QUALIFIED IMMUNITY FOR "JUST FOLLOWING ORDERS"

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When military officers have been tried for grave atrocities, from the Holocaust to the My Lai Massacre,[1] some have claimed that they were "only following orders."[2] The "Nuremberg" defense or "superior orders defense"[3] has its cousin in civil rights law through the *"just following orders" defense*, a strand of qualified immunity doctrine.[4] Officers sued by plaintiffs seeking civil damages for the violation of their constitutional and statutory rights have raised this defense in many contexts. Police officers received immunity based on following orders[5] when, responding to a 911 call and lacking a warrant, they entered the apartment of a woman with Down syndrome, seized her, and involuntarily held her in a psychiatric ward.[6] Police officers who asked for a prosecutor's advice before conducting searches[7] and arrested suspects for violating statutes that had previously been declared unconstitutional[8] similarly received qualified immunity under the "just following orders" defense.[9] On the other hand, the D.C. Circuit rejected an argument from officers who helped execute COINTELPRO[10] that they were merely implementing agency policy when surveilling plaintiffs.[11] Courts also denied qualified immunity to officers who removed a child from his parents without reasonable suspicion of an imminent threat[12] or barred an

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[1] *See* James B. Insco, Note, *Defense of Superior Orders Before Military Commissions*, 13 DUKE J. COMPAR. & INT'L L. 389, 389, 406 (2003).

[2] *Id.* at 389.

[3] Mark W.S. Hobel, *"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel*, 111 COLUM. L. REV. 574, 576–77 (2011) (defining "the 'Nuremberg' defense — the defense invoked by Nazi defendants at the Nuremberg Tribunals that they had merely been 'obeying orders' and therefore should be exculpated").

[4] *See, e.g.*, Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57, 75 (2007).

[5] *See* Anthony v. City of New York, 339 F.3d 129, 138 (2d Cir. 2003).

[6] *See id.* at 132–34, 137.

[7] *See, e.g.*, Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997).

[8] *See* Amore v. Novarro, 624 F.3d 522, 532 (2d Cir. 2010).

[9] *See id.* at 535; *Forman*, 104 F.3d at 960.

[10] COINTELPRO was an FBI surveillance program that targeted the Communist Party, antiwar groups, and civil rights organizations (among others) from 1956–1971. *See* Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1079, 1088–89, 1093 (2002).

[11] Hobson v. Wilson, 737 F.2d 1, 66–67 (D.C. Cir. 1984) (per curiam).

[12] Halley v. Huckaby, 902 F.3d 1136, 1149 (10th Cir. 2018).

individual from public grounds without due process of law[13] and claimed the "just following orders" defense.

The Supreme Court discussed the "just following orders" defense during oral argument in *Trump v. United States*,[14] which addressed the scope of presidential immunity for criminal liability.[15] Justices Alito and Sotomayor played with a hypothetical: What if the President ordered SEAL Team 6 (or other military officers) to assassinate a political rival?[16] Justice Alito posited that this order "isn't plausibly legal."[17] Justice Sotomayor agreed that, under the qualified immunity doctrine, it would not be reasonable to "order[] the assassination of a rival."[18] Both Justices resisted the idea of criminal or civil immunity for such an egregiously unlawful action.[19]

The "just following orders" defense has a bearing on the civil liability of officers implementing the specific orders of their superiors and engaging in any number of routine government functions. It derives from language in *Harlow v. Fitzgerald*[20] related to "extraordinary circumstances"[21] that warrant qualified immunity even where the law is clearly established and based on an officer's good faith, in contrast to *Harlow*'s overwhelming emphasis on qualified immunity as a purely objective inquiry.[22] One might anticipate the "just following orders" doctrine swallowing the modern, objective qualified immunity test because the defense, in practice, covers ordinary events for a government officer: following orders, instructions, laws, and policies.[23] This is not so. Courts do not blindly credit the defense and instead inquire into the reasonableness of an officer's decision to follow orders.[24]

This Essay outlines a descriptive typology of the "just following orders" defense, arguing that it takes four forms: Officers claim qualified immunity for following (1) the orders of a superior; (2) the advice of counsel; (3) the directive of a statute, ordinance, or policy; or (4) the orders of a court. In each instance, courts have rejected treating this wide-spanning defense as an exception to the objective qualified

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13 Kennedy v. City of Cincinnati, 595 F.3d 327, 337–38 (6th Cir. 2010).

14 144 S. Ct. 2312 (2024); *see* Transcript of Oral Argument at 41, 48, 60, Trump v. United States, 144 S. Ct. 2312 (No. 23-939), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_3fb4.pdf [https://perma.cc/DAT4-374V].

15 Trump v. United States, 144 S. Ct. at 2324.

16 *See* Transcript of Oral Argument, *supra* note 14, at 12, 24.

17 *Id.* at 24.

18 *Id.* at 12.

19 *See id.* at 23–24.

20 457 U.S. 800 (1982).

21 *Id.* at 819.

22 *See id.* at 818–19.

23 *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988).

24 *See infra* Part II, pp. 108–13.

immunity inquiry, instead assessing an officer's reliance on orders for reasonableness, the core tenet of qualified immunity.[25]

I. ORIGINS OF THE "JUST FOLLOWING ORDERS" DEFENSE

Qualified immunity protects government officers from suit in their individual capacity.[26] Prior to *Harlow*, qualified immunity was a "good faith" standard with both objective and subjective elements.[27] Qualified immunity was unavailable when an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[28]

Harlow "completely reformulated" the doctrine of qualified immunity, shifting from the subjective malice inquiry derived from common law to an objective reasonableness inquiry.[29] *Harlow* held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known[,]" even if an official acted in bad faith.[30] Still, *Harlow* preserved a vestige of the good faith defense that appeared to even further broaden the availability of qualified immunity:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims *extraordinary circumstances* and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.[31]

Although the Court cited subjective considerations as a basis for qualified immunity, it reasserted that "the defense would turn primarily on objective factors."[32] Since *Harlow*, the Court has not used the phrase "extraordinary circumstances," leading scholars to describe this aspect

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[25] *See infra* notes 37–44 and accompanying text.

[26] *Harlow*, 457 U.S. at 815 (defining qualified immunity defense); *see also* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.").

[27] *See* Baxter v. Bracey, 140 S. Ct. 1862, 1863–64 (2020) (Thomas, J., dissenting from the denial of certiorari) (chronicling history of qualified immunity and good faith defense).

[28] Wood v. Strickland, 420 U.S. 308, 322 (1975).

[29] Anderson v. Creighton, 483 U.S. 635, 645 (1987).

[30] *Harlow*, 457 U.S. at 818; *see, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 211 (2023) (explaining that *Harlow* rejected good faith immunity in favor of a test centered on "the reasonableness of the officer's behavior").

[31] *Harlow*, 457 U.S. at 818–19 (emphasis added).

[32] *Id.* at 819.

of qualified immunity as "mysterious"[33] and "confusing."[34] Though qualified immunity is the subject of frequent critiques and empirical analyses,[35] scholars rarely examine the extraordinary circumstances doctrine.[36]

This Essay presents several lines of case law that have developed under the extraordinary circumstances language of *Harlow*. Courts of appeals have held that officers should be granted qualified immunity for extraordinary circumstances if (1) following the orders of another officer;[37] (2) following a statute, ordinance, regulation, or policy;[38] (3) relying on the advice of counsel or a prosecutor;[39] or (4) following a court order.[40] Officers claim that the order, advice, or statute on which they relied prohibited them from knowing the relevant legal standard. In these four lines of case law, and particularly where an officer cites the advice of counsel, officers draw on *Harlow*'s extraordinary circumstances language to claim good faith immunity that is otherwise unavailable under *Harlow*.[41] The orders or law at issue need not be painstakingly precise as to the action an officer must take, and officers may therefore claim the defense when they execute a variety of potential orders.

Although it might appear that the extraordinary circumstances language from *Harlow* broadens qualified immunity, courts resoundingly reject officers' efforts to claim qualified immunity based on good faith.

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[33] John M. Greabe, *Objecting at the Altar: Why the* Herring *Good Faith Principle and the* Harlow *Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 11 (2012) (noting "*Harlow*'s mysterious 'extraordinary circumstances' dictum, which immediately followed its announcement of the qualified immunity test, but which has not appeared in a majority opinion issued by the Court since *Harlow*").

[34] Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 539 (2016) ("The Court's statement about extraordinary circumstances is confusing because it simultaneously suggests that the inquiry should be subjective . . . and objective . . . .").

[35] *See generally, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (empirically surveying qualified immunity defenses raised in cases brought under 42 U.S.C. § 1983); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (explaining that qualified immunity does not appear in the text of 42 U.S.C. § 1983 and rejecting three defenses of qualified immunity offered by the Supreme Court).

[36] *See* Teressa E. Ravenell & Riley H. Ross III, *Qualified Immunity and Unqualified Assumptions*, 112 J. CRIM. L. & CRIMINOLOGY 1, 20 (2022) (noting that "scholars pay scant attention to" extraordinary circumstances). A handful of articles discuss the extraordinary circumstances exception. *See, e.g.*, Robert Weems, Essay, *Questioning the U.S. Supreme Court's Legalistic Qualified Immunity Approach and Suggestions for a Better Approach*, 66 S.C. L. REV. 543, 544 (2014) (arguing that *Harlow*'s extraordinary circumstances language should apply only to higher-level officials, as few lower-level officials know the appellate court precedent related to their actions); Blum, *supra* note 4, at 65 (discussing extraordinary circumstances doctrine and characterizing two categories, "(1) reliance on advice of counsel or prosecutor and (2) reliance on state laws or local ordinances").

[37] *See infra* Part II, pp. 108–13.

[38] *See infra* Part III, pp. 113–17.

[39] *See infra* Part IV, pp. 117–24.

[40] *See infra* Part V, pp. 124–25.

[41] *See infra* notes 110–11 and accompanying text.

Courts will not grant qualified immunity when officers follow flagrantly unlawful policies, laws, orders, or advice.[42] Rather, courts inquire into the objective reasonableness of the defendant's reliance on the orders of another officer, law, or court.[43] Courts are less deferential to officers following the advice of counsel.[44] Overall, however, following orders is no basis for qualified immunity unless an officer's reliance on those orders was reasonable, restricting the influence of the extraordinary circumstances language in *Harlow*.

II. JUST FOLLOWING ORDERS: FOLLOWING THE ORDERS OF A SUPERIOR OR OTHER OFFICER

Officers claim qualified immunity when they are sued for actions they took upon the orders of a superior or other officer.[45] Courts reject a blanket qualified immunity defense for following orders but grant qualified immunity where the orders could reasonably support a constitutional basis for the action in light of the facts and circumstances.[46]

Almost every court of appeals — the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits — has rejected a blanket "just following orders" defense that an officer is automatically justified in relying on the legal conclusions of a superior.[47] Still, all these courts, except the Seventh and D.C. Circuits, have held that "[p]lausible instructions" from another officer could warrant qualified immunity if they would lead a reasonable officer to determine that their actions are legally justified.[48] Two circuits — the Third and Fourth — have not addressed the issue in detail,[49] though the Third Circuit once granted qualified immunity in part due to an officer's reliance on the instructions

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[42] *See, e.g.*, *infra* note 90 and accompanying text.

[43] *See, e.g.*, Bilida v. McCleod, 211 F.3d 166, 174–75 (1st Cir. 2000); *infra* notes 90, 160 and accompanying text.

[44] *See infra* notes 111–12 and accompanying text.

[45] *See, e.g.*, *infra* notes 51–82 and accompanying text.

[46] This section does not address the qualified immunity defense of an officer who relies on the factual conclusions of another officer (the "collective knowledge" or "fellow officer" doctrine), which falls outside this Essay's concern with officers who act at the legal direction of colleagues, superiors, laws, or courts. Officers who lack factual basis for a search or seizure may follow instructions or rely on information communicated by an officer with sufficient knowledge, and this may be a basis for qualified immunity if the reliance was objectively reasonable. *See, e.g.*, Whiteley v. Warden, 401 U.S. 560, 568 (1971) ("[P]olice officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause."); United States v. Hensley, 469 U.S. 221, 232 (1985) (holding that officers may rely on flyer issued by another law enforcement agency as basis for investigatory stop and qualified immunity may be warranted based on the objective reading of the flyer).

[47] *See infra* notes 51–82 and accompanying text.

[48] *Id.*

[49] *See infra* notes 65–66 and accompanying text.

of another officer.[50] The following overview addresses the D.C. Circuit first and then the remaining circuits in numerical order.

The D.C. Circuit has rejected a blanket "just following orders" defense, while district courts in the circuit join most circuits in granting qualified immunity when an officer's reliance on a superior's instructions was reasonable. In *Hobson v. Wilson*,[51] the court rejected the defendants' argument that compliance with agency policy was an "extraordinary circumstance" under *Harlow*: "In its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this new argument."[52] The court's reasoning as to following a policy logically applies with equal force to following the orders of a superior, though its holding that an officer may only receive qualified immunity for reasonably following orders was reversed on other grounds.[53]

The D.C. Circuit's antipathy to the "just following orders" defense has been articulated in the criminal context as well.[54] District court opinions in the D.C. Circuit have developed a multifactor test for the doctrine, including whether "a reasonable officer" would find the act to violate the Constitution, whether the officer "made any effort to obtain clarity" regarding the act's legality, the officer's experience, and their "familiarity with the circumstances."[55] Though the D.C. Circuit has never granted qualified immunity based on a "just following orders" defense, district courts in D.C. have granted qualified immunity where officers were following objectively reasonable orders that allowed the officers to conclude that an action had a lawful basis. For example, the court granted qualified immunity where an officer "was merely following his superior officer's objectively reasonable order" and there was "no genuine dispute" as to the legal basis of the order.[56]

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[50] Harvey v. Plains Twp. Police Dep't, 421 F.3d 185, 199 (3d Cir. 2005).

[51] 737 F.2d 1 (D.C. Cir. 1984).

[52] *Id.* at 67 (per curiam).

[53] *See* Wesby v. District of Columbia, 765 F.3d 13, 29 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct. 577 (2018).

[54] *See, e.g.*, United States v. North, 910 F.2d 843, 881 (D.C. Cir.) (per curiam) (rejecting jury instruction that "goes so far as to conjure up the notion of a 'Nuremberg' defense, a notion from which our criminal justice system, one based on individual accountability and responsibility, has historically recoiled," and "refus[ing] to hold that following orders, without more, can transform an illegal act into a legal one"), *withdrawn and superseded in part on other grounds*, 920 F.2d 940 (D.C. Cir. 1990); Leopold v. FBI, No. 22-1921, 2025 WL 445183, at *10 n.12 (D.D.C. Feb. 10, 2025) (explaining lack of basis for the "just following orders" defense for actions ordered by the President).

[55] Corrigan v. Glover, 254 F. Supp. 3d 184, 195 (D.D.C. 2017) (denying qualified immunity because officer failed to clarify basis for a patently unreasonable search or ensure its constitutionality, *id.* at 198).

[56] Louis v. District of Columbia, 59 F. Supp. 3d 135, 149 (D.D.C. 2014); *see also* Olaniyi v. District of Columbia, 763 F. Supp. 2d 70, 107–08 (D.D.C. 2011) (granting qualified immunity because "the instructions from [a fellow FBI agent] provided these defendants an objectively reasonable

Other circuits have taken a similar approach to D.C. district courts, holding that no blanket "just following orders" defense exists but that officers may receive qualified immunity when their reliance on a superior's orders was reasonable. In *Bilida v. McCleod*,[57] the First Circuit granted qualified immunity to two officers who seized a raccoon at the direction of a superior officer, reasoning:

> Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (*e.g.* a warrant, probable cause, exigent circumstances). Here, there were no warning signs or bases for suspicion about the lawfulness of the order. On the contrary, [the officers] knew that the police and an animal control officer had recently been at the scene and that a raccoon — a target species for rabies — was there. Upon receiving an explicit order to go to the home and seize the animal, they had every reason to think that [their superior] had secured a warrant or concluded (possibly based on exigent circumstances unknown to [them]) that one was unnecessary.[58]

Bilida is an influential and much-cited opinion.[59] While its approach permits qualified immunity for following orders, it requires courts to assess whether the orders followed were objectively reasonable.[60]

The Second Circuit has likewise held that qualified immunity may be appropriate when an officer follows orders that are not facially invalid or illegal. The key rule was articulated by then-Judge Sotomayor, who quoted the first sentence of the above quote from *Bilida*[61] and whose opinion has been cited extensively.[62] The Second Circuit has repeatedly denied qualified immunity where an officer followed orders that were not reasonable.[63] The court has also granted qualified

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basis to believe that the inventory search was lawful"); Muhammad v. District of Columbia, 881 F. Supp. 2d 115, 122 (D.D.C. 2012) (holding that qualified immunity is only available for following objectively reasonable orders that objectively support a legal basis for the action).

[57] 211 F.3d 166 (1st Cir. 2000).

[58] *Id.* at 174–75 (footnote omitted).

[59] *See, e.g.*, Anthony v. City of New York, 339 F.3d 129, 138 (2d Cir. 2003) (Sotomayor, J.) (quoting *Bilida*, 211 F.3d at 174–75); Gonzalez v. Trevino, 144 S. Ct. 1663, 1671 (2024) (Alito, J., concurring) (same); Hall v. Navarre, 118 F.4th 749, 760 (6th Cir. 2024) (same).

[60] Much like the D.C. Circuit, the First Circuit has also rejected the "just following orders" defense when raised by officers in criminal proceedings. *See* United States v. Robertson, No. 24-1475, 2025 WL 3687773, at *9 (1st Cir. Dec. 19, 2025) ("[T]hat Robertson[, a Massachusetts State Police officer,] was 'just following orders' from [his superior] -- what we'll refer to as his 'Nuremberg defense' -- doesn't negate the illegality of the acts on these facts; the testimony of his subordinates showed that they all (including Robertson) knew that it was wrong and that they were stealing.").

[61] *Anthony*, 339 F.3d at 138 (quoting *Bilida*, 211 F.3d at 174–75).

[62] *See, e.g.*, Bunkley v. City of Detroit, 902 F.3d 552, 562 (6th Cir. 2018) (quoting *Anthony*, 339 F.3d at 138).

[63] *See, e.g.*, Murphy v. Hughson, 82 F.4th 177, 187 (2d Cir. 2023) (denying qualified immunity due to absence of "'plausible' instructions that are objectively reasonable").

immunity due to an officer's reliance on orders that were not facially invalid.[64]

The Third and Fourth Circuits have not addressed the issue in much detail. The Third Circuit has only once mentioned a "just following orders" defense.[65] While the Fourth Circuit has not addressed the defense, district courts have rejected a blanket "just following orders" defense.[66]

All the remaining regional circuits have joined the First and Second Circuits in their approach to the "just following orders" defense. The Fifth Circuit has denied qualified immunity where the orders at issue were "facially outrageous."[67] The Sixth Circuit also takes this approach.[68] That court has explained that, on the one hand, "an officer cannot benefit from qualified immunity's shield simply by asserting that he was 'following orders.'"[69] On the other hand, however, "qualified immunity may be warranted when 'reasonable officers could conclude that they have probable cause' for their conduct 'based on plausible instructions from a supervisor when viewed objectively in light of their own knowledge of the surrounding facts and circumstances.'"[70]

Like the D.C. Circuit, the Seventh Circuit has not articulated a reasonableness test for following orders but has applied similar principles. In a case decided prior to *Harlow*, the court rejected the idea "that an individual is relieved of personal responsibility for perpetrating unlawful acts against another simply because he is acting as an agent or

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[64] *See, e.g.*, Varrone v. Bilotti, 123 F.3d 75, 82 (2d Cir. 1997) (extending qualified immunity to officials "carrying out [an] order, not facially invalid, issued by a superior officer who is protected by qualified immunity").

[65] *See* Harvey v. Plains Twp. Police Dep't, 421 F.3d 185, 199 (3d Cir. 2005) (granting qualified immunity because, inter alia, an officer relied on the orders of his sergeant, giving him "additional basis for believing that the necessary arrangements were made for proper entry into Harvey's apartment").

[66] *See, e.g.*, Mial v. Sherin, No. 11cv921, 2012 WL 2838424, at *10 (E.D. Va. July 9, 2012) (rejecting defendants' argument that they are entitled to qualified immunity because they were "just following orders"); Gonzalez v. Cecil County,m221 F. Supp. 2d 611, 617 (D. Md. 2002) (same).

[67] *E.g.*, Von Derhaar v. Watson, 109 F.4th 817, 830–31 (5th Cir. 2024) ("An individual may 'act[] reasonably in following [orders]' — such that following those orders does not violate clearly established law — when the orders are 'not facially outrageous.'" *Id.* at 830 (alterations in original) (quoting Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388, 398 (5th Cir. 2000))); Ford v. Anderson County, 102 F.4th 292, 312 n.10 (5th Cir. 2024) ("[A]sserting an 'I was following orders' defense may not be viable if those orders are 'facially outrageous,' which . . . may be the case here." (quoting Cope v. Cogdill, 3 F.4th 198, 208 (5th Cir. 2021))).

[68] *See* Thaddeus-X v. Blatter, 175 F.3d 378, 393 (6th Cir. 1999) (collecting cases).

[69] Hall v. Navarre, 118 F.4th 749, 760 (6th Cir. 2024) (quoting Bunkley v. City of Detroit, 902 F.3d 552, 563 (6th Cir. 2018)); *see also* Kennedy v. City of Cincinnati, 595 F.3d 327, 337 (6th Cir.) ("[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." (quoting N.N. *ex rel.* S.S. v. Madison Metro. Sch. Dist., 670 F. Supp. 2d 927, 933 (W.D. Wis. 2009))), *cert. denied*, 562 U.S. 832 (2010).

[70] *Hall*, 118 F.4th at 760 (quoting *Bunkley*, 902 F.3d at 562 (citation modified)).

subject to a superior's orders."[71] However, the court still granted qualified immunity to a chief of police who unlawfully terminated a police officer at the mayor's direction.[72] While the chief believed such termination unlawfully denied the officer a pretermination hearing, the court held that "it is unreasonable to expect that [Chief] Bosman should have disobeyed the Mayor's direct order because of this belief, when Bosman also believed he was required by law to obey the Mayor's orders after informing the Mayor that he believed the orders to be unlawful, and when the Mayor's orders were not outside the range of normal personnel actions."[73] After *Harlow*, the court continued to hold similarly.[74]

The Eighth,[75] Ninth,[76] Tenth, and Eleventh Circuits also apply the same rule. In *Halley v. Huckaby*,[77] the Tenth Circuit granted qualified immunity to an officer who "merely relied on" directions to transport a minor child to a safe house "without knowing specifics,"[78] and who therefore reasonably responded "to what he could have assumed to be an adequately supported child welfare investigation."[79] The court denied qualified immunity to another officer, noting that the "just following orders" defense "only holds 'as long as the officer's reliance was objectively reasonable,'" and since this officer "knew the facts surrounding [the child's] case, it was not objectively reasonable for him to go

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[71] Busche v. Burkee, 649 F.2d 509, 517 (7th Cir. 1981) (citing Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.)).

[72] *Id.* at 518.

[73] *Id.*

[74] *See, e.g.*, Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1348 (7th Cir. 1985) (explaining that defendants might be able to establish extraordinary circumstances under *Harlow* for an unlawful arrest given that at least one of the arresting officers was a volunteer and the officers made arrest at the direction of their supervisor); *see also* Lewis v. Downey, 581 F.3d 467, 479 (7th Cir. 2009) (denying qualified immunity to officer who fired taser at the order of a superior because a reasonable officer would have understood this use of force to "violate the prisoners' constitutional rights").

[75] *See* Baude v. Leyshock, 23 F.4th 1065, 1074 (8th Cir. 2022) ("Subordinate police officers cannot escape liability when they blindly follow orders. Rather, their conduct while following orders must be reasonable."); *see also* J.H.H. v. O'Hara, 878 F.2d 240, 244 n.4 (8th Cir. 1989) ("An official's actions are not immunized because they were taken according to orders or regulations if the defendant still knew or should have known he was violating plaintiff's constitutional rights.").

[76] *See* Perez v. City of Fresno, 98 F.4th 919, 926 (9th Cir. 2024) (explaining the "general principle that subordinate officers cannot simply defer to unlawful orders by their superiors" but granting qualified immunity where officers followed a paramedic's orders on "medically-related matters"); *id.* at 935 (S.R. Thomas, J., concurring in part and dissenting in part) ("Even if the paramedic did direct the application of lethal force, police officers are not immunized from obviously unconstitutional conduct merely because they were following instructions."); *see also* Cal. Att'ys for Crim. Just. v. Butts, 195 F.3d 1039, 1050 (9th Cir. 1999) ("[A] reasonable police officer should have known that this conduct was improper . . . whether or not the conduct was endorsed by training materials.").

[77] 902 F.3d 1136 (10th Cir. 2018).

[78] *Id.* at 1150.

[79] *Id.* at 1151.

along with DHS's patently erroneous determination."[80] The Eleventh Circuit has joined the consensus.[81] As the court explained, "since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a 'reason why any of them should question the validity of that order.'"[82]

Whether officers cite the orders of a high-level superior or a direct supervisor, the weight of authority clearly demonstrates that courts do not accept a blanket "just following orders" defense. Officers may claim qualified immunity on this basis only when their reliance on a superior's orders was reasonable.

III. FOLLOWING A STATUTE, ORDINANCE, OR POLICY

Courts have taken a similar approach to qualified immunity claims based on reliance on statutes, policies, or ordinances. Courts hold that reliance on a statute, policy, ordinance, or regulation does not make an officer's conduct per se reasonable. But so long as the statute, ordinance, or policy is not flagrantly unconstitutional, reliance serves as a factor supporting qualified immunity or creates a presumption in favor of qualified immunity. This doctrine operates similarly regardless of whether an officer follows a statute, a local ordinance, or an agency policy, with little difference in how courts analyze reliance on distinct sources of law.

1. Following a Statute. — In a seminal early qualified immunity case, the Supreme Court posited that "[a]lthough the matter is not entirely free from doubt," a police officer should receive qualified immunity when "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied."[83] The Court later reaffirmed that a legislature's enactment of a law "forecloses speculation by enforcement officers concerning its constitutionality," unless the law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[84] Accordingly,

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[80] *Id.* at 1152 (quoting Felders *ex rel.* Smedley v. Malcom, 755 F.3d 870, 882 (10th Cir. 2014)). As support for its general rule, the court cited other Tenth Circuit cases related to relying on the knowledge (rather than the orders) of other officers: "[A] police officer who acts 'in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity . . . as long as the officer's reliance was objectively reasonable.'" *Id.* at 1150 (quoting *Felders*, 755 F.3d at 882); *see* Hobson v. Wilson, 737 F.2d 1, 66–67 (D.C. Cir. 1984) (per curiam).

[81] *See* Brent v. Ashley, 247 F.3d 1294, 1305–06 (11th Cir. 2001) (holding that while "following orders does not immunize government agents from civil liability," *id.* at 1305, qualified immunity is appropriate where a government agent follows the orders of a supervisor and "the record reflects no reason why any of them should question the validity of that order," *id.* at 1306).

[82] O'Rourke v. Hayes, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (quoting *Brent*, 247 F.3d at 1306).

[83] Pierson v. Ray, 386 U.S. 547, 555 (1967) (footnote omitted); *see also* Gomez v. Toledo, 446 U.S. 635, 639 (1980) (quoting *Pierson*, 386 U.S. at 555).

[84] Michigan v. DeFillippo, 443 U.S. 31, 38 (1979).

"[u]nless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law."[85]

Each of the circuits has similarly held that officers receive qualified immunity in their efforts to follow the mandate of a statute that is not flagrantly unconstitutional. The Ninth Circuit gave a robust and influential treatment of the issue in *Grossman v. City of Portland*,[86] granting qualified immunity for an officer's arrest of a demonstrator who violated an ordinance requiring permits to use a public park.[87] The court explained that "where a police officer has probable cause to arrest someone under a statute that a reasonable officer could believe is constitutional, the officer will be immune from liability even if the statute is later held to be unconstitutional,"[88] specifying in a footnote that this holding did not apply to statutes in desuetude.[89]

Following *Grossman*, all circuits have similarly held that reliance on a statute supports the objective reasonableness of an officer's conduct so long as the statute is not patently unconstitutional.[90] This approach

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[85] Illinois v. Krull, 480 U.S. 340, 349–50 (1987); *see* Lemon v. Kurtzman, 411 U.S. 192, 208 (1973) (plurality opinion) (explaining that state officials need not wait for ratification of statutes by the legislature, though they may defer acting until a court pronounces the constitutionality of a law).

[86] 33 F.3d 1200 (9th Cir. 1994).

[87] *Id.* at 1210.

[88] *Id.* at 1209.

[89] *Id.* n.19.

[90] *See, e.g.*, Guillemard-Ginorio v. Contreras-Gómez, 490 F.3d 31, 40 (1st Cir. 2007) (affirming denial of defendants' summary judgment motion because they relied on a "patently unconstitutional" statute); Connecticut *ex rel.* Blumenthal v. Crotty, 346 F.3d 84, 104–07 (2d Cir. 2003) (granting qualified immunity to officials enforcing a law despite it violating the Constitution because "enforcement of a presumptively valid statute creates a heavy presumption in favor of qualified immunity," *id.* at 104); Blackhawk v. Pennsylvania, 381 F.3d 202, 215 (3d Cir. 2004) (Alito, J.) (holding statute enforced by officers unconstitutional but granting qualified immunity because "the governing precedents were complex and developing"); Swanson v. Powers, 937 F.2d 965, 968–69 (4th Cir. 1991) (granting qualified immunity to officers for enforcing a "long-standing statute," *id.* at 968, and explaining that "[r]eliance upon the presumptive validity of state law may be 'the paradigm' of objectively reasonable conduct that the grant of immunity was designed to protect," *id.* at 969 (quoting Landrum v. Moats, 576 F.2d 1320, 1327 n.14 (8th Cir. 1978))), *cert. denied,* 502 U.S. 1031 (1992); Villarreal v. City of Laredo, 94 F.4th 374, 391–92 (5th Cir.) (granting qualified immunity as "under existing caselaw, officers are almost always entitled to qualified immunity when enforcing even an unconstitutional law, so long as they have probable cause"), *cert. granted*, *judgment vacated sub nom.*, Villarreal v. Alaniz, 145 S. Ct. 368 (2024); Citizens in Charge, Inc. v. Husted, 810 F.3d 437, 440 (6th Cir. 2016) (granting qualified immunity for enforcement of a statute); Doe v. Heck, 327 F.3d 492, 516 (7th Cir. 2003) (granting qualified immunity to officials who enforced statute later held unconstitutional because the statutory subsection was not "so patently unconstitutional as to deny the defendants qualified immunity from their claims"); Ness v. City of Bloomington, 11 F.4th 914, 921–22 (8th Cir. 2021) (explaining that "[t]he reliance on a state statute that has not been declared unconstitutional is generally a paradigmatic example of reasonableness that entitles an officer to qualified immunity," *id.* at 921, and affirming grant of qualified immunity, *id.* at 921–22); Way v. County of Ventura, 445 F.3d 1157, 1163 (9th Cir. 2006) ("[W]e cannot conclude that a reasonable officer would necessarily have realized that relying on a Department policy that excepted arrestees being held on controlled substance offenses from the general prohibition on strip searches . . . was unconstitutional."); Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1252 (10th Cir. 2003) (quoting

extends to officers' reliance on ordinances[91] and regulations.[92]

Courts recognize that there are limits to a "just following the law" defense, and such a defense will not apply where a policy or statute is facially invalid or enforced in an egregious or unconstitutional manner. The Ninth Circuit explained in *Grossman* that where a statute "is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity,"[93] nor is an officer who "enforces an ordinance in a particularly egregious manner."[94] The Tenth Circuit applied *Grossman* to a derelict vehicle ordinance, holding that a sheriff should have known the ordinance was unconstitutional because it failed to provide notice or opportunity for a hearing before deprivation of property.[95] Other circuits have also repeatedly denied qualified immunity for similar reasons.[96]

Even when a statute has been declared unconstitutional by a court, if it remains reasonable for an officer to believe that the statute is good law, reliance on that law can support qualified immunity. In *Amore v. Novarro*,[97] the Second Circuit considered an arrest made pursuant to a

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Grossman, 33 F.3d at 1209) (explaining that reliance on a statute "does not render the conduct per se reasonable" but is a factor supporting the reasonableness of conduct); Cooper v. Dillon, 403 F.3d 1208, 1220 (11th Cir. 2005) (holding that officer "was eligible for qualified immunity because he was acting under his discretionary authority in enforcing" a statute whose invalidity was not clearly established); Lederman v. United States, 291 F.3d 36, 47 (D.C. Cir. 2002) (referencing *Grossman* in discussing qualified immunity for officers enforcing a regulation).

91 *See, e.g.*, Wingate v. Fulford, 987 F.3d 299, 312 (4th Cir. 2021) (holding that officers were not "plainly incompetent" to rely on local ordinance not yet tested in federal court and granting qualified immunity (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011))), *as amended* (Feb. 5, 2021).

92 *See, e.g.*, Dukore v. District of Columbia, 970 F. Supp. 2d 23, 28 (D.D.C. 2013) ("[A]n officer who relies on a duly enacted regulation is entitled to qualified immunity unless the regulation is grossly and flagrantly unconstitutional."), *aff'd*, 799 F.3d 1137 (D.C. Cir. 2015); Boles v. Neet, 486 F.3d 1177, 1184 (10th Cir. 2007) (rejecting qualified immunity defense that officer was following a prison regulation and stating that "he [was] not immune from liability simply because he acted in accordance with prison regulations").

93 *Grossman*, 33 F.3d at 1209.

94 *Id.* at 1210; *see also* Pike v. Hester, 891 F.3d 1131, 1141 n.9 (9th Cir. 2018) ("[A]n officer may not rely on a department policy that is contrary to clearly established law.").

95 Lawrence v. Reed, 406 F.3d 1224, 1233 (10th Cir. 2005) ("[T]he ordinance provides no hearing whatsoever; an officer need not understand the niceties of [Mathews v. Eldridge, 424 U.S. 319 (1976),] to know that it is unconstitutional."); *Guillemard-Ginorio*, 490 F.3d at 40–41 (denying qualified immunity where statute allowed officials to suspend a professional license without a hearing in violation of the Due Process Clause).

96 *See, e.g.*, Field Day, LLC v. County of Suffolk, 463 F.3d 167, 191 (2d Cir. 2006) (affirming denial of motion to dismiss based on qualified immunity where statute was allegedly enforced in a discriminatory manner because even "a constitutional law must be enforced in a constitutional manner" (quoting Field Day, LLC v. County of Suffolk, No. 04-CV-2202, 2005 WL 2445794, at *16 (E.D.N.Y. Sep. 30, 2005))); Sorensen v. City of New York, 42 F. App'x 507, 510–11 (2d Cir. 2002) (affirming denial of qualified immunity to officers claiming they were "simply low-level employees following orders" under a strip search policy that had twice been declared unconstitutional and therefore could not be considered facially valid); Leonard v. Robinson, 477 F.3d 347, 359, 361 (6th Cir. 2007) (denying qualified immunity where officers claimed reliance on a statute in clear violation of the First Amendment).

97 624 F.3d 522 (2d Cir. 2010).

statute that remained on the books and was amended several years after the New York Court of Appeals declared it unconstitutional.[98] The court granted qualified immunity and explained that:

> [T]he question for purposes of determining Novarro's entitlement to qualified immunity is whether it was objectively reasonable for him to arrest Amore while failing to realize that the statute he was attempting to enforce had been held unconstitutional. . . . [W]e generally extend qualified immunity to an officer for an arrest made pursuant to a statute that is "on the books," so long as the arrest was based on probable cause that the statute was violated.[99]

Similarly, the Second Circuit also granted qualified immunity when officers enforced a law despite a comparable law having been declared unconstitutional.[100] The court relied on the well-settled idea that officers may presume statutes are valid and explained that the unconstitutional statute was sufficiently different "to muddy the waters . . . by casting doubt in the minds of reasonable officials."[101] Courts have also noted that ambiguous or conflicting statutes support qualified immunity.[102] But erroneous understandings of clear statutes do not provide a basis for qualified immunity.[103]

2. Following a Policy. — Much like its approach to statutes, the Court has held in the qualified immunity context that officers' reliance on policies, whether constitutional or not, supports the reasonableness of their actions when the law on the issue is unclear. In *Wilson v. Layne*,[104] the Court granted qualified immunity to officers who brought a reporter and a photographer into petitioners' home while executing an arrest warrant.[105] While holding that media ride-alongs in private homes violate the Fourth Amendment, the Court granted qualified immunity and explained that "important to our conclusion was the reliance by the United States marshals in this case on a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests."[106] While this policy "could not make reasonable a belief that was contrary to a decided body of case law," the

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98 *Id.* at 532–33.

99 *Id.* at 531 (quoting Connecticut *ex rel.* Blumenthal v. Crotty, 346 F.3d 84, 105 (2d Cir. 2003)).

100 *See Crotty*, 346 F.3d at 106–07.

101 *Id.* at 107.

102 *See, e.g.*, Austell v. Sprenger, 690 F.3d 929, 936 (8th Cir. 2012) ("Qualified immunity is particularly appropriate in this instance because the DHS defendants were operating under conflicting statutory directives."); Reher v. Vivo, 656 F.3d 772, 775 (7th Cir. 2011) ("Where the law is open to interpretation, qualified immunity protects police officers who reasonably interpret an unclear statute.").

103 *See* Courtney v. Oklahoma *ex rel.* Dep't of Pub. Safety, 722 F.3d 1216, 1226–27 (10th Cir. 2013) (holding that application of felon-in-possession statute to juvenile not covered by statute did not entitle officer to qualified immunity).

104 526 U.S. 603 (1999).

105 *Id.* at 615.

106 *Id.* at 617.

case law on the issue was "at best undeveloped," so "it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies."[107] Qualified immunity was therefore appropriate because the policy was not flagrantly unconstitutional.[108]

Many courts of appeals have similarly held that reliance on a policy supports the objective reasonableness of an officer's actions if the policy is not flagrantly unconstitutional.[109] Clearly unconstitutional enforcement of a constitutional policy does not warrant qualified immunity.[110] In sum, all courts of appeals agree that reliance on a statute, policy, ordinance, or regulation warrants qualified immunity if that statute, policy, ordinance, or regulation is not flagrantly unconstitutional.

IV. FOLLOWING THE ADVICE OF COUNSEL

In the course of their duties, officers may seek advice on legal issues from prosecutors or other government lawyers. An official's reliance on the advice of counsel has been considered the most commonly occurring example of an "extraordinary circumstance" under *Harlow*, and this line of case law also more often cites directly to *Harlow*'s language than the other strands.[111] Typically, however, reliance on the advice of counsel receives less deference than when an officer relies on the orders of a superior or a statute, policy, or ordinance. In all but the Second and Third Circuits, advice of counsel is merely one among several factors influencing the court's analysis of the reasonableness of an officer's

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[107] *Id.*

[108] *Id.*

[109] *See, e.g.*, Savard v. Rhode Island, 338 F.3d 23, 32 (1st Cir. 2003) (en banc) (explaining that unsettled law meant "the defendants reasonably could have thought . . . that there was room in the law for the ACI's strip search policy"); Garrett v. Clarke, 74 F.4th 579, 587 (4th Cir. 2023) (granting qualified immunity to officers who followed a policy that was not clearly unconstitutional); Foster v. Basham, 932 F.2d 732, 735 (8th Cir. 1991) (per curiam) (granting qualified immunity to officer who implemented unlawful policy because a reasonable official could have believed it was constitutional); Way v. County of Ventura, 445 F.3d 1157, 1163 (9th Cir. 2006) ("[W]e cannot conclude that a reasonable officer would necessarily have realized that relying on a Department policy . . . was unconstitutional."); Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1251 (10th Cir. 2003) (explaining that reliance on a policy, statute, or regulation is one factor in assessing the objective reasonableness of an officer's actions). *But cf.* Hobson v. Wilson, 737 F.2d 1, 67 (D.C. Cir. 1984) (per curiam) (rejecting qualified immunity defense based on following a policy because "[i]n its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights").

[110] Chew v. Gates, 27 F.3d 1432, 1450 (9th Cir. 1994) ("An officer who unlawfully implements an official policy or ordinance in an egregious manner or in a manner which clearly exceeds the reasonable bounds of the policy is not entitled to qualified immunity, whether or not there is a case on point declaring such actions unconstitutional.").

[111] *See, e.g.*, V-1 Oil Co. v. Wyo. Dep't of Env't Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982), then explaining that "[t]he circumstance most often considered for treatment as 'extraordinary' is reliance upon the advice of counsel").

behavior.[112] The D.C. Circuit has only addressed this issue once, but it appears to take the majority view.[113] In the minority approach of the Third Circuit, consultation with counsel lends itself to a presumption of qualified immunity so long as the officer's reliance was reasonable, the same standard as when officers rely on legal or factual conclusions of others or take an action pursuant to a statute, policy, or ordinance.[114] The Second Circuit has no settled position on the issue.[115] No circuit has held that the advice of counsel makes conduct per se reasonable.

While *Harlow* did away with the good faith inquiry and rooted qualified immunity in an objective inquiry,[116] courts still occasionally note that consultation with counsel provides evidence of an officer's good faith.[117] The other strands of the "just following orders" doctrine more often frame qualified immunity as a purely objective inquiry.[118]

A. Majority Approach

Most courts explain that consultation with counsel is relevant to evaluating the reasonableness of an officer's conduct for the purposes of qualified immunity, following related Supreme Court precedent. In *Messerschmidt v. Millender*,[119] the Supreme Court assessed a challenge to the scope of a warrant and explained that "the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it . . . provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause."[120] Although the approval of the officers' superior and the

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[112] *See infra* section IV.A, pp. 118–23; *see also, e.g.*, Brown v. Knapp, 75 F.4th 638, 648–49 (6th Cir. 2023) ("declin[ing] to endorse . . . the dispositive nature" of a prosecutor's legal conclusion, *id.* at 649), *cert. denied*, 144 S. Ct. 819 (2024).

[113] Dellums v. Powell, 566 F.2d 167, 185 (D.C. Cir. 1977) (holding, prior to *Harlow*, that advice of counsel as an absolute defense was "untenable both as a matter of law and as a basis for directing a verdict on the facts of this case").

[114] Kelly v. Borough of Carlisle, 622 F.3d 248, 255–56 (3d Cir. 2010).

[115] *See* Washington v. Napolitano, 29 F.4th 93, 104 n.5 (2d Cir. 2022).

[116] *See supra* notes 26–32 and accompanying text.

[117] *See, e.g.*, Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009) (stating that consultation with a prosecutor is relevant as "evidence of good faith"); Stevens v. Rose, 298 F.3d 880, 884 (9th Cir. 2002) ("[W]hile reliance on counsel's advice will not satisfy a defendant's burden of acting reasonably, it is evidence of . . . good faith." (omission in original) (quoting Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990))); Forman v. Richmond Police Dep't, 104 F.3d 950, 960 (7th Cir. 1997) (holding that police officer's solicitation of advice from county prosecutor in conducting search was evidence of officer's good faith and reasonableness); Tubbesing v. Arnold, 742 F.2d 401, 407 (8th Cir. 1984) ("[T]he Board members acted in good faith in following their attorney's advice."); *see also* Brown v. Lewis, 779 F.3d 401, 412–13 (6th Cir. 2015) (citing United States v. Hensley, 469 U.S. 221 (1985), in outlining a good faith defense based on reliance on facts reported by other officers).

[118] *See, e.g.*, J.H.H. v. O'Hara, 878 F.2d 240, 244 n.4 (8th Cir. 1989) (rejecting district court's conclusion that acting under regulations or orders supports good faith and affirming an objective qualified immunity inquiry).

[119] 565 U.S. 535 (2012).

[120] *Id.* at 553.

deputy district attorney "cannot be regarded as dispositive"[121] because they are members of the prosecution team, "[t]he fact that the officers secured [their] approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause."[122] Relying on this and other bases, the Court reversed the lower court's denial of qualified immunity.[123] Three Justices rejected the majority view, noting the potential bias of superiors and prosecutors and the arbitrariness of sanctioning unconstitutional conduct because another officer approved it.[124]

Courts of appeals in the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have taken a similar approach to officer reliance on the advice of counsel, holding that it is not dispositive but typically probative of "extraordinary circumstances."[125] The D.C. Circuit adopted this reasoning in a pre-*Harlow* opinion but has not expounded on the issue more recently.[126] And the Second Circuit has at times followed suit but has not settled the issue.[127]

In one of the most cited opinions explaining the majority position, the First Circuit highlighted the rationale for its ruling in the context of a prosecutor's advice on probable cause:

> [A] wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one. That is not to say, however, that a reviewing court must throw out the baby with the bath water. There is a middle ground: the fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity. . . .
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> . . . It stands to reason that if an officer makes a full presentation of the known facts to a competent prosecutor and receives a green light, the officer would have stronger reason to believe that probable cause existed. And as a matter of policy, it makes eminently good sense, when time and

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121 *Id.* at 554.

122 *Id.* at 554–55.

123 *Id.* at 556.

124 *See* id. at 559 (Kagan, J., concurring in part and dissenting in part) (arguing that since state attorneys and police officers are "part of the prosecution team[,] . . . [t]o make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct — like applying for a warrant without anything resembling probable cause"); *id.* at 574 (Sotomayor, J., dissenting, joined by Ginsburg, J.) ("I cannot agree, however, that the 'objective legal reasonableness of an official's acts,' turns on the number of police officers or prosecutors who improperly sanction a search that violates the Fourth Amendment." (citation omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982))).

125 *See infra* notes 128–53 and accompanying text.

126 *See supra* note 113 and accompanying text.

127 *See infra* section IV.B, pp. 123–24.

> circumstances permit, to encourage officers to obtain an informed opinion before charging ahead and making an arrest in uncertain circumstances.[128]

Per the court, while consultations are advisable, they alone are insufficient to claim qualified immunity under the extraordinary circumstances exception.[129]

Before and after *Harlow*, many other courts of appeals have reasoned similarly, holding that reliance on the advice of an officer is relevant to but not dispositive of qualified immunity.[130] While the Eleventh Circuit has not published an opinion on this issue, it concurs,[131] and limited doctrine in the D.C. Circuit suggests an approach in line with these circuits.[132]

The Sixth and Tenth Circuits follow the majority approach in holding that reliance on the advice of counsel is simply one factor in assessing qualified immunity, though each have emphasized that reliance on the advice of counsel should not generally be considered "extraordinary" under *Harlow*.[133] The Sixth Circuit's treatment is particularly extensive,

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[128] Cox v. Hainey, 391 F.3d 25, 34–35 (1st Cir. 2004); *see also* Sueiro Vázquez v. Torregrosa de la Rosa, 494 F.3d 227, 235 (1st Cir. 2007) ("Reliance on advice of counsel alone does not per se provide defendants with the shield of immunity.").

[129] *Cox*, 391 F.3d at 35.

[130] *See, e.g.*, Buonocore v. Harris, 134 F.3d 245, 253 (4th Cir. 1998) ("[A]lthough reliance on counsel's advice may indeed be a factor to be considered in deciding whether a defendant has demonstrated an 'extraordinary circumstance,' reliance on legal advice *alone* does not, in and of itself, constitute an 'extraordinary circumstance' sufficient to prove entitlement to the exception to the general *Harlow* rule." (quoting Hollingsworth v. Hill, 110 F.3d 733, 741 (10th Cir. 1997))); Sims v. Labowitz, 885 F.3d 254, 267 (4th Cir. 2018) (applying *Buonocore*); Perry v. Mendoza, 83 F.4th 313, 318 (5th Cir. 2023) ("[A]dvice obtained from a prosecutor *prior* to making an arrest should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity." (quoting Gorsky v. Guajardo, No. 20-20084, 2023 WL 3690429, at *9 n.17 (5th Cir. May 26, 2023))); Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004) ("Consulting a prosecutor . . . goes far to establish qualified immunity. Otherwise the incentive for officers to consult prosecutors — a valuable screen against false arrest — would be greatly diminished."); Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 792 (8th Cir. 2004) ("Although following an attorney's advice 'does not automatically cloak [officers] with qualified immunity,' it can 'show the reasonableness of the action taken.'" (alternation in original) (quoting Womack v. City of Bellefontaine Neighbors, 193 F.3d 1028, 1031 (8th Cir. 1999))); Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) ("[R]eliance on counsel's advice will not satisfy a defendant's burden of acting reasonably, [but] is evidence of defendant's good faith.").

[131] Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009) ("[I]t is altogether consistent with a totality of the circumstances analysis to consider pre-arrest consultation and advice of a district attorney as being one circumstance contributing to the objective reasonableness of an officer's conduct.").

[132] *See* Dellums v. Powell, 566 F.2d 167, 185 (D.C. Cir. 1977) (rejecting qualified immunity where "the scope of counsel's advice was not enough to create a complete defense," the law "was not highly technical," and the officer "was obviously as expert [on this issue] as any counsel who might give him advice").

[133] Other circuits have also on occasion rejected qualified immunity because a defendant's consultation with counsel was not extraordinary. *See, e.g.*, *Buonocore*, 134 F.3d at 252 ("Cundiff offers no proof, or even any assertion, that his situation was 'extraordinary.' It is hardly unusual, let alone extraordinary, for public officers to seek legal advice."); Watertown Equip. Co. v. Norwest Bank

and it often examines the facts to assess whether consultation with counsel was an extraordinary circumstance. In *Silberstein v. City of Dayton*,[134] it cautioned that the advice of counsel defense should be limited to avoid pro forma efforts to consult with counsel by officers seeking to insulate their conduct from liability:

> The Board Members cannot cloak themselves in immunity simply by delegating their termination procedure decisions to their legal department, as the availability of such a defense would invite all government actors to shield themselves from § 1983 suits by first seeking self-serving legal memoranda before taking action that may violate a constitutional right.[135]

The court further explained that relying on the advice of counsel does not qualify as an extraordinary circumstance in most cases: Even if an officer is not legally trained, "this fact alone cannot give rise to 'extraordinary circumstances.'"[136] While the Sixth Circuit takes a semantically unique approach in often emphasizing extraordinary circumstances,[137] it and other circuits ultimately treat legal advice as merely one relevant factor for qualified immunity.[138]

The Tenth Circuit similarly employs the majority's multifactor approach while placing rhetorical emphasis on whether the circumstances surrounding the advice of counsel were indeed extraordinary[139] and therefore "so 'prevented' [the official] from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right."[140] The court concurred with the Sixth Circuit that "such reliance is not inherently extraordinary, for few things in government are more common than the receipt of legal advice."[141] A multifactor test developed in the Tenth Circuit presents four relevant criteria: the (1) unequivocal and tailored nature of the advice; (2) completeness of the information provided to the attorney giving the advice; (3) "prominence and competence of the attorney(s)"; and (4) time between the advice and the action.[142] However, in a more recent case, the

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Watertown, N.A., 830 F.2d 1487, 1495–96 (8th Cir. 1987) (declining to find extraordinary circumstances warranting qualified immunity for reliance on advice of counsel where that "advice was somewhat equivocal" and the issue was not "a unique factual situation or a 'perilous' one which clearly demanded prompt action," *id*. at 1496).

134 440 F.3d 306 (6th Cir. 2006).

135 *Id.* at 318.

136 *Id.*

137 Cochran v. Gilliam, 656 F.3d 300, 309 (6th Cir. 2011) ("[R]eliance on counsel's legal advice constitutes a qualified immunity defense only under 'extraordinary circumstances . . . .'" (quoting *Silberstein*, 440 F.3d at 318)); Burgess v. Bowers, 773 F. App'x 238, 242 (6th Cir. 2019) (same); York v. Purkey, 14 F. App'x 628, 633 (6th Cir. 2001) (explaining that the "'extraordinary circumstances' exception applies only rarely" and requires truly extraordinary circumstances).

138 *See, e.g.*, *York*, 14 F. App'x at 633; Cox v. Hainey, 391 F.3d 25, 34–35 (1st Cir. 2004).

139 Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1253 (10th Cir. 2003).

140 *Id.* at 1251 (quoting Cannon v. City of Denver, 998 F.2d 867, 874 (10th Cir. 1993)).

141 V-1 Oil Co. v. Wyo. Dep't of Env't Quality, 902 F.2d 1482, 1488 (10th Cir. 1990).

142 *Id.* at 1489; *see also* Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998) (citing the Tenth Circuit's factors); *York*, 14 F. App'x at 633 (same).

court added that the officer "must point to something in his consultation . . . that prevented him from knowing the law," in this case, that a warrant, notice, and a hearing were required.[143] Because the statute the officer relied on in that case was blatantly unconstitutional,[144] perhaps the requisite competence was deemed lower.

While holding that consultation with counsel is relevant to qualified immunity, these courts of appeals recognize that it does not automatically warrant such immunity.[145] Qualified immunity has been denied in a variety of cases despite an officer's reliance on the advice of counsel.[146] Officers must have actually sought the advice from the attorney and have sufficient basis to claim that the attorney blessed their actions.[147] When officers seek the advice of counsel but provide false, misleading, or incomplete information, the fact of seeking advice no longer weighs in favor of qualified immunity. In *Sornberger v. City of Knoxville*,[148] for example, the Seventh Circuit rejected a qualified immunity defense based on the advice of counsel where the officers gave information that was "incomplete and one-sided"[149] and therefore not "good-faith seeking of legal advice" but rather "manipulat[ion of] the available evidence to mislead the state prosecutor into authorizing" the arrest.[150] An attorney's lack of adequate information similarly weighs against qualified immunity.[151] Likewise, "when no reasonable officer would have sought out the warrant," seeking the advice of a prosecutor before submitting a warrant application "could not overcome the extreme unreasonableness of the officer's actions."[152] Failing to follow the advice of counsel

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143 Lawrence v. Reed, 406 F.3d 1224, 1231 (10th Cir. 2005).

144 *Id.* at 1234–35.

145 *See, e.g.*, Friedman v. Boucher, 580 F.3d 847, 859 (9th Cir. 2009) ("[W]hen a police officer argues he is entitled to qualified immunity because he relied on the advice of a prosecutor, it does not render the officer's conduct per se reasonable . . . ."); Stearns v. Clarkson, 615 F.3d 1278, 1284 (10th Cir. 2010) ("We have never held, however, that an officer's receipt of a favorable probable cause determination from a prosecutor prior to making an arrest necessarily entitles the officer to qualified immunity.").

146 *See, e.g.*, *Friedman*, 580 F.3d at 859–60.

147 *Stearns*, 615 F.3d at 1284–86 (rejecting reliance on advice of counsel defense where officer assumed that attorney endorsed arrest); Lindsey v. City of Orrick, 491 F.3d 892, 902 (8th Cir. 2007) (rejecting advice of counsel defense where officer did not ask attorney for advice).

148 434 F.3d 1006 (7th Cir. 2006).

149 *Id.* at 1015.

150 *Id.* at 1016.

151 *See, e.g.*, Belk v. City of Eldon, 228 F.3d 872, 882–83 (8th Cir. 2000) (rejecting qualified immunity argument based on "reliance on the opinion of an attorney-investigator" as the investigator lacked complete information).

152 Thurston v. Frye, 99 F.4th 665, 679 (4th Cir. 2024); *see also* Cochran v. Gilliam, 656 F.3d 300, 309 (6th Cir. 2011) ("[A] law enforcement officer's phone call to a county or district attorney for general guidance when confronted with a situation where there is no legal basis for the contemplated actions does not automatically convert unreasonable actions into reasonable actions."); Merchant v. Bauer, 677 F.3d 656, 664–65 (4th Cir. 2012) (holding it unreasonable for officer to overlook exculpatory evidence while relying on prosecutor's advice concerning probable cause).

likewise eliminates the possibility of relying on that advice to seek qualified immunity.[153]

B. The Third Circuit's Presumption and the Second Circuit's Split

The Second and Third Circuits depart from the majority in their rules on advice of counsel. The Second Circuit has not settled on whether the advice of counsel should have any impact on qualified immunity, while the Third Circuit takes a more deferential approach than most courts, reasoning that reliance on the advice of counsel warrants a presumption in favor of qualified immunity.

The Second Circuit has not resolved whether reliance on the advice of counsel supports qualified immunity. *In re County of Erie*[154] explained that "'clearly established' . . . is an objective, not a subjective, test, and reliance upon advice of counsel therefore cannot be used to support the defense of qualified immunity" where officers do not claim a good faith defense.[155] Another panel, however, followed the majority of circuits, reasoning that "the solicitation of legal advice informs the reasonableness inquiry," though the panel declined to decide whether reliance on legal advice was an extraordinary circumstance that alone warrants qualified immunity.[156] The circuit remains divided on the issue.[157]

The Third Circuit's approach is unique in that it rejects the totality of circumstances approach of most circuits and holds instead that consultation with counsel leads to a presumption of qualified immunity so long as the reliance on counsel's advice was reasonable. The Third Circuit has explained:

> In our view, encouraging police to seek legal advice serves such a salutary purpose as to constitute a "thumb on the scale" in favor of qualified immunity. Accordingly, we hold that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity . . . . That reliance must itself be objectively reasonable . . . . Accordingly, a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice.[158]

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153 Buonocore v. Harris, 134 F.3d 245, 253 (4th Cir. 1998); *see* Womack v. City of Bellefontaine Neighbors, 193 F.3d 1028, 1031 (8th Cir. 1999).

154 546 F.3d 222 (2d Cir. 2008).

155 *Id.* at 229.

156 Taravella v. Town of Wolcott, 599 F.3d 129, 135 n.3 (2d Cir. 2010).

157 *See* Washington v. Napolitano, 29 F.4th 93, 104 n.5 (2d Cir. 2022) (highlighting a divide in case law on whether advice of counsel may inform the reasonableness inquiry of qualified immunity).

158 Kelly v. Borough of Carlisle, 622 F.3d 248, 255–56 (3d Cir. 2010); *see also* Fiore v. City of Bethlehem, 510 F. App'x 215, 220 (3d Cir. 2013) (quoting *Kelly*, 622 F.3d at 255–56, for support and

While several circuits taking the majority approach have noted that consultation with counsel "goes far" to establish qualified immunity,[159] the Third Circuit's presumption is unique.

V. FOLLOWING COURT ORDERS

In the Second and Ninth Circuits, courts acknowledge that following a court order, including the order of a receiver, results in qualified immunity where officials could reasonably believe that doing so is constitutionally sufficient. On the other hand, several circuits and the district court in D.C. have held that officers are not entitled to qualified immunity when they violate a court order.

The Ninth Circuit has explained that, while "a court order does not give carte blanche to prison officials," an officer who follows a *reasonable* court order should receive qualified immunity.[160] In *Hines v. Youseff*,[161] officials complied with orders from the court and the court-appointed receiver but not with other guidance and recommendations made.[162] The court granted qualified immunity and explained that "[b]ecause the Receiver oversaw prison medical care . . . , state officials could have reasonably believed that their actions were constitutional so long as they complied with the orders from the Receiver and the . . . court."[163] In a case involving a prison official following a court order, the Second Circuit similarly explained that "[f]ollowing orders, no matter how invalid they are on their face, cannot be an absolute defense," but granted qualified immunity because "a reasonable prison official might very well have properly followed the court order."[164] Both courts that have assessed the defense of following a court order applied the same reasonableness standard employed when officers seek qualified immunity on the basis of following the orders of a fellow officer, relying on factual knowledge of a colleague, or following a statute, policy, or ordinance.

"presum[ing] that [officers] are entitled to qualified immunity" because they relied on counsel's advice); Handy v. Palmiero, 836 F. App'x 116, 118–19 (3d Cir. 2020) (quoting *Kelly*, 622 F.3d at 255–56, for the proposition that officers who "rel[y] in good faith on a prosecutor's legal opinion" are presumptively entitled to qualified immunity, *Handy*, 836 F. App'x at 119).

159 Kijonka v. Seitzinger, 363 F.3d 645, 648 (7th Cir. 2004); *see, e.g.*, Arnsberg v. United States, 757 F.2d 971, 982 (9th Cir. 1985); Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 792 (8th Cir. 2004); Poulakis v. Rogers, 341 F. App'x 523, 533 (11th Cir. 2009).

160 Rico v. Ducart, 980 F.3d 1292, 1301 (9th Cir. 2020) (granting qualified immunity to officers conducting court-ordered suicide checks in a prison).

161 914 F.3d 1218 (9th Cir. 2019).

162 *Id.* at 1231.

163 *Id.*; *see* Stein v. Ryan, 662 F.3d 1114, 1119–20 (9th Cir. 2011) ("[N]o reasonable prison official would understand that executing a court order without investigating its potential illegality would violate [a] prisoner's right to be free from cruel and unusual punishment.").

164 Aponte v. Perez, 75 F.4th 49, 61 (2d Cir. 2023).

Several courts have, however, held that officers and prosecutors are not entitled to qualified immunity when they violate a court order.[165] A district court denied qualified immunity where defendants violated a court order by "summarily destroying" property without due process.[166] The court explained that in addition to a "long line" of precedent on due process obligations prior to destruction of property, defendants acted in violation of a court order: "Plaintiffs' preliminary-injunction request was denied on the assumption that Defendants would not engage in the kind of conduct Plaintiff alleges here — the summary destruction of his belongings without due process."[167] Thus, adherence to reasonable court orders supports qualified immunity, much like in the other contexts described above.

VI. CONCLUSION

Although the "just following orders" defense takes many forms and the circuits have ruled differently on certain nuances, the law is clear that officers have no per se claim to qualified immunity for following orders of another officer or a court, a statute, a policy, an ordinance, or the advice of counsel. Under three of the four lines of case law outlined above — following the legal conclusions of another officer; relying on a statute, policy, or ordinance; or following a court order — courts generally award qualified immunity when an officer's reliance on orders was objectively reasonable. When officers claim qualified immunity after relying on the advice of counsel, as opposed to the order of another officer or a statute or policy, most courts will place less weight on the fact that an officer received legal advice, considering this as one among many relevant factors.

The "just following orders" defense in all its forms is closely linked to *Harlow*'s extraordinary circumstances language, yet the four categories described above are in no way extraordinary. Officers are trained to follow the directives of superiors and colleagues, as well as policies, ordinances, statutes, and court orders. Officers regularly seek legal advice before conducting searches or seizures or implementing more sophisticated programs, and indeed law enforcement officers must do so to perform numerous aspects of their roles. As the Court recently

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165 Reitz v. County of Bucks, 125 F.3d 139, 147 (3d Cir. 1997) ("[I]t is incomprehensible that a prosecutor faced with such an order would not know that he should comply timely and that a failure to do so would undermine the authority of the court."); Sockwell v. Phelps, 20 F.3d 187, 192 (5th Cir. 1994) (denying qualified immunity where defendants violated a court order mandating desegregation); Walters v. Grossheim, 990 F.2d 381, 384 (8th Cir. 1993) (denying qualified immunity because the "decision not to comply with the [state court's] judgment was not objectively reasonable" even at advice of counsel); Slone v. Herman, 983 F.2d 107, 110 (8th Cir. 1993) (holding that "[i]t was not objectively reasonable for defendants to deny [the prisoner] his freedom because they disagreed with a court order").

166 Bloem v. Unknown Dep't of the Interior Emps., 920 F. Supp. 2d 154, 167 (D.D.C. 2013).

167 *Id.* at 168.

explained, "the machinery of criminal justice often works through multiple government officers. An officer who makes an arrest may do so based on his own judgment, orders from a superior, or . . . a warrant issued by a magistrate."[168] Whether allowing media to accompany officers during the execution of a search warrant pursuant to law enforcement policy, transporting a prisoner to a hospital for medical or mental health care, or seizing property, an officer's reliance on relevant laws, policies, or the instructions or advice of other officers is in no way "extraordinary." This Essay's analysis of this relatively broad line of qualified immunity defense[169] demonstrates courts' resistance, in almost all contexts, to allowing officers to claim good faith immunity and affirms the scholarly consensus that *Harlow* did away with good faith immunity.

The extraordinary circumstances language from *Harlow* is of little consequence in practice, as "just following orders" does not unyoke officers from an objective inquiry into the reasonableness of their conduct. The "just following orders" defense might appear to shield officers from a greater scope of liability than when an officer takes an action independently, but as befits a defense covering many core aspects of officers' functions, the doctrine is in harmony with the emphasis on reasonableness throughout qualified immunity law.

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168 Gonzalez v. Trevino, 144 S. Ct. 1663, 1670 (2024).

169 Scholars have not empirically categorized how often officers claim the "just following orders" defense. While officers regularly raise this defense, it is additionally often embedded in an officer's narrative of events even if not specifically raised with the language applied here.