# Qualified Immunity: A Strong Defense to Fourth Amendment Civil Claims

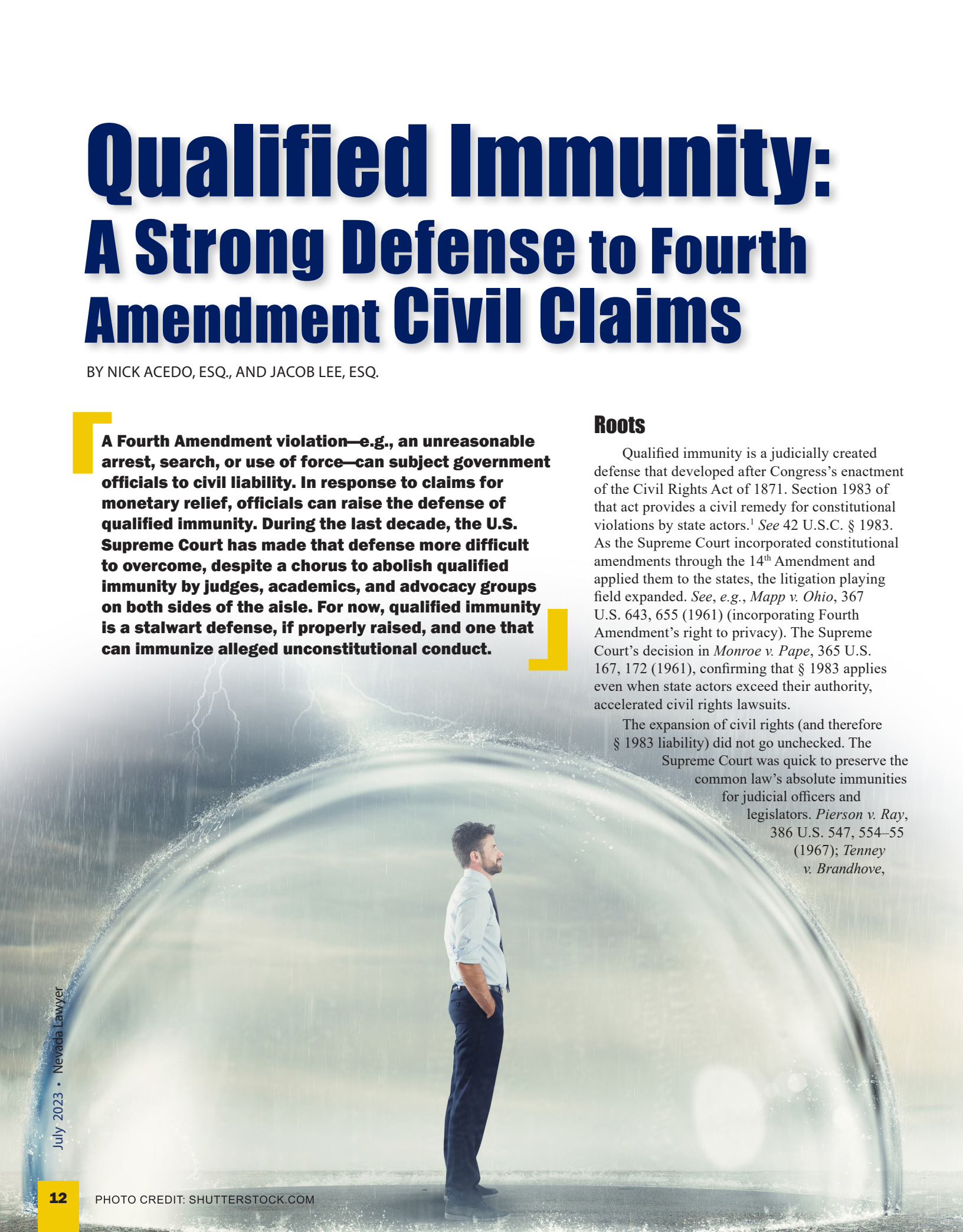
BY NICK ACEDO, ESQ., AND JACOB LEE, ESQ.

**A Fourth Amendment violation—e.g., an unreasonable arrest, search, or use of force—can subject government officials to civil liability. In response to claims for monetary relief, officials can raise the defense of qualified immunity. During the last decade, the U.S. Supreme Court has made that defense more difficult to overcome, despite a chorus to abolish qualified immunity by judges, academics, and advocacy groups on both sides of the aisle. For now, qualified immunity is a stalwart defense, if properly raised, and one that can immunize alleged unconstitutional conduct.**

## Roots

Qualified immunity is a judicially created defense that developed after Congress's enactment of the Civil Rights Act of 1871. Section 1983 of that act provides a civil remedy for constitutional violations by state actors.[1] *See* 42 U.S.C. § 1983. As the Supreme Court incorporated constitutional amendments through the 14th Amendment and applied them to the states, the litigation playing field expanded. *See*, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating Fourth Amendment's right to privacy). The Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), confirming that § 1983 applies even when state actors exceed their authority, accelerated civil rights lawsuits.

The expansion of civil rights (and therefore § 1983 liability) did not go unchecked. The Supreme Court was quick to preserve the common law's absolute immunities for judicial officers and legislators. *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967); *Tenney v. Brandhove*,





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341 U.S. 367, 379 (1951). In 1974, the court recognized that subordinate executive officials, including police officers, are entitled to qualified immunity if there were "reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974). A few years later, in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court modified this "totality of the circumstances" test and created the modern-day "clearly established law" test: executive officials are entitled to qualified immunity if their conduct did not violate a "clearly established" constitutional right "of which a reasonable person would have known."

Immunity under those circumstances, the court noted, represents "the best attainable accommodation of competing values," *id*. at 814; that is, protecting the citizenry's constitutional rights while preserving "public officials' effective performance of their duties," *Davis v. Scherer*, 468 U.S. 183, 195 (1984). *See also id*. ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."); *Harlow*, 457 U.S. at 814 (recognizing the "social costs" inherent in § 1983 claims, such as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as the need to terminate harassing "insubstantial lawsuits").

## Today's Framework

Over the next few decades, the Supreme Court refined and strengthened *Harlow*'s "clearly established law" test.

It pronounced that qualified immunity is "an immunity from suit rather than a mere defense to liability" that should stay discovery once invoked and can be immediately appealed if denied,[2] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); is designed to protect "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986); "turns on the 'objective legal reasonableness' of the action," *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); and must be "assessed in light of the legal rules that were 'clearly established' at the time [the official action] was taken," *id*.[3] The court also placed the burden of defeating qualified immunity on the plaintiff, *Davis*, 468 U.S. at 197, which requires showing both that (1) the officer's conduct violated a constitutional right, and (2) the right was "clearly established," *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court, however, may address the second prong first and grant qualified immunity solely upon finding that the alleged constitutional violation was not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Beginning in 2011, the Supreme Court ratcheted it up a notch (or two). It held that clearly established precedent must have placed the constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). That is, the law must be "sufficiently clear that *every* reasonable official would have understood that what he is doing violates" the Constitution. *Id*. (emphasis added, internal quotations and citation omitted). "It is not enough that the rule is suggested by then-existing precedent." *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018). The court has also called out the Ninth Circuit for repeatedly defining clearly established law "at a high level of generality." *al-Kidd*, 563 U.S. at 742. A court cannot simply say that the Fourth Amendment proscribes unreasonable searches and seizures. *Id*. "Qualified immunity is no immunity at all if 'clearly established' law can simply be defined" at that level. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015).

Rather, the "clearly established law" test is an "exacting standard," *id*. at 611, and "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 590. "Such specificity is especially important in the Fourth Amendment context" because "it is sometimes difficult for an officer to determine how the relevant legal doctrine … will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal quotations and citation omitted). This standard requires a plaintiff to identify a case "where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. 73, 79 (2017). Moreover, the Supreme Court has suggested—but not decided—that only *its* precedent can rise to the level of clearly established law, and regularly distinguishes circuit court cases on their facts and relies on circuit conflicts to afford qualified immunity. *See*, *e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153–55 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503–04 (2019); *Taylor v. Barkes*, 575 U.S. 822, 826–27 (2015); *Carroll v. Carman*, 574 U.S. 13, 17–20 (2014); *Stanton v. Sims*, 571 U.S. 3, 6–11 (2013); *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (the law must be "settled").

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The demanding qualified-immunity standard has resulted in a scorecard in the Supreme Court favoring civil defendants. Of the approximately 30 published cases where the Supreme Court has addressed qualified immunity, the plaintiff has prevailed in only three. The Supreme Court has reversed the denial of qualified immunity in a per curiam decision at least 10 times.

The doctrine of qualified immunity, however, is not without its critics, including one on the Supreme Court. Justice Clarence Thomas frequently criticizes the doctrine, arguing that it is untethered from the common law's (good faith) approach and therefore unmoored from any judicial interpretation of the Civil Rights Act. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari); *Baxter v. Bracey*, 140 S. Ct. 1862, 1862–65 (2020) (Thomas, J., dissenting from the denial of certiorari); *Ziglar*, 582 U.S. at 156–60 (Thomas, J., concurring in the judgment). Other jurists have complained that the

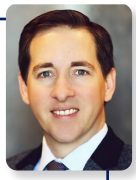
CONTINUED ON PAGE 15

CONTINUED FROM PAGE 13

# Qualified Immunity

doctrine is impractical and difficult to overcome. *See Zadeh v. Robinson*, 902 F.3d 483, 498–500 (5th Cir. 2018) (Willett, J., concurring dubitante). But the Supreme Court does not seem interested in revisiting the propriety of the doctrine. It continues to deny petitions raising such challenges and, just last term, it reversed two circuit court opinions and afforded qualified immunity to officers against Fourth Amendment claims. *See City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 9 (2021).

For now, qualified immunity is stubbornly strong and not going anywhere.

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**ENDNOTES:**

1. Qualified immunity also applies to federal statutory violations and constitutional claims against federal actors under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *See*, *e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 150–55 (2017).
2. In the Ninth Circuit, an interlocutory appeal is limited to the "purely legal contention that an officer's conduct 'did not violate the Constitution, and in any event, did not violate clearly established law.'" *Smith v. Agdeppa*, 56 F.4th 1193, 1200 (9th Cir. 2022) (quoting *Foster v. City of Indio*, 908 F3d 1204, 1210 (9th Cir. 2018)) (cleaned up). Questions of "evidence sufficiency" are not immediately appealable. *Id*.
3. For example, on a claim alleging an unlawful search, the relevant question is "whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Anderson*, 483 U.S. at 641. If the officer "reasonably but mistakenly" concluded that probable cause was present, the officer is immune. *Id*.