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## RECENT CASES

CIVIL RIGHTS LITIGATION — QUALIFIED IMMUNITY — EIGHTH CIRCUIT GRANTS QUALIFIED IMMUNITY TO OFFICER WHO PERFORMED TAKEDOWN MANEUVER ON NONVIOLENT, NONTHREATENING, NONFLEEING MISDEMEANANT. — *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (en banc).

Under the doctrine of qualified immunity, government officials are protected from damages liability in suits brought under 42 U.S.C. § 1983, so long as their conduct did not violate a clearly established right of which a reasonable official would have known.<sup>1</sup> Applying this standard — and in particular, determining whether a right is clearly established — has been the source of much confusion.<sup>2</sup> While the Supreme Court has made clear that a plaintiff challenging qualified immunity must point to precedent that “squarely governs” the facts at issue,<sup>3</sup> it has failed to provide any meaningful guidance as to the degree of factual similarity required.<sup>4</sup> Recently, in *Kelsay v. Ernst*,<sup>5</sup> the Eighth Circuit held that an officer who performed a takedown maneuver on a nonviolent, nonthreatening, nonfleeing misdemeanor was entitled to qualified immunity on the basis that the law surrounding the officer’s use of force was not clearly established.<sup>6</sup> In searching for a case that “squarely govern[ed]” the facts at issue, the court constrained the universe of relevant precedent and virtually guaranteed the outcome of its qualified immunity analysis. *Kelsay* thus highlights the danger in demanding factually specific precedent and shows why courts should prefer a standard based on general principles.

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<sup>1</sup> Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

<sup>2</sup> See, e.g., Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2015–16 (2018) (“Courts have had difficulty applying qualified immunity consistently, as figuring out what a reasonable officer ‘should have known’ and at what level of specificity a legal principle has been established can devolve into an almost metaphysical exercise.”); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1034–36 (2005) (explaining that courts struggle to determine the level of detail at which the law must be established, how much factual similarity is required between the current case and precedent, and what sources can clearly establish the law).

<sup>3</sup> Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam) (emphasis omitted) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam)).

<sup>4</sup> See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 257 (2013) (“[T]he degree of precedential specificity required for clearly established law is hard to state precisely. . . . [P]artly, it is because the Supreme Court has not stepped in with the level of supervision required to resolve . . . inconsistencies.”).

<sup>5</sup> 933 F.3d 975 (8th Cir. 2019) (en banc).

<sup>6</sup> *Id.* at 981–82. While the misdemeanor’s act of walking away could be interpreted as flight, viewing the facts in the light most favorable to her, she was not fleeing — nor was she violent, threatening, resisting arrest, or ignoring commands. *Id.* at 985–86 (Smith, C.J., dissenting).

On May 29, 2014, Melanie Kelsay was at a public pool in Wymore, Nebraska, with her three children and her friend Patrick Caslin.<sup>7</sup> Caslin, at one point, came up behind Kelsay as if to throw her into the pool; onlookers believed Caslin was assaulting Kelsay, and a pool employee called the police.<sup>8</sup> When Kelsay and her party left the pool, Wymore Police Chief Russell Kirkpatrick and Officer Matthew Bornemeier were waiting for them,<sup>9</sup> and Kirkpatrick placed Caslin under arrest for domestic assault.<sup>10</sup> Kelsay tried to explain that she and Caslin were just “playing around.”<sup>11</sup> When that failed, she stood in front of the patrol car door until Bornemeier escorted her away.<sup>12</sup> Gage County Sheriff’s Deputy Matt Ernst and Sergeant Jay Welch arrived, and Kirkpatrick told them that “Kelsay tried to prevent Caslin’s arrest” and should be arrested.<sup>13</sup> Kelsay began to walk toward her daughter, who was arguing with a patron near the pool doors, but Ernst “grabbed [Kelsay’s] arm, and told her to ‘get back here.’”<sup>14</sup> Kelsay stopped, turned toward Ernst, and explained that she wanted to know what the patron was saying to her daughter, then continued to walk toward her daughter.<sup>15</sup> Ernst then placed Kelsay — who was approximately five feet tall and 130 pounds — in a “bear hug” and threw her to the ground, rendering Kelsay briefly unconscious and fracturing her collarbone.<sup>16</sup>

Kelsay sued the City of Wymore and Kirkpatrick, Bornemeier, Ernst, and Welch for wrongful arrest, excessive use of force, and deliberate indifference to her medical needs.<sup>17</sup> In May 2017, the district court denied Ernst’s motion for summary judgment on Kelsay’s excessive force claim but granted the other defendants’ motions on all remaining claims.<sup>18</sup> Because Ernst argued that he was entitled to qualified immunity, the court applied the two-part qualified immunity test, which asks (1) whether the officer violated a constitutional right, and (2) whether that right was clearly established at the time of the incident.<sup>19</sup> Under *Pearson v. Callahan*,<sup>20</sup> a court need not answer both questions; so long

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<sup>7</sup> *Id.* at 977–78 (majority opinion).

<sup>8</sup> *Id.* at 978.

<sup>9</sup> *Kelsay v. Ernst*, No. 15-CV-3077, 2017 WL 5953112, at \*1 (D. Neb. May 19, 2017).

<sup>10</sup> *Kelsay*, 933 F.3d at 978.

<sup>11</sup> *Kelsay*, 2017 WL 5953112, at \*1.

<sup>12</sup> *Kelsay*, 933 F.3d at 978.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Kelsay*, 2017 WL 5953112, at \*2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*1. The court had previously dismissed the wrongful arrest and deliberate indifference claims against Ernst and Welch. *Id.* at \*2.

<sup>19</sup> *Id.* at \*3.

<sup>20</sup> 555 U.S. 223 (2009).

as the answer to either question is no, the officer is not held liable.<sup>21</sup> The district court first considered whether Ernst had violated Kelsay's Fourth Amendment right to be free from excessive force — that is, whether Ernst's use of force was objectively reasonable.<sup>22</sup> Viewing the facts in the light most favorable to Kelsay, the court concluded that although Kelsay “was not precisely ‘compliant,’” she was not violent, threatening, or “actively resisting arrest,” and thus, a jury could find that Ernst's takedown maneuver was unreasonable.<sup>23</sup>

Next, the district court found that Kelsay's right to be free from this excessive use of force was clearly established.<sup>24</sup> Citing several cases in which the Eighth Circuit found unreasonable the use of force against non-violent, nonthreatening, nonfleeing individuals who were “interfering with police or behaving disrespectfully,” the district court stated that “[f]orce may only be used to overcome physical resistance or threatened force, and may not be employed simply because a suspect is disagreeable.”<sup>25</sup> Thus, if Kelsay's account of the events leading to her takedown were true, “the excessiveness of Ernst's use of force would have been apparent.”<sup>26</sup> But because Ernst's account differed materially from Kelsay's, the court ruled that qualified immunity and summary judgment were precluded.<sup>27</sup>

Ernst appealed from the district court's judgment, and an Eighth Circuit panel reversed on the basis that the law surrounding Ernst's use of force was not clearly established.<sup>28</sup> In coming to this conclusion, the court relied primarily on its decision in *Ehlers v. City of Rapid City*,<sup>29</sup> wherein it held that an officer did not violate the Fourth Amendment by using force against a nonviolent misdemeanor who continued to walk away after being ordered twice to place his hands behind his back.<sup>30</sup> The court added that none of the decisions cited by the district court could clearly establish the law in this particular context, since none of them involved the specific factual scenario of “a suspect who ignored an officer's command and walked away.”<sup>31</sup>

The Eighth Circuit granted an en banc rehearing and, like the panel opinion it vacated, reversed the district court's judgment.<sup>32</sup> Writing for

<sup>21</sup> See *id.* at 236.

<sup>22</sup> *Kelsay*, 2017 WL 5953112, at \*4.

<sup>23</sup> *Id.* Though Ernst alleged that Kelsay “was perceived by all officers and objective witnesses present to be aggressive, resisting, and noncompliant,” Kelsay denied such conduct. *Id.*

<sup>24</sup> *Id.* at \*5.

<sup>25</sup> *Id.* (citing *Shannon v. Koehler*, 616 F.3d 855, 864–65 (8th Cir. 2010)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Kelsay v. Ernst*, 905 F.3d 1081, 1082 (8th Cir. 2018), *vacated and reh'g en banc granted*, No. 17-2181 (8th Cir. Nov. 30, 2018).

<sup>29</sup> 846 F.3d 1002 (8th Cir. 2017).

<sup>30</sup> *Kelsay*, 905 F.3d at 1085 (citing *Ehlers*, 846 F.3d at 1010–11).

<sup>31</sup> *Id.*

<sup>32</sup> *Kelsay*, 933 F.3d at 977.

the en banc court, Judge Colloton<sup>33</sup> noted that in the context of excessive force, “police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.”<sup>34</sup> Like the panel, the en banc court held that it was not clearly established that Ernst could not perform a takedown maneuver on Kelsay after she disregarded his command.<sup>35</sup> The en banc court, however, emphasized the differences between the incident at issue and each of the cases cited by Kelsay and the district court, concluding that none “squarely govern[ed] the specific facts at issue.”<sup>36</sup> Specifically, since those cases involved “suspects who were compliant or engaged in passive resistance,” they did not “constitute clearly established law” in the circumstances surrounding Ernst’s use of force against Kelsay.<sup>37</sup> Finally, the court cited *Ehlers* as its “closest decision on point,” and, as in the panel decision, concluded that it supported qualified immunity for Ernst.<sup>38</sup>

Chief Judge Smith dissented, disagreeing in particular with the majority’s characterization of Kelsay’s behavior and the relevant precedent.<sup>39</sup> Whereas the majority focused on Kelsay’s noncompliance, Judge Smith emphasized that Kelsay was nonviolent, nonthreatening, nonfleeing, and nonresisting.<sup>40</sup> Further, viewing the facts in the light most favorable to Kelsay, Judge Smith contended that Kelsay did comply with Ernst’s command by stopping, turning around, and explaining what she was doing.<sup>41</sup> Judge Smith noted that Eighth Circuit case law, through a body of decisions dealing with circumstances similar to Kelsay’s, had clearly established that the use of force against a “non-threatening misdemeanor who was not fleeing, resisting arrest, or ignoring other commands violates that individual’s right to be free from excessive force.”<sup>42</sup>

Judge Grasz also wrote separately to note that “the outcome here underscores a wider legal problem.”<sup>43</sup> Specifically, what happened to Kelsay could happen again, because the majority skipped the constitutionality prong of its qualified immunity analysis — as allowed by the Supreme Court’s decision in *Pearson*.<sup>44</sup> As such, “[t]he law is never made clear enough to hold individual officials liable.”<sup>45</sup>

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<sup>33</sup> Judges Beam, Loken, Gruender, Benton, Shepherd, Stras, and Kobes joined Judge Colloton.

<sup>34</sup> *Kelsay*, 933 F.3d at 980 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (internal quotation marks omitted)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting *Kisela*, 138 S. Ct. at 1153).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 981.

<sup>39</sup> *Id.* at 985 (Smith, C.J., dissenting). Judges Kelly, Erickson, and Grasz joined Judge Smith.

<sup>40</sup> *Id.* at 985–86.

<sup>41</sup> *Id.* at 986.

<sup>42</sup> *Id.* at 985.

<sup>43</sup> *Id.* at 987 (Grasz, J., dissenting).

<sup>44</sup> *Id.* at 987–88.

<sup>45</sup> *Id.* at 987.

Given the Supreme Court's lack of guidance as to the level of factual specificity required for the law to be clearly established, the divergent outcomes between the district court and the Eighth Circuit are not entirely surprising. It is worth noting that both the district court and the Eighth Circuit essentially agreed on the facts of the case; indeed, the district court conceded that Kelsay "was not precisely 'compliant.'"<sup>46</sup> What the courts disagreed on was which facts were relevant to the qualified immunity analysis and how similar those facts had to be to existing precedent. But *Kelsay* underscores the risk that the Supreme Court's lack of guidance creates — namely, that a court's framing of the relevant facts can determine the outcome of the qualified immunity analysis. Thus, courts should prefer a standard based on general principles, which would better protect plaintiffs without being outcome determinative.

The Supreme Court's qualified immunity jurisprudence has failed to provide useful guidance to lower courts as to when the law is clearly established. Specifically, the Court has been unclear about the relevant facts lower courts should consider and the requisite degree of factual similarity between the case at hand and existing precedent. While the Court held in *Hope v. Pelzer*<sup>47</sup> that "materially similar" facts are not necessary to clearly establish the law,<sup>48</sup> just two years later, in *Brosseau v. Haugen*,<sup>49</sup> the Court reversed a denial of qualified immunity on the basis that none of the cases the parties pointed to "squarely govern[ed]" the facts at issue.<sup>50</sup> Since *Brosseau*, the Court has stated that in the context of excessive force, "the result [of the qualified immunity analysis] depends very much on the facts of each case."<sup>51</sup> Yet even as the Court has consistently heightened the standard for clearly establishing the law, it has not explicitly overruled *Hope*.<sup>52</sup>

Unsurprisingly, the circuit courts have struggled to reconcile the Supreme Court's conflicting messages.<sup>53</sup> Comparing the opinions within

<sup>46</sup> *Kelsay v. Ernst*, No. 15-CV-3077, 2017 WL 5953112, at \*4 (D. Neb. May 19, 2017).

<sup>47</sup> 536 U.S. 730 (2002).

<sup>48</sup> *Id.* at 741.

<sup>49</sup> 543 U.S. 194 (2004) (per curiam).

<sup>50</sup> *Id.* at 201.

<sup>51</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)).

<sup>52</sup> See, e.g., Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 654–56 (2013); Daniel K. Siegel, Recent Development, *Clearly Established Enough: The Fourth Circuit's New Approach to Qualified Immunity in Bellotte v. Edwards*, 90 *N.C. L. REV.* 1241, 1241–42 (2012) ("[T]he Court has seesawed between requiring precedent with a high degree of factual similarity to the case at hand and allowing broader statements of law to suffice. No iteration of the test explicitly overrules any other, and the Court has never fully explained how these tests are supposed to fit together.")

<sup>53</sup> See Siegel, *supra* note 52, at 1251–52. For instance, while the Sixth Circuit views *Hope* and *Brosseau* as "two paths" to finding clearly established rights," *id.* at 1251 (quoting Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope's Legacy, Neither Clear nor*

*Kelsay* is telling: In laying out the standard for qualified immunity, the majority noted that “existing precedent [must] squarely govern[] the specific facts at issue.”<sup>54</sup> The dissent did not use that language, noting instead that while “a body of relevant case law is usually necessary,”<sup>55</sup> “a case directly on point” is not.<sup>56</sup> And while the district court noted the importance of “specificity . . . in the Fourth Amendment context,” it clarified, like the dissent, that a case on point is not necessary.<sup>57</sup> The Supreme Court’s lack of guidance has thus led judges — even within the same jurisdiction — to determine whether the law is clearly established based on seemingly “arbitrary degree[s] of factual specificity.”<sup>58</sup>

How a court frames the question of whether the law is clearly established then virtually determines whether qualified immunity is granted or denied. Specifically, courts that allow general principles developed through prior case law to establish the law will be more likely to deny qualified immunity in a variety of circumstances, whereas courts that require a “factually identical case” will almost always grant qualified immunity.<sup>59</sup> Relatedly, the facts the court deems germane to the analysis determine the relevant precedent.<sup>60</sup> In *Kelsay*, the majority focused on the issue of Kelsay’s noncompliance, rather than the fact that she was not threatening, violent, or fleeing.<sup>61</sup> But even that emphasis on non-compliance need not have resulted in qualified immunity for Ernst; the Eighth Circuit had previously denied qualified immunity in cases where the plaintiff had been noncompliant.<sup>62</sup>

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*Established*, 29 AM.J. TRIAL ADVOC. 563, 601 (2006)), the Eighth Circuit acknowledges but ultimately ignores *Brosseau* in favor of *Hope*, and “the Ninth Circuit has fully embraced *Brosseau*,” *id.* at 1252.

<sup>54</sup> *Kelsay*, 933 F.3d at 980 (quoting *Kisela*, 138 S. Ct. at 1153).

<sup>55</sup> *Id.* at 982 (Smith, C.J., dissenting) (quoting *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019)).

<sup>56</sup> *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

<sup>57</sup> *Kelsay v. Ernst*, No. 15-CV-3077, 2017 WL 5953112, at \*5 (D. Neb. May 19, 2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)).

<sup>58</sup> Aaron Belzer, Comment, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENVER U. L. REV. 647, 647 (2012).

<sup>59</sup> Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 475 (2000); see also John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1309 (2012) (“When a court formulates a legal question with [a high degree of] factual specificity, it is much more likely to find that the right in question is not clearly established.”).

<sup>60</sup> Cf. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1954 (2018) (“[W]hether a reasonable official would recognize that her conduct violates clearly established constitutional law is highly determined by comparing the facts of her scenario to the facts of the relevant cases that define the scope of that right.”).

<sup>61</sup> See *Kelsay*, 933 F.3d at 980 (“None of the decisions cited by . . . Kelsay involved a suspect who ignored an officer’s command and walked away . . .”).

<sup>62</sup> See, e.g., *id.* at 985–86 (Smith, C.J., dissenting) (collecting cases); *Brown v. City of Golden Valley*, 574 F.3d 491, 494–95, 500 (8th Cir. 2009) (denying qualified immunity where an officer tasered a woman who failed to comply with two commands to hang up her phone); see also *Kelsay*, 2017 WL 5953112, at \*5 (explaining that the Eighth Circuit has found uses of force to be unreasonable even where the individual was “interfering with police”).

The court in *Kelsay* guaranteed a grant of qualified immunity when it homed in on the particularities of Kelsay's noncompliance: that she ignored one command and walked away.<sup>63</sup> By deciding that the relevant fact was not just that Kelsay *was* noncompliant, but exactly *how* she was noncompliant, the court severely constrained the universe of relevant precedent. Indeed, while there were numerous Eighth Circuit cases involving use of force against noncompliant individuals, the court found none involving an individual who was taken down after ignoring one command and walking away.<sup>64</sup> The court's "closest decision on point" involved a misdemeanor who ignored *two* commands and walked away — and there, the court had granted qualified immunity.<sup>65</sup> The court concluded that "even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established when Ernst made his arrest," and thus Ernst was entitled to qualified immunity.<sup>66</sup>

*Kelsay* highlights why courts should prefer a qualified immunity standard that is less dependent on factually specific precedent and based instead on general principles. As noted by both the district court and the en banc dissent, an entire body of Eighth Circuit case law had established that "force is least justified" against nonviolent, nonthreatening, nonfleeing misdemeanants who are not resisting arrest.<sup>67</sup> Under this principle, first articulated in the Supreme Court's decision in *Graham v. Connor*,<sup>68</sup> the Eighth Circuit has denied qualified immunity in a variety of factual contexts as early as 2002 and as recently as 2012.<sup>69</sup> But the en banc majority did not even mention this principle. Instead, the majority demanded precedent involving "an officer's use of force against a suspect who ignores a command and walks away."<sup>70</sup>

Such an "exacting . . . demand for similarity in precedent" is overly protective of officers' interests.<sup>71</sup> Some commentators have observed

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<sup>63</sup> See *Kelsay*, 933 F.3d at 980.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 981 (discussing *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017)).

<sup>66</sup> *Id.* at 981; see *id.* at 981–82.

<sup>67</sup> *Kelsay*, 2017 WL 5953112, at \*5; see also *Kelsay*, 933 F.3d at 982–83 (Smith, C.J., dissenting) (quoting *Brown*, 574 F.3d at 499).

<sup>68</sup> 490 U.S. 386 (1989). The Court explained that whether a use of force is reasonable depends on factors "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

<sup>69</sup> See *Kelsay*, 2017 WL 5953112, at \*5 (collecting cases).

<sup>70</sup> *Kelsay*, 933 F.3d at 980.

<sup>71</sup> Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1815 (2016); see also John C. Jeffries, Jr., *Dunwody Distinguished Lecture in Law, What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010) ("[A] restrictive approach to relevant precedent beeps up qualified immunity and makes its protections more difficult to penetrate."); Wilson, *supra* note 59, at 473 ("Circuits that demand tight factual similarity between a prior case

that qualified immunity currently resembles something more like absolute immunity.<sup>72</sup> As Fifth Circuit Judge Willett recently noted, an exacting standard “let[s] public officials duck consequences for bad behavior — no matter how palpably unreasonable — as long as they were the *first* to behave badly.”<sup>73</sup> A generalized rule, on the other hand, “better protect[s] citizens” against excessive uses of police force.<sup>74</sup>

Application of broad principles does not grant a windfall to civil rights plaintiffs — it merely helps to level the playing field. Perhaps the most compelling argument against a qualified immunity standard based on general principles is that it would fail to provide sufficient notice to government officials. However, police officers already apply broad principles to a variety of situations every day.<sup>75</sup> For instance, police officers are guided by use of force policies that typically “embrace fairly generalized standards” such as that expounded in *Graham*.<sup>76</sup> Another concern is that the use of general principles will make attaining qualified immunity impossible. Yet the Eighth Circuit itself has granted qualified immunity under its general principle regarding use of force.<sup>77</sup> Therefore, use of broad principles simply puts some weight on a side of the scale where, under the current qualified immunity framework and the approach taken in *Kelsay*, there is almost none.<sup>78</sup>

In light of the Supreme Court’s conflicting messages regarding what constitutes clearly established law, the Eighth Circuit had previously eschewed *Brosseau*’s demand for factually similar precedent in favor of *Hope*’s plaintiff-friendly notice standard.<sup>79</sup> The court’s decision in *Kelsay* represents a stark departure from that approach. By adding a “narrow view of relevant precedent . . . to the demand for extreme factual specificity in the guidance those precedents must provide,”<sup>80</sup> the court virtually guaranteed a grant of qualified immunity for Ernst.

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and the case at hand . . . represent those where the prevailing consensus seeks strongly to support . . . protection of public officials from personal liability . . .”).

<sup>72</sup> See, e.g., Anthony Stauber, Note, *When Is a Right Not a Right?: Qualified Immunity After Pearson*, 39 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 125, 134 (2018).

<sup>73</sup> *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

<sup>74</sup> Cover, *supra* note 71, at 1814; see also Wilson, *supra* note 59, at 473 (“In circuits where general principles of law . . . can clearly establish the law, the more persuasive policy concern has tended to be that of providing plaintiffs with an adequate remedy against government actors who violate their rights.”).

<sup>75</sup> See Cover, *supra* note 71, at 1816 & n.271.

<sup>76</sup> *Id.* at 1824.

<sup>77</sup> See, e.g., *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1012 (8th Cir. 2017) (granting qualified immunity where officers “reasonably interpreted” the plaintiff to be resisting arrest and posing a threat).

<sup>78</sup> See, e.g., Jeffries, *supra* note 71, at 869 (“Today, the law of qualified immunity is out of balance, particularly in the context of rights defined generally without particularizing rules and doctrines, a category of which unconstitutionally excessive force . . . is both the clearest and most important example.”).

<sup>79</sup> See Golden & Hubbard, *supra* note 53, at 604; Siegel, *supra* note 52, at 1251–52.

<sup>80</sup> Jeffries, *supra* note 71, at 859.