separated from his wife, lost his job, and could not find steady employment.\footnote{Id. at 954.} The federal government never called al-Kidd as a witness in any criminal proceeding.\footnote{Id.}

The Ninth Circuit found the Attorney General’s conduct violated the defendant’s constitutional rights with sufficient clarity to defeat a grant of qualified immunity.\footnote{Id. at 973.} The Supreme Court reversed and unanimously granted the Attorney General qualified immunity because the law was not clearly established at the time of the violation.\footnote{al-Kidd, 131 S. Ct. at 2085; see also id. at 2085 (Kennedy, J., concurring) (“The Court’s holding is limited to the arguments presented by the parties and leaves unresolved whether the Government’s use of the Material Witness Statute in this case was unlawful.”).} While the\textit{al-Kidd} Court did attempt to clarify the clearly-established-law analysis, the majority and concurring opinions did not, as the Fifth Circuit suggested, eliminate the concept of obvious cases. The majority, citing\textit{Brosseau}, stated, “We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”\footnote{Id. at 2084 (majority opinion) (internal citation omitted).} The majority opinion also stated that “[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate,”\footnote{Id. at 2083 (emphasis added).} and that in the absence of binding authority, courts must find a violation based on “a robust ‘consensus of cases of persuasive authority.’”\footnote{Id. at 2084–85.}

Applying these principles, the Court concluded that the evidence considered by the Ninth Circuit did not clearly establish the law at the time the defendant was detained.\footnote{al-Kidd v. Ashcroft, 580 F.3d 949, 972–73 (9th Cir. 2009) (citing United States v. Awadallah, 202 F. Supp. 2d 55, 77 n.28 (S.D.N.Y. 2002), rev’d, 131 S. Ct. 2074 (2011)).} The Ninth Circuit analysis had relied on a footnote from a Southern District of New York opinion, which explicitly warned the Attorney General that using the material-witness statute as a pretext to detain an individual would be unconstitutional.\footnote{Id. at 2084 (emphasis added) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).} Rejecting this reasoning and finding the footnote could not provide the defendant with sufficient notice of a clearly established right, Justice Scalia, writing for the Supreme Court, stated,
We will indulge the assumption (though it does not seem to us realistic) that Justice Department lawyers bring to the Attorney General’s personal attention all district judges’ footnoted speculations that boldly “call him out by name.” On that assumption, would it prove that for him (and for him only?) it became clearly established that pretextual use of the material-witness statute rendered the arrest unconstitutional? An extraordinary proposition. Even a district judge’s *ipse dixit* of a holding is not “controlling authority” in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust “consensus of cases of persuasive authority.”

Similarly, the Court dismissed the Ninth Circuit’s reliance on the general purposes and history of the Fourth Amendment, reasoning, “Ashcroft must be forgiven for missing the parallel, which escapes us as well.”

Although *al-Kidd* requires the Ninth Circuit to rethink its approach to sources of clearly established law, the decision falls short of eliminating the concept of obvious cases, as suggested by the Fifth Circuit. Given that the Ninth Circuit extensively quoted *Hope* in denying qualified immunity for the Attorney General, it is notable that the *al-Kidd* opinion never cited the case. While the Fifth Circuit suggested this omission means the Supreme Court may no longer recognize the concept of an obvious case, the absence of citations to *Hope* is better explained by Justice Kennedy’s concurrence, which emphasizes that the *al-Kidd* holding reflects the uniquely national role of the Attorney General and national security concerns presented in the case. Consistent with *Hope*, the concurrence also notes that the analysis of qualified immunity for officials performing a single function within one jurisdiction would be different from the analysis applicable to the Attorney General.

Following *al-Kidd*, moreover, several circuit courts denied qualified immunity when a defendant’s conduct constituted an obvious violation of

122. *Id.*
123. See Mattas v. Agarano, 661 F.3d 433, 442 (9th Cir. 2011) (accepting the “beyond debate” language and declaring accordingly that “Graham’s general excessive force standard cannot always, alone, provide fair notice to every reasonable law enforcement officer that his or her conduct is unconstitutional”).
124. See *supra* notes 107–08 and accompanying text.
125. See *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring) (“The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case.”).
126. See *id.* at 2087 (“[N]ationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.”).
127. *Id.* at 2086 (Kennedy, J., concurring) (“They reasonably can anticipate when their conduct may give rise to liability for damages and so are expected to adjust their behavior in accordance with local precedent.” (internal quotation marks omitted)).
clearly established law. In Schneyder v. Smith, the Third Circuit denied a prosecutor qualified immunity based on the “self-evident wrongfulness” of her conduct. The issue in Schneyder was whether a prosecutor violated a plaintiff’s clearly established Fourth Amendment right by detaining her for almost two months without notifying the judge and on the pretext that she would be a material witness in a future trial. Holding that “[n]o reasonable prosecutor would think that she could indefinitely detain an innocent witness pending trial without obtaining reauthorization,” the Third Circuit reasoned that “this is one of those exceedingly rare cases in which the existence of the plaintiff’s constitutional right is so manifest that it is clearly established by broad rules and general principles.” By finding an obvious violation in a case similar to al-Kidd, Schneyder indicates al-Kidd should not be read to eliminate the consideration of obviousness in Section 1983 litigation.

IV. Conclusion

Historically, case law attempted to balance the need for vindicating civil rights violations through Section 1983 litigation with the need to protect public officials from unreasonable lawsuits that interfere with their duties and responsibilities. Often the interests of courts and public officials aligned, as the former adopted restrictive approaches favoring defendants, which led to early dismissal of litigation. But, as reflected by Hope, qualified immunity jurisprudence also developed out of concerns that existing standards steered courts to grant immunity even when public-official conduct was manifestly improper.

As this Note shows, the development of an obviousness factor for evaluating whether a defendant violated a clearly established constitutional right helps address this problem. Considering the obviousness of a violation refocuses the inquiry on notice and enables plaintiffs to establish the law by reference to more general rules, nonbinding case law, and regulations. While al-Kidd suggested these sources cannot provide notice to national actors, like the U.S. Attorney General, they can apply to more local actors, such as the prison officer in Nelson and the prosecutor in Schneyder.

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128. E.g., Vance v. Rumsfeld, 653 F.3d 591, 611 (7th Cir. 2011), vacated, reh’g granted; Schneyder v. Smith, 653 F.3d 313, 331 (3d Cir. 2011). The Seventh Circuit may revisit the issue when it rehears Vance en banc. However, based on the briefing, the issue may not arise because Vance implicates other national security issues, which could dispose of the claims without reaching the clearly-established-law requirement. See Brief for Former Secretaries of Defense and Members of the Joint Chiefs of Staff as Amici Curiae Supporting Petitioner at 12–13, Vance, 653 F.3d 591 (Nos. 10-1687, 10-2442), 2011 WL 4542829, at *12 (arguing that potential liability for U.S. officials could compromise their decision-making abilities and thus harm national security).

129. 653 F.3d 313 (3d Cir. 2011).

130. Id. at 331.

131. Id. at 318.

132. Id. at 330–31.
Recent changes to the qualified immunity doctrine will likely stimulate further debate about the consideration of obviousness in Section 1983 claims. Ironically, Morgan’s suggestion that Hope can no longer stand for considering obviousness represents the most definitive recognition by the Fifth Circuit that an obvious case can exist.133 In other circuits, adopting al-Kidd’s more restrictive approach to sources of clearly established law could compel courts to rely more on obviousness in order to hold defendants liable for outrageous conduct, even in the absence of binding case law.

Likewise, changes to the order of analysis in qualified immunity could prompt circuits to decide cases by relying on obviousness to conclude the right was clearly established at the time of the violation. In Pearson v. Callahan,134 the Supreme Court made it discretionary for courts to bypass the constitutional issue in Section 1983 litigation and dismiss claims based on a lack of clearly established law.135 This change raised concerns about whether courts would produce substantially less rights-defining litigation—a problem for future plaintiffs hoping to rely on case law to prove clearly established law.136 While these concerns have yet to manifest,137 the reasoning in Justice Kennedy’s dissent in Camreta v. Greene,138 which was supported by Justices Scalia and Thomas, suggests the Court might adopt a stricter approach that would prevent lower courts from considering the constitutional issue in cases dismissed for a lack of clearly established law.139 Adopting this position could lead to substantially less rights-defining litigation and consequently compel courts to deny qualified immunity on the basis that the conduct at issue presented an obvious violation of a constitutional right.

133. Judge Dennis specially concurred in order to debate Judge Benavides’s assertions about Hope. See Morgan v. Swanson, 659 F.3d 359, 393 (5th Cir. 2011) (Dennis, J., concurring) (“I believe that certain official conduct may so obviously fall within the prohibition of a general or abstract rule of the Constitution that any reasonable official would have ‘fair warning’ that his actions are unconstitutional . . . .”).
135. Id. at 236.
136. See The Supreme Court—Leading Cases, 123 H ARV. L. REV. 153, 282 (2009) (“The provision of legal clarity is welcome and necessary . . . . Dismissing challenges early in litigation on the ground that a claimed right was not clearly established does little to help parties structure future conduct.” (footnotes omitted)).
139. See id. at 2043 (Kennedy, J., dissenting) (“If today’s decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.”).
If courts continue to recognize the existence of obvious cases, as this Note argues they should, they will need to develop a workable standard for what constitutes an obvious case. Difficulties that may arise in trying to define an obviousness standard should not prevent courts from recognizing the need for obviousness as a factor in the clearly-established-law analysis. As the Fifth Circuit approach to clearly established law demonstrates, failure to adequately allow for the consideration of obviousness can lead to the denial of qualified immunity even when a range of sources indicates the constitutional violation should have been apparent to any reasonable official. Given the importance of obviousness in cases where no clear precedent exists, courts should incorporate the concept into the clearly-established-law analysis.

—Amelia A. Friedman