

## 9.41 Qualified Immunity

### Comment

The Committee has not formulated any instructions concerning qualified immunity because most issues of qualified immunity are resolved before trial, or the ultimate question of qualified immunity is reserved for the judge to be decided after trial based on the jury's resolution of the disputed facts. The trend of the Ninth Circuit's qualified immunity jurisprudence has been toward resolving qualified immunity as a legal issue before trial whenever possible. *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017).

To guide the trial court and the parties, this Comment provides general authority related to qualified immunity. This Comment also provides guidance should factual disputes preclude resolution of qualified immunity before trial, and the issue proceeds to trial for resolution.

### **Two-Prong Analysis**

The qualified immunity analysis consists of two prongs: whether the defendant's conduct "(1) violated a constitutional right that (2) was clearly established at the time of the violation." *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023); *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020) (explaining that the qualified immunity analysis consists of a two-prong analysis: (1) "whether the facts taken in the light most favorable to the plaintiff show that the officer's conduct violated a constitutional right"; and (2) if so, "whether the right in question was clearly established at the time of the officer's actions, such that any reasonably well-trained officer would have known that his conduct was unlawful"). A court may "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Evans v. Skolnick*, 997 F.3d 1060, 1064 (9th Cir. 2021) (noting that a court may address the two prong analysis in either order); *O'Doan v. Sanford*, 991 F.3d 1027, 1036 (9th Cir. 2021) ("Although qualified immunity involves a two-step analysis, we may exercise our discretion to resolve a case only on the second ground when no clearly established law shows that the officers' conduct was unconstitutional.") (citations omitted).

"Under the first prong [of the qualified immunity inquiry,] we ask whether, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'" *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022); *Pearson*, 555 U.S. at 236 (noting that analyzing the first then second prong, while not mandatory, "is often beneficial[,] . . . promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"). To evaluate whether there is a constitutional violation, the court applies the current law. *See Sandoval v. County of San Diego*, 985 F.3d 657, 678 (9th Cir. 2021) (stating that "when the governing law has changed since the time of the incident, we apply the current law to determine if a constitutional

violation took place under the first prong of qualified immunity analysis”); see *Singh v. City of Phoenix*, 124 F.4th 746 (9th Cir. 2024) (comparing the instant case with key facts from a plaintiff-identified similar case for the second step of qualified immunity which purportedly put the defendant officer on notice that the officer’s conduct might violate the Constitution and the instant case).

Regarding the second prong, the Ninth Circuit has explained: “We begin our inquiry into whether this constitutional violation was clearly established by defining the law at issue in a concrete, particularized manner.” *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117-18 (9th Cir. 2017) (stating that the plaintiff bears the burden of showing that the rights allegedly violated were clearly established); *Gordon v. County of Orange*, 6 F.4th 961, 969 (9th Cir. 2021) (“[t]he plaintiff bears the burden of proving that the right allegedly violated was clearly established” at the time of the violation). Moreover, to show that a right was clearly established, the plaintiff must demonstrate that, at the time of the alleged violation, the state of the law gave fair warning that the relevant conduct was unconstitutional. See *Ballentine*, 28 F.4th at 64. A case directly on point is not necessary to defeat qualified immunity, but existing case law must have put “every reasonable official” on notice that the conduct was unconstitutional. *Martinez v. High*, 91 F.4th 1022, 1031 (9th Cir. 2024); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (stating that a plaintiff need not find “a case directly on point,” but existing precedent must have placed the statutory or constitutional question beyond debate); accord *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021) (per curiam) (“Although this Court’s caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.” (internal quotation marks and citations omitted)); *Sandoval*, 985 F.3d at 674 (stating that the second prong remains what it has always been: an objective examination “that compares the factual circumstances faced by the defendant to the factual circumstances of prior cases to determine whether the decisions in the earlier cases would have made clear to the defendant that his conduct violated the law”).

In deciding which precedents apply, the Ninth Circuit routinely relies “on the intersection of multiple cases when holding that a constitutional right has been clearly established.” *Polanco*, 76 F.4th at 930 n.8 (“We routinely rely on the intersection of multiple cases when holding that a constitutional right has been clearly established . . . This approach is required by the Supreme Court’s instruction that qualified immunity is improper where ‘a legal principle [has] a sufficiently clear foundation in then-existing precedent.’”) (citations omitted); see also *Russell v. Lumitap*, 31 F.4th 729, 737 (9th Cir. 2022) (“The precedent must be ‘controlling’—from the Ninth Circuit or the Supreme Court—or otherwise be embraced by a ‘consensus’ of courts outside the relevant jurisdiction.”); accord *Martinez*, 91 F.4th at 1031 (“existing case law must be ‘controlling law’—from the Ninth Circuit, the Supreme Court, or from a consensus of courts outside the relevant jurisdiction.”). “Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged

against the backdrop of the law at the time of the conduct.” *Scanlon v. County of Los Angeles*, 92 F.4th 781, 809 (9th Cir. 2024) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Only the judge can decide whether a particular constitutional right was “clearly established” once any factual issues are resolved by a fact finder. *See Morales*, 873 F.3d at 823.

### **Qualified Immunity as a Matter of Law**

A defendant is entitled to qualified immunity as a matter of law only if, taking the facts in the light most favorable to the nonmoving party, he or she did not violate any clearly established constitutional right. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008). If reasonable jurors could believe that the defendant violated the plaintiff’s constitutional right, and the right at issue was clearly established, the case should proceed to trial. *Id.*; *see also LaLonde v. County of Riverside*, 204 F.3d 947, 953 (9th Cir. 2000) (“If . . . there is a material dispute as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial, before a jury if requested.”). “Though we may excuse the reasonable officer for . . . a mistake, it sometimes proves necessary for a jury to determine first whether the mistake, was, in fact, reasonable.” *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (citations omitted).

The Ninth Circuit has decided numerous cases of “clearly established” law. Limited examples of “clearly established” law follow. The Committee suggests review of the Ninth Circuit’s website for a more robust accumulation of case authorities. *See* Ninth Circuit Section 1983 Outline (( or ).

#### *1. Excessive Force*

In *Rice v. Morehouse*, the Ninth Circuit reiterated that, for purposes of clearly established law, “we clearly established one’s ‘right to be free from the application of non-trivial force for engaging in mere passive resistance.’” 989 F.3d 1112, 1125 (9th Cir. 2021) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)) (citing *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) (explaining that cases dating back to 2001 established that “a failure to fully or immediately comply with an officer’s orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force”); *Sanderlin v. Dwyer*, 116 F.4th 905, 915-17 (9th Cir. 2024) (holding that, under *Nelson v. City of Davis*, it was clearly established that an officer’s use of a foam projectile on protestor who was standing in front of the officer holding a sign above his head and who did not move when ordered to stand aside constituted excessive force)).

It is clearly established that officers cannot use intermediate force when a suspect is restrained, has stopped resisting, and does not pose a threat. *See Gonzalez v. City of Phoenix*, 163 F.4th 1289 (9th Cir. 2026) (holding that placing pressure on a prone, “hog-tied” person who was suspected of drug use, after physical exertion when temperature was 101 degrees

constituted excessive force). *See also Tuuamalealo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (per curiam) (“[I]t was clearly established that the use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment’s prohibition on the use of excessive force.”); *Rosenbaum v. City of San Jose*, 107 F.4th 919, 926 (9th Cir. 2024) (stating that it is clearly established that a suspect has right to be free from excessive force under the Fourth Amendment when the officer allows a police dog to continue biting the suspect after the suspect has fully surrendered and is under officer control when he lay on his stomach with his arms outstretched, was not actively resisting arrest or attempting to get up or flee, and where officers had immobilized his arms and legs and were pointing their firearm at him); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-57 (9th Cir. 2003) (holding that police officers’ alleged act of continuing to press their weight onto mentally ill detainee’s neck and torso as he lay handcuffed on ground and begged for air constituted use of excessive force under the circumstances); *Spencer v. Pew*, 117 F.4th 1130, 1143-44 (9th Cir. 2024) (holding that *Drummond* was “sufficiently materially similar to this case to provide adequate notice to [the defendant] that his post-handcuffing compression of [plaintiff’s] back and neck with his knee was excessive”); *compare Perez v. City of Fresno*, 98 F.4th 919, 926 (9th Cir. 2024) (“Given the specific context of this case, we cannot conclude that *Drummond* put the officers on fair notice that their actions—pressing on a backboard on top of a prone individual being restrained for medical transport, at the direction of a paramedic working to provide medical care—was unlawful.”).

Police officers were not entitled to qualified immunity for continuing to detain bystanders for five hours, while handcuffed, in violation of the plaintiffs’ Fourth Amendment rights, because it became apparent to officers almost immediately that the bystanders were not armed, were not engaging in any criminal activity, and were minors, and the detention continued long after any probable cause had dissipated. *Nicholson v. City of Los Angeles*, 935 F.3d 685, 691 (9th Cir. 2019).

In *Hyer v. City and County of Honolulu*, the Ninth Circuit analyzed a situation where police officers used both intermediate and deadly force during their encounter with a suspect. The Ninth Circuit held that the suspect’s right to be free from the use of deadly force as long as he was not directly threatening a police officer with a weapon was clearly established at the time of the decedent’s death in June 2018. And the suspect’s right to be free from the use of chemical munitions as long as he was suspected of a minor crime, posed no threat to officers or others, and was engaged in only passive resistance was also clearly established at that time. But the individual’s right to be free from the use of a police dog under the circumstances was not then clearly established. 118 F.4th 1044, 1067-70 (9th Cir. 2024).

Regarding the use of deadly force, it was clearly established that the use of deadly force against a man who was walking down the street carrying gun in his waistband, posing no immediate threat, and failing to comply with conflicting commands violated the Fourth Amendment. *Calonge v. City of San Jose*, 104 F.4th 39, 48 (9th Cir. 2024) (“When a man is walking down the street carrying a gun in his waistband, posing no immediate threat, police

officers may not shout conflicting commands at him and then kill him.”) *Est. of Hernandez v. City of Los Angeles*, 139 F.4th 790, 795 (9th Cir. 2025) (“It has been clearly established for more than a decade that when an officer shoots and wounds a suspect, and he falls to the ground, the officer cannot continue to shoot him, absent some indication that he presents a continuing threat, without first reassessing the need for lethal force.”).

## 2. First Amendment

It is clearly established that the First Amendment protects a person’s right to record or attempt to record police when the person is in a place where the person is permitted to be, is unarmed, and is not a suspect. *See Bernal v. Sacramento Cnty. Sheriff’s Dep’t*, 73 F.4th 678, 698-99 (9th Cir. 2023) (holding that qualified immunity did not shield law enforcement officers who forcibly restrained the unarmed, non-suspect plaintiff after he yelled at and filmed the officers in his front yard). “It was clearly established at the time of Defendants’ conduct that the First Amendment prohibits public officials from threatening to remove a child from an individual’s custody to chill protected speech out of retaliatory animus for such speech.” *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1020 (9th Cir. 2020). For a discussion of when a law enforcement officer may rely on a policy, an ordinance, or a permit scheme underlying the officer’s challenged actions that is not itself challenged, see *Saved Mag. v. Spokane Police Dep’t*, 19 F.4th 1193, 1200-01 (9th Cir. 2021).

For a discussion of public employees’ First Amendment rights, see the Comment to Instruction 9.9. “[G]enerally, ‘when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.’” *Jensen v. Brown*, 131 F.4th 677, 688 (9th Cir. 2025) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). But this rule “does not apply to ‘speech related to scholarship or teaching,’” that is “performed ‘pursuant to the official duties’ of a teacher and professor.” *Demers v. Austin*, 746 F.3d 402, 406, 412 (9th Cir. 2014) (quoting *Garcetti*, 547 U.S. at 425). “Rather, speech ‘related to scholarship or teaching’ is covered by the *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] doctrine even if it was made pursuant to a public employee’s official duties.” *Jensen*, 131 F.4th at 688 (quoting *Demers*, 746 F.3d at 412). It is “clearly established that a professor has a right to speak about a school’s curriculum without being reprimanded, given negative performance reviews, and put through an investigation and termination hearing.” *Id.* at 694.

The law is clearly established that denying or delaying mail to prisoners without a legitimate penological interest violates the First Amendment, although there is no bright line rule on how long of a delay constitutes a violation. *Human Rights Defense Ctr., Inc. v. Uttecht*, 161 F.4th 1141 (9th Cir. 2025).

## 3. Search and Seizure

It is also “clearly established” that “officers can be held liable for conducting a high-risk vehicle stop based on nothing more than a reasonable suspicion that the vehicle was stolen.” *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 893 (9th Cir. 2024) (citing *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014)). Property owners brought § 1983 action against city and city police officers, alleging that officers violated the owners’ Fourth Amendment rights by stealing their property after conducting search and seizure pursuant to a warrant. *Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019). The Ninth Circuit stated that there was “no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant,” since the Ninth Circuit had not decided the issue and other circuits are divided. *Id.* Although officers “ought to have recognized that” stealing seized property “was morally wrong, they did not have clear notice that it violated the Fourth Amendment.” *Id.* at 942.

In *Olson v. County of Grant*, 127 F.4th 1193, 1203 (9th Cir. 2025), the Ninth Circuit held that a plaintiff’s consent to allowing one law enforcement agency to search the plaintiff’s cell phone did not extend to a search by a different law enforcement agency. The plaintiff, Olson, was arrested in Idaho for marijuana possession and signed a form giving Idaho police consent to search her phone, and an “extraction,” or copy, of her phone contents was made. Defendant Carpenter, county prosecutor in Oregon, requested and reviewed Olson’s phone data for evidence of criminal activity, found none, and deleted his copy of the extraction. Olson sued Carpenter for violation of the Fourth Amendment. The court upheld qualified immunity for Carpenter because the law was not clearly established at the time, but took the opportunity to conclude that “[b]ecause it is important to lay down a marker for future cases, we heed the Court’s call in *Pearson* to develop constitutional precedent and conclude that Carpenter’s search infringed on Olson’s Fourth Amendment rights.” Here, Carpenter’s review of the cell phone extraction was without consent, without a warrant, and without a reasonable suspicion of further criminal activity by Olson. Thus, after *Olson*, the law is clearly established that this kind of search is a violation of the Fourth Amendment.

#### 4. “Obvious” Unlawful Conduct without Controlling Case Law

“[T]here can be the rare ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (citing *Brosseau*, 543 U.S. at 199); *Estate*

*of Soakai v. Abdelaziz*, 137 F.4th 969 (9th Cir. 2025) (absence of a controlling case applying

theory of state-created danger to injuries suffered by bystanders after a high-speed police chase was not necessary because existing precedent placed the constitutional question beyond debate that officers violate substantive due process rights when they affirmatively

place an individual in danger and then, with deliberate indifference, do nothing to address that danger); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (stating police officers “shepherding” of presidential candidate’s supporters into crowd of violent counter-protesters to be one such rare but obvious circumstance); *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017) (identifying intentional use of perjured or fabricated evidence in child dependency hearing to be one such rare but obvious circumstance); *Rieman v. Vazquez*, 96 F.4th 1085, 1094 (9th Cir. 2024) (providing incomplete and false information to the juvenile court to convince the court the social worker had satisfied the due process notice requirement constitutes judicial deception and was an obvious violation of the Fourth Amendment). “[A] right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances.” *Ballentine*, 28 F.4th at 66 (stating it was “clearly established” that an arrest supported by probable cause, but made in retaliation for protected speech, violates the First Amendment) (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013) (holding that a plaintiff pressing a retaliatory arrest claim based on speech protected by the First Amendment generally must plead and prove the absence of probable cause for the arrest), *abrogated on other grounds by Nieves v. Bartlett*, 587 U.S. 391 (2019); *Spencer*, 117 F.4th at 1138-40 (rejecting plaintiff’s assertion that his excessive force claim was an “obvious case,” because it was not obvious “from the *Graham* factors alone, that every reasonable official would have understood that what he is doing violates the right to be free from excessive force” (citing *Graham v. Connor*, 490 U.S. 386 (1989) (additional quotations and citations omitted))). The Ninth Circuit noted the scarcity of such rare and obvious cases: “[W]e have repeatedly emphasized that such cases are few and far between, and thus, we are hesitant to find a right clearly established without a body of relevant case law.” *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 888 (9th Cir. 2022) (citations omitted).

#### 5. State Action Required

The Ninth Circuit’s historical view of qualified immunity finds no basis to grant qualified immunity to officials not engaged in their duties as public servants. “State action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available.” *Bracken v. Okura*, 869 F.3d 771, 776, 778 (9th Cir. 2017) (explaining that the inquiry is whether the person acted “in performance of public duties” or to “carry out the work of government.”). Thus, when an off-duty police officer, wearing his uniform, is working as a private security guard, qualified immunity does not apply, even if the off-duty work is with the consent of the police department and the off-duty officer may be found to have been acting under the color of state law. *Id.* at 776-78 (stating that qualified immunity would not be available when a government officer uses the badge of his authority in service of a private non-governmental goal).

#### 6. State-Created Danger

“As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties.” *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992)). One exception to this general rule is the state-created danger doctrine. Under this exception, a government employee must have affirmatively placed the plaintiff in a position of danger, that is, the employee’s actions must have created or exposed an individual to a danger that he or she would not have otherwise faced. *Id.* To prove that the exception applies, “[t]he affirmative act must create an actual, particularized danger,” “the ultimate injury to the plaintiffs must be foreseeable,” and “the employees must have . . . acted with ‘deliberate indifference’ to a ‘known or obvious danger.’” *Id.* (citations omitted). As an example, it was not clearly established that at the time a police officer disclosed the victim’s confidential report of domestic violence to the victim’s alleged abuser, who was another police officer, such disclosure violated victim’s substantive due process rights under the state-created danger doctrine. The disclosing officer was entitled to qualified immunity from the victim’s § 1983 substantive due process claim. *Martinez*, 91 F.4th at 1031-32 (“[W]e now clarify that right going forward. An officer is liable under the state-created danger doctrine when the officer discloses a victim’s confidential report to a violent perpetrator in a manner that increases the risk of retaliation against the victim.”). In *Estate of Soakai v. Abdelaziz*, the Ninth Circuit held that it was clearly established that “hampering an individual’s access to emergency treatment can constitute a substantive due process violation when the ‘affirmative conduct’ prong of the state-created danger exception is also satisfied” and that “an officer’s inaction—such as failing to provide aid—can violate the Due Process Clause if the officer previously put another in danger, even if the officer’s earlier danger-creating conduct served legitimate law enforcement objectives.” 137 at 986 (9th Cir. 2025). For a discussion of the state-created danger doctrine and the clearly established requirement in the context of a state prison exposing guards and inmates to a heightened danger from COVID-19, see *Polanco*, 76 F.4th at 926-31. For a discussion of foster children’s clearly established right to state protection in the supervision, protection, and safe foster care placement by a social worker, see *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010).

## 7. Fourteenth Amendment

There is a clearly established Fourteenth Amendment right to bodily privacy. *Vazquez v. County of Kern*, 949 F.3d 1153, 1165 (9th Cir. 2020) (stating that a correctional officer at a juvenile detention facility was not entitled to qualified immunity for allegedly violating female ward’s Fourteenth Amendment right to bodily privacy by peering through a gap in a curtain to shower stalls so that he could observe inmate as she showered in violation of clearly established law, “the Juvenile Hall administrative policies, and the training [defendant] likely attended.”). The Ninth Circuit has held that “casual, restricted, and obscured viewing of a prison inmate’s naked body is constitutionally permitted if it is justified by legitimate government interests such as prison security needs.” *Ioane v. Hodges*, 939 F.3d 945, 957 (9th Cir. 2019).

There is a clearly established Fourteenth Amendment right “to be free from judicial deception in child custody proceedings.” *Benavidez v. County of San Diego*, 993 F.3d 1134, 1152-53 (9th Cir. 2021) (stating that county social workers were not entitled to qualified immunity for obtaining medical examinations of children that they had removed from parents’ home by means of knowingly or recklessly false representations to the juvenile court judge who authorized the examinations).

In *Gordon v. County of Orange*, the Ninth Circuit stated that “[w]e now hold that pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment.” 6 F.4th 961, 973 (9th Cir. 2021) (“[L]aw enforcement and prison personnel should heed this warning because the recognition of this constitutional right will protect future detainees.”); *see also Sandoval v. County of San Diego*, 985 F.3d 657, 679-81 (9th Cir. 2021) (holding it was clearly established that nurses at county jail were not entitled to qualified immunity for their alleged conduct in failing to monitor pretrial detainee who exhibited severe sweating, shaking, and other symptoms of being under the influence of drugs for several hours and failing to provide or obtain any medical treatment for detainee).

In *K.J. v. Jackson*, 127 F.4th 1239, 1250 (9th Cir. 2025) (citing *Goss v. Lopez*, 419 U.S. 565 (1975)), the Ninth Circuit recognized as a clearly established right under the Fourteenth Amendment that a student facing suspension or extended suspension based on “a new accusation” has a right to “oral or written notice of the charges,” “an explanation of the evidence the authorities have in support of that charge,” and “an opportunity to present his side of the story” in response.

In *Estate of Soakai*, the Ninth Circuit held that it was clearly established law that bystanders could bring a purpose-to-harm claim against defendant officers when the plaintiffs alleged that the defendants initiated a high speed car chase of a suspect without activating their lights or sirens, the suspect crashed into the plaintiffs, killing or injuring them, and the defendants expressed their hope that the suspect had died in the crash. 137 F.4th at 980-81, 986 (holding that three prior Ninth Circuit cases provided fair warning to defendants that their alleged conduct was unconstitutional).

In *D’Braunstein v. Cal. Highway Patrol*, the Ninth Circuit stated that “it is clearly established [under the Fourth and Fourteenth Amendments] that officers must seek to provide an injured detainee or arrestee with objectively reasonable medical care in the face of medical necessity creating a substantial and obvious risk of serious harm, including by summoning medical assistance.” 131 F.4th 764, 771 (9th Cir. 2025). “Officers may not act with objective deliberate indifference to such a medical need.” *Id.* In evaluating whether a reasonable jury could conclude that the officer violated the plaintiff’s clearly established rights, the court stated that “the common underlying constitutional question reflected in Fourth and Fourteenth Amendment case law is whether an officer’s provision (or deprivation) of medical care was objectively unreasonable.” *Id.* at 769.

## 8. Monell *Liability*

Qualified immunity does not apply to municipalities. *Owen v. City of Independence*, 445 U.S. 622, 645-47 (1980); *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass’n*, 38 F.4th 68, 71 (9th Cir. 2022) (“[P]recedent recognizes that municipalities are generally liable in the same way as private corporations in § 1983 actions” and a good faith defense may apply in limited circumstances).

The Ninth Circuit has rejected the view that municipal liability is precluded as a matter of law under § 1983 when the individual officers are exonerated of constitutional wrongdoing. *Richards v. County of San Bernardino*, 39 F.4th 562, 574 (9th Cir. 2022). If a plaintiff established he suffered constitutional injury by the county, the fact that individual officers are exonerated is immaterial to liability under § 1983. *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1250 n.12 (9th Cir. 2016) (citing *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002)). “This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof.” *Fairley*, 281 F.3d at 917 n.4.

For instructions against local governing bodies, see the following instructions: 9.5 (Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof), 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof), and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Policy that Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof).

## 9. *Eighth Amendment*

There is a clearly established right under the Eighth Amendment for prisoners to have outdoor exercise or “otherwise meaningful opportunities for recreation.” *Cardenas-Ornelas v. Johnson*, 165 F.4th 1234, 1240 (9th Cir. 2026); *Shorter v. Baca*, 895 F.3d 1176, 1185-86 (9th Cir. 2018); *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th Cir. 2010); *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993); *Spain v. Procunier*, 600 F.2d 189, 199-200 (9th Cir. 1979).

## 10. *Fourth Amendment*

Although prosecutors enjoy immunity for prosecutorial actions, it is clearly established that a state actor who presents knowingly false testimony for an arrest warrant violates the Fourth Amendment. *Gibson v. City of Portland*, 165 F.4th 1265, 1285 (9th Cir. 2026).

## **Qualified Immunity at Trial**

In most cases in which qualified immunity remains an issue at trial, the court will have found some underlying factual dispute that precluded a pretrial ruling. Qualified immunity is

then transformed from a doctrine providing immunity from suit to one providing a defense at trial. See *Torres*, 548 F.3d at 1211 n.9. When a case proceeds to trial “qualified immunity can no longer rightly be called an ‘immunity from suit’ (since the suit has already proceeded to its conclusion); rather, it is now effectively a defense.” *Sloman v. Tadlock*, 21 F.3d 1462, 1468 n.6 (9th Cir. 1994).

A dilemma arises when a qualified immunity case goes to trial because disputed factual issues remain. *Torres*, 548 F.3d at 1211 n.9. When there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity. *Morales*, 873 F.3d at 824. “[C]omparing a given case with existing statutory or constitutional precedent is quintessentially a question of law for the judge, not the jury. A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.” *Id.*

Special interrogatories to the jury can be used to establish disputed material facts. *Morales*, 873 F.3d at 824 (acknowledging jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues) (citing cases from the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits); *Conner v. Heiman*, 672 F.3d 1126, 1131 n.2 (9th Cir. 2012) (“[W]hile determining the facts is the jury’s job (where the facts are in dispute), determining what objectively reasonable inferences may be drawn from such facts may be determined by the court as a matter of logic and law.”). When the qualified immunity issue goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court’s duty. *Morales*, 873 F.3d at 824-25. Thus, consistent with this case law, there may be particular cases in which a special verdict on a discrete fact is warranted to resolve a qualified immunity claim.

But a special verdict is not required in every qualified immunity case involving disputed issues of material fact for the purpose of evaluating a post-verdict qualified immunity defense. See *Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017) (“[T]he decision ‘whether to submit special interrogatories to the jury is a matter committed to the discretion of the district court.’” (quoting *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 522 (9th Cir. 1999))); see also *Ruvalcaba*, 167 F.3d at 522 (stating that submitting special interrogatories to the jury is a matter of trial court discretion, but that “[w]e now expressly hold that a district court shall disclose [to the parties] at least the substance of special interrogatories before closing arguments have been completed”)); *Sloman*, 21 F.3d at 1468 (noting that sending the factual issues to the jury but reserving to the judge the ultimate “reasonable officer” determination leads to serious logistical difficulties: “Special jury verdicts would unnecessarily complicate easy cases, and might be unworkable in complicated ones”).

At trial a litigant may preserve the qualified immunity issue by making a Rule 50(a) motion for judgment as a matter of law. Whether the right was clearly established is an issue

for a judgment as a matter of law under Rule 50(a) and (b) and should be preserved in a Rule 50(a) motion at the close of evidence and then revisited, if appropriate, after the verdict in a Rule 50(b) motion. *Tortu v. L. V. Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009) (“When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant’s responsibility to preserve the legal issue for determination after the jury resolves the factual conflict. A Rule 50(a) motion meets this requirement.”); *Lam*, 869 F.3d at 1089 (stating that the qualified immunity defense at trial is waived by “failure to preserve the defense by filing rule 50 motions”); *see also A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452 n.2 (9th Cir. 2013) (noting that the defendant preserved his position on qualified immunity—renewed in Rule 50(b) motion after trial—by bringing Rule 50(a) motion for judgment as a matter of law before the case was submitted to jury). “[P]ost-verdict, a court must apply the qualified immunity framework to the facts that the jury found (including the defendant’s subjective intent).” *A.D.*, 712 F.3d at 459.

Please also refer to the ( or ) for further discussion of qualified immunity cases maintained therein.

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