RECENT CASES

CIVIL RIGHTS LITIGATION — QUALIFIED IMMUNITY — FIFTH CIRCUIT HOLDS MEDICAL BOARD INVESTIGATORS ARE PROTECTED BY QUALIFIED IMMUNITY IN WARRANTLESS SEARCH OF RECORDS. — *Zadeh v. Robinson*, 902 F.3d 483 (5th Cir. 2018).

Qualified immunity protects government officials from paying damages in lawsuits brought under 42 U.S.C. § 1983 unless a court finds that the official's conduct violated clearly established law at the time of the act.[1] Recently, in *Zadeh v. Robinson*,[2] the Fifth Circuit held that Texas Medical Board (TMB) members who violated a doctor's constitutional rights were entitled to qualified immunity.[3] The Fifth Circuit reasoned that the TMB's warrantless search of Dr. Joseph Zadeh's medical records violated the Fourth Amendment.[4] The panel found no precedent, however, with a sufficiently "close congruence of facts"[5] to clearly establish that the conduct was unlawful.[6] *Zadeh* illustrates how such an analogically driven inquiry into clearly established law may result in a finding of qualified immunity even where there has been a demonstrated violation of a constitutional right. A broader inquiry focused instead on general constitutional principles, consistent with the U.S. Supreme Court's decision in *Hope v. Pelzer*,[7] would better balance rights protections with the concerns driving the qualified immunity doctrine.

On October 22, 2013, the TMB executed an administrative subpoena, searching Zadeh's office for sixteen patients' medical records.[8] Zadeh and one of his patients subsequently sued the TMB Executive Director and two TMB investigators under § 1983, claiming the warrantless search was a violation of their Fourth Amendment, due process, and privacy rights.[9] The U.S. District Court for the Western District of Texas partially granted the defendants' motion to dismiss on the grounds that they were entitled to qualified immunity with respect to the due process and privacy claims,[10] and also granted defendants' motion for summary judgment on the grounds of qualified immunity with respect to plaintiffs' Fourth Amendment claims.[11]

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1 *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).
2 902 F.3d 483 (5th Cir. 2018).
3 *Id.* at 495, 497–98.
4 *Id.* at 493.
5 *Id.*
6 *See id.* at 494–95.
7 536 U.S. 730 (2002).
8 *Zadeh*, 902 F.3d at 487–88.
9 *Id.* at 488.
10 Order at 24, Zadeh v. Robinson, No. 15-CV-598 (W.D. Tex. Mar. 29, 2016), ECF No. 34.
11 Order at 11, 14, *Zadeh*, No. 15-CV-598 (W.D. Tex. Feb. 17, 2017), ECF No. 108.

The Fifth Circuit affirmed.[12] Writing for the panel, Judge Southwick[13] concluded that the warrantless search violated the plaintiffs' Fourth Amendment rights,[14] but a lack of clearly established law finding such actions unconstitutional entitled the defendants to qualified immunity.[15] The court cited *Cotropia v. Chapman*,[16] in which the Fifth Circuit held that Supreme Court precedent clearly established that physicians were entitled to precompliance review of administrative subpoenas by a neutral decisionmaker prior to an administrative search of their office.[17] However, the court noted that in *Cotropia*, the defendant failed to argue for an exception to the warrant requirement based on *New York v. Burger*.[18] In *Burger*, the Supreme Court established this exception in closely regulated industries where three criteria are met: (1) there is a substantial government interest in the regulatory scheme under which an inspection is made; (2) the warrantless inspection is necessary to further that regulatory scheme; and (3) the inspection program provides a "constitutionally adequate substitute" for a warrant.[19]

In *Zadeh*, the Fifth Circuit performed the *Burger* analysis that the *Cotropia* court had missed. First, the court determined that the medical industry as a whole is not a closely regulated industry.[20] The court reasoned that the relevant regulations largely concerned the prescription of controlled substances, not the entire medical profession; additionally, the court pointed out the medical industry's heightened expectation of privacy.[21] The panel recognized that the subset of the medical industry that prescribes controlled substances could be a closely regulated industry.[22] However, the court declined to address the question of whether Zadeh's prescribing behavior would place him in that closely regulated category.[23]

Instead, the court concluded that even if Zadeh's clinic could be categorized as a pain management clinic engaged in a closely regulated industry, warrantless search of it would not satisfy the *Burger* exception.[24] The panel decided that the first two *Burger* criteria were satisfied, as the State did have a substantial interest in regulating the

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[12] *Zadeh*, 902 F.3d at 495, 498.

[13] Judge Southwick was joined by Judge Jolly.

[14] While plaintiffs appealed the adverse rulings with respect to all their constitutional claims, *Zadeh*, 902 F.3d at 488, the Fifth Circuit focused exclusively on the Fourth Amendment claims.

[15] *Id.* at 493–95.

[16] 721 F. App'x 354 (5th Cir. 2018). Although the *Zadeh* panel acknowledged that *Cotropia* was nonprecedential, the court nevertheless made the opinion a cornerstone of its analysis.

[17] *See Zadeh*, 902 F.3d at 489 (citing *Cotropia*, 721 F. App'x at 358).

[18] 482 U.S. 691 (1987).

[19] *Id.* at 702–03.

[20] *Zadeh*, 902 F.3d at 490–91.

[21] *See id.*

[22] *See id.* at 491.

[23] *Id.* at 492.

[24] *Id.* at 492–93.

prescription of controlled substances, and the warrantless inspection of medical records would aid in such regulation.[25] However, the court concluded that the relevant regulatory statute's grant of subpoena authority and authority to inspect pain management clinics was not a constitutionally adequate substitute for a warrant, and therefore, the TMB's administrative search did not meet the third *Burger* criterion.[26]

After concluding that Zadeh's Fourth Amendment rights had been violated, the Fifth Circuit turned to whether clearly established law would defeat a qualified immunity defense.[27] To evaluate whether the unlawfulness of the TMB officials' conduct was clearly established at the time of the violation, the court focused on whether reasonable officials would have believed that the *Burger* exception applied.[28] The TMB representatives cited *Beck v. Texas State Board of Dental Examiners*,[29] in which the Fifth Circuit held that an administrative search of a dentist's office by the Texas State Board of Dental Examiners (TSBDE) met the requirements established by *Burger*.[30] The TMB officials in *Zadeh* reasoned that because they, like the TSBDE agents granted qualified immunity in *Beck*, were investigating prescriptions of controlled substances, it was not clearly established that their conduct was outside the *Burger* exception.[31] The plaintiffs in *Zadeh*, on the other hand, argued that *Beck* was "patently distinguishable."[32]

The Fifth Circuit determined that any distinction between the case at hand and *Beck* had to be "sufficiently clear" such that reasonable TMB officials would have understood that their conduct was unlawful at the time of the search.[33] The court examined whether there existed "a close congruence of the facts in the precedent"[34] such that "every reasonable official would interpret it to establish the particular rule the plaintiffs seek to apply."[35] The panel concluded that the TMB investigators had no duty to resolve whether the conclusion drawn in *Beck* would have been drawn in their circumstances.[36] The Fifth Circuit therefore held that it was not clearly established that the TMB's administrative search was beyond the *Burger* exception, so defendants were entitled to qualified immunity.[37]

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[25] *Id.* at 492.
[26] *Id.* at 492–93.
[27] *Id.* at 493–95.
[28] *Id.* at 494.
[29] 204 F.3d 629 (5th Cir. 2000).
[30] *Id.* at 638–39.
[31] *Zadeh*, 902 F.3d at 493–94.
[32] *Id.* at 494.
[33] *Id.* (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)).
[34] *Id.* at 493.
[35] *Id.* (quoting *Wesby*, 138 S. Ct. at 590).
[36] *Id.* at 494.
[37] *See id.* at 494–95. The court rejected plaintiffs' argument that the search was invalid as a pretextual search because it was not performed "solely to uncover evidence of criminality." *Id.* at 496.

Judge Willett concurred dubitante, critiquing the clearly established law prong of qualified immunity analysis.[38] He agreed that Zadeh's constitutional rights were violated and that because of qualified immunity, the individual defendants could not be subject to suit.[39] However, he argued that the doctrine was complex and unsatisfactory in that it required plaintiffs to cite "functionally identical precedent" yet remained unclear as to how indistinguishable existing precedent must be to defeat qualified immunity, rendering "the 'clearly established' standard neither clear nor established among our Nation's lower courts."[40] Judge Willett closed by "urging recalibration of contemporary immunity jurisprudence."[41]

By requiring that plaintiffs cite precedent with "a close congruence of the facts"[42] to support a finding of clearly established law, the Fifth Circuit implicitly ignored *Hope*. In *Hope*, the Supreme Court held that case law involving materially similar facts is not necessary to defeat qualified immunity where official conduct is egregious enough to itself supply "fair warning" that the conduct violates a constitutional right.[43] *Zadeh* highlights how defining clearly established law so narrowly as to require materially similar facts denies plaintiffs recovery even where there exists a legal principle rendering an official's conduct clearly unconstitutional. To better balance the protection of constitutional rights with the promotion of government efficiency, the Fifth Circuit should leave room in its qualified immunity jurisprudence to find violations of clearly established law in cases of egregious facts as in *Hope*. Under this model, the Fifth Circuit — and other courts — should consider extending *Hope*'s obviousness inquiry to apply not only to clearly egregious conduct, but also to clearly established legal principles.

In *Hope*, the Supreme Court considered whether clearly established law prohibited prison guards from handcuffing a prisoner to an outdoor hitching post for seven hours with no bathroom breaks and minimal access to water.[44] The Court held that even though there were no earlier cases with "materially similar" facts that clearly established the unlawfulness of such conduct, the defendants were not entitled to qualified

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(quoting New York v. Burger, 482 U.S. 691, 698 (1987)). The court also held that the district court did not abuse its discretion in abstaining from deciding the requests for declaratory relief, *id.* at 496–97, and rejected plaintiffs' argument that TMB Director Robinson was liable in her supervisory capacity, *id.* at 497.

[38] *Id.* at 498 (Willett, J., concurring dubitante).

[39] *See id.*

[40] *Id.*

[41] *Id.* at 499–500.

[42] *Id.* at 493 (majority opinion).

[43] Hope v. Pelzer, 536 U.S. 730, 741 (2002). Subsequent Supreme Court decisions that do not explicitly overrule *Hope*'s "fair warning" standard but nonetheless require a close congruence of facts raise the question as to whether *Hope* is still good law. *See* cases cited *infra* note 52.

[44] *Id.* at 734–35.

immunity.[45] The Court reasoned that the prison guards' conduct so obviously violated the Eighth Amendment that a state agency regulation, a U.S. Department of Justice report, and nonidentical but relevant precedent were sufficient to give respondents fair warning that their conduct was unlawful.[46] However, subsequent Supreme Court decisions seem to conflict with the principle in *Hope* that materially similar facts in legal precedent need not exist to preclude the qualified immunity defense.[47]

In *Ashcroft v. al-Kidd*,[48] the Court held that it is not necessary for a plaintiff trying to defeat qualified immunity to produce "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[49] The Court did not mention *Hope* in its decision; indeed, it cautioned that clearly established law cannot be defined "at a high level of generality."[50] The Court reasoned that even if al-Kidd's arrest was made under the pretext of ensuring that he appear as a material witness, there was no case law holding such objectively reasonable arrests unconstitutional.[51] *Al-Kidd* and similar Supreme Court cases[52] have weakened the validity of *Hope*'s fair warning principle, which the Supreme Court has declined to apply since.[53] In *Zadeh*, the Fifth Circuit ignored *Hope*'s principles, instead aligning itself with *al-Kidd* in requiring existing legal precedent with a

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[45] *Id.* at 744–46.

[46] *See id.* at 741–46 (reprimanding the Eleventh Circuit for applying a "rigid gloss" on the qualified immunity standard by requiring that facts of precedent be materially similar to the present case, *id.* at 739, and noting that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *id.* at 741); *see also* United States v. Lanier, 520 U.S. 259, 271 (1997) ("In some circumstances . . . a very high degree of prior factual particularity may be necessary. . . . [But] in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ."); Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 204 (2008) ("The Supreme Court made clear in *Hope* . . . that factual similarity is not the touchstone of qualified immunity.").

[47] *See* Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 654 (2013) (arguing that since *Hope*, "the 'fair warning' formula has been virtually ignored by the Supreme Court").

[48] 563 U.S. 731, 741–43 (2011) (holding that former U.S. Attorney General John Ashcroft was entitled to qualified immunity because he did not violate clearly established law by authorizing federal prosecutors to arrest and detain terrorism suspects under the material witness statute).

[49] *Id.* at 741.

[50] *Id.* at 742.

[51] *Id.* at 741.

[52] *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 310 (2015) (concluding an officer did not violate clearly established law because "none of [the Court's] precedents 'squarely governs' the facts here"); Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (holding that the relevant precedent did not clearly establish that the defendant's conduct violated the Fourth Amendment because the facts of those cases did not "squarely govern[] the case here").

[53] In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011), the Fifth Circuit highlighted *al-Kidd*'s silence as to *Hope* and the tension between *Hope*'s fair warning standard and Supreme Court jurisprudence that advises courts not to "define clearly established law at a high level of generality." *Id.* at 373 (citing *al-Kidd*, 563 U.S. at 742).

"close congruence of the facts"[54] to place the unlawfulness of the officials' conduct "beyond debate."[55] This standard would require the Fifth Circuit to search for precedent that sufficiently tied to the particular facts of a case in every qualified immunity inquiry that came before it.

Hope acknowledged that "general statements of the law are not inherently incapable of giving fair and clear warning."[56] The Supreme Court's Fourth Amendment analysis is grounded in a baseline presumption that warrantless searches are per se unreasonable absent an applicable exception.[57] Despite having fair warning of this well-established principle, the TMB investigators in *Zadeh* demanded immediate compliance with their subpoena request and searched Zadeh's office.[58] Furthermore, the context of medical records suggests heightened expectations of privacy — indeed, over the last forty-five years, the Supreme Court has identified only four industries where the history of close regulation is pervasive enough to override a reasonable expectation of privacy: liquor sales, firearms dealing, mining, and running an automobile junkyard.[59] The infrequency with which the *Burger* exception has been invoked suggests that the panel could have found that the TMB investigators acted unreasonably in relying on the *Burger* exception to warrantless searches.[60] Although the panel may have still found qualified immunity after determining that, given the complexities of the *Burger* exception, the general legal principle against warrantless searches was insufficient to clearly establish the law, pursuing such an obviousness inquiry could still have bolstered the court's clearly established law analysis.

The Fifth Circuit's holding effectively denied Zadeh his constitutional rights even where the panel could have found that the legal principle barring such conduct was clearly established.[61] Importing

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[54] *Zadeh*, 902 F.3d at 493.

[55] *Id.* at 494.

[56] Hope v. Pelzer, 536 U.S. 730, 741 (2002) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

[57] *See, e.g.*, Riley v. California, 573 U.S. 373, 382 (2014) ("In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement."); Kentucky v. King, 563 U.S. 452, 459 (2011) ("Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. . . . But we have also recognized that this presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is reasonableness.'" (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))); Mincey v. Arizona, 437 U.S. 385, 393 (1978) (stating that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation'" (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968))).

[58] *See Zadeh*, 902 F.3d at 489.

[59] *See* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2454 (2015).

[60] Admittedly, the conduct of the TMB investigators does not rise to the level of egregiousness in *Hope* that led the Court to conclude that "[t]he obvious cruelty inherent in [the prison guards' punishment] should have provided [them] with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Hope*, 536 U.S. at 745.

[61] *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional*

the fair warning philosophy embodied in *Hope* might have mitigated this result. When formulating the proper standard for defining clearly established law, one must "balance § 1983's concerns of prevention, compensation, and punishment with the competing concerns of overdeterrence, conservation of government funds, and fairness to defendants."[62] Requiring materially similar facts in existing precedent risks skewing this balance, promoting government interests encompassed in qualified immunity while undermining the protection of constitutional rights.[63] Where a legal principle — such as the unreasonableness of warrantless searches — is well established but a situation lacks factually identical precedent, qualified immunity concerns such as overdeterrence are not legitimate reasons to eschew the protection of constitutional rights.[64] *Hope* recognized this principle and suggested that, in some cases, whether a law is clearly established can be based on whether officials had fair warning that their conduct was unlawful without factually similar precedent.[65] Admittedly, the Fourth Amendment's clearly established prohibition on warrantless searches may not have defeated qualified immunity in *Zadeh*, given the *Burger* exception. However, engaging in an inquiry that considers whether a legal principle is sufficient to give officials fair warning that their conduct violates constitutional rights enables courts to better balance the competing policy goals inherent in qualified immunity cases.

To reconcile the ambiguity in Supreme Court precedent on clearly established law, courts may consider moving toward a two-category approach based on the obviousness of a general constitutional principle. In the "obvious" category, a relevant statute or generally established constitutional principle would be enough to clearly establish the law, even where the facts of precedent are not identical.[66] In the "nonobvious" category, plaintiffs may be required to cite precedent of factual particularity to clearly establish the law. A two-category approach hinging

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Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219, 1244 (2015) ("[T]he Court's fundamental reshaping of the qualified immunity doctrine . . . has had the harmful, practical effect of limiting the ability of all persons to receive the protections of the Constitution.").

62 Caryn J. Ackerman, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1033 (2006).

63 *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77 (1989) ("The Court's current approach unnecessarily subordinates constitutional protections to interests of governmental efficiency. . . . [A] qualified immunity standard that allows for a defense of 'reasonable' violations of rights invites a re-balancing of the substantive constitutional equation and the double counting of the governmental interests.").

64 *See id.* at 75–76.

65 *See Hope*, 536 U.S. at 739–41; *see also* Reinhardt, *supra* note 61, at 1246.

66 *See* Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1284–85 (2012).

on obviousness would require courts to standardize certain criteria. Courts must determine when a violation is "obvious."[67]

One approach might be derived from *Vinyard v. Wilson*.[68] In *Vinyard*, the Eleventh Circuit applied a three-category analysis of fair warning: (1) in "obvious clarity" cases, a federal statute or constitutional provision is specific enough to clearly establish the law even in the absence of case law;[69] (2) where an official's "conduct is not so egregious as to violate" a constitutional right "on its face," the court should turn to case law, which can include "broad statements of principle" that "are not tied to particularized facts";[70] and (3) where there is "no case law with a broad holding 'of X' that is not tied to particularized facts," clearly established law requires "precedent that is tied to the facts."[71] A case may therefore be "obvious" if, in an authoritative decision not tied to particularized circumstances, the court concluded that a general constitutional rule gives fair warning that certain conduct is per se unconstitutional. *Al-Kidd*, for example, was perhaps a "nonobvious" case because there was no binding precedent that held that pretextual arrests were per se unconstitutional at the time of the plaintiff's arrest.[72] In contrast, *Hope* argued that punishment amounting to unnecessary infliction of "wanton and unnecessary"[73] pain is generally recognized by precedent as an Eighth Amendment violation.[74] This would suggest that *Hope* was an "obvious" case.

Qualified immunity has received much criticism for its dependence on a judge's subjective inquiry: there is broad judicial discretion in the determination of whether clearly established law exists.[75] *Zadeh* illustrates the key policy concerns that are implicated by the Fifth Circuit's narrow, fact-specific definition of clearly established law. A framework that, like the Eleventh Circuit's *Vinyard* test, both acknowledges recent Supreme Court decisions' emphasis on factual similarity and integrates *Hope*'s focus on fair warning, may better carry out the purposes of the qualified immunity doctrine while promoting the protection of constitutional rights. To effect this result, courts may consider moving toward a two-category approach based on the obviousness of the constitutional violation at issue.

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[67] *See* Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense:* Hope*'s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 584–85 (2006) (commenting on the challenge that lower courts face in applying an objective test to determine whether an official's conduct is an obvious enough constitutional violation to meet *Hope*'s "ambiguous" fair warning standard, *id.* at 584).

[68] 311 F.3d 1340 (11th Cir. 2002).

[69] *Id.* at 1350.

[70] *Id.* at 1351.

[71] *Id.* (emphasis omitted).

[72] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

[73] Hope v. Pelzer, 536 U.S. 730, 738 (2002).

[74] *See id.* at 737–38.

[75] *See, e.g.*, Aaron Belzer, *The Audacity of Ignoring* Hope*: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 679 (2012) ("The lack of guidance about the clearly established requirement leaves the availability of a remedy up to the caprice of a judge who may or may not require a high degree of factual similarity.").