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Per Curiam Signals in the Supreme Court's Shadow Docket

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PER CURIAM SIGNALS IN THE SUPREME COURT'S SHADOW DOCKET

Zina Makar[*]

Abstract: Lower courts and litigants depend a great deal on the Supreme Court to articulate and communicate signals regarding how to interpret existing doctrine. Signals are at their strongest and most reliable when they originate from the Court's merits docket. More recently, the Court has been increasingly relying on its orders docket—colloquially referred to as its "shadow docket"—to communicate with lower courts by summarily reversing and correcting errors in interpretation without briefing or oral argument.

Over the past decade the Roberts Court has granted certiorari to summarily reverse a growing number of qualified immunity cases, issuing over a dozen unsigned per curiam opinions that, without further examination, appear to favor expansive protections for law enforcement officials. Despite this pro-law enforcement trend, lower courts have not necessarily assumed this as a blanket directive to expand the scope of qualified immunity. Rather, lower courts have interpreted the Court's per curiam opinions in a myriad of ways, construing different signals and applying them in subsequent cases, revealing a critical stream of discourse that has the ability to influence future doctrinal development.

Understanding how the current Court is using the orders docket will require a lengthier period of conversation, but one thing is clear: the prolific use of the orders docket has demonstrated that it is one worthy of deeper study given how frequently lower courts turn to these opinions for guidance. This Article advances a six-part taxonomy of signals, based on a study of qualified immunity cases, to catalog common attributes of a given per curiam opinion that causes lower courts to interpret the opinion one way or another. This categorization not only provides a novel foundation for studying this secondary docket, but also a critical lens for analyzing the percolation of signals across various doctrinal contexts.

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INTRODUCTION

Over the past five years, public interest in and skepticism of the Supreme Court's orders docket—colloquially referred to as its "shadow docket"—has grown exponentially.[1] But the use of the orders docket is nothing new. All courts have one and utilizing it is a common and necessary practice that allows courts to engage in procedural docket management such as addressing one-off emergencies and preliminary issues without discussing the merits.[2] Unlike the Court's merits docket, where conventional precedent is established, judgments rendered on the orders docket are not accompanied by briefing, oral argument, or lengthy signed opinions.[3]

Scholarly and public commentators have strongly criticized the Court's

1. Two noteworthy spikes in Google searches that include the term "shadow docket" occurred during this five-year period, the first between October 11–17, 2020 and the second between August 29–September 4, 2021. *See* GOOGLE TRENDS, https://trends.google.com [https://perma.cc/8K5E-4VNN] (use "shadow docket" as search term; adjust time range for "Past five years"). The growing interest in the orders docket in October of 2020 coincides with the increased volume of COVID-19 emergency relief petitions filed before the Court. Stephen Wermiel, *On the Supreme Court's Shadow Docket, the Steady Volume of Pandemic Cases Continues*, SCOTUS BLOG (Dec. 23, 2020, 3:16 PM), https://www.scotusblog.com/2020/12/on-the-supreme-courts-shadow-docket-the-steady-volume-of-pandemic-cases-continues/ [https://perma.cc/J58Z-SYBM]. Similarly, the spike in interest in the shadow docket in 2021 lines up with the Court's September 1, 2021 order that declined to prevent an anti-abortion Texas law, commonly referred to as S.B. 8, from going into effect. Whole Woman's Health v. Jackson, 595 U.S. __, 141 S. Ct. 2494 (2021).

2. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1, 18 (2015) (discussing the procedural mechanics and history of the orders docket).

3. *Id.* at 12–14.

recent perceived use of the orders docket for rights-making practices that would typically be subject to the scrutiny and rigors of its merits docket.[4] The docket even became the subject of a House of Representatives committee investigation in 2021.[5] Since then, some Justices have spoken openly on the topic to disabuse the public of the notion that its actions on the orders docket have any bearing on substantive rights—reiterating that such practice is purely a function of its merits docket and nothing about its recent orders should cast doubt on that notion.[6] Nonetheless, many still find the lack of transparency in the process iniquitous.[7]

With the recent uptick in cases reviewed on the orders docket, it is still too early to tell why the Court has increased its use and what impact, if any, this docket will have on cases involving the application of substantive rights. Professor Steven Vladeck, a staunch critic of the orders docket, identifies that the primary motivator for the Court's prolific use of the docket is not necessarily that there are more applications for emergency relief but rather more applications that the Justices are interested in taking on.[8] The result, he argues, is that the impact of such opinions goes beyond

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4. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012) (arguing that per curiam opinions stymie the development of law and remove judicial accountability).

5. Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, A.B.A. (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/ [https://perma.cc/6LRQ-SD6Y].

6. The following are instances in which Justices have openly criticized the colloquial term used to classify its orders dockets: Adam Liptak, *Alito Responds to Critics of the Supreme Court's Shadow Docket*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html (last visited May 29, 2023) (quoting Justice Alito as stating that "[t]he catchy and sinister term 'shadow docket' has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways" and noting that Alito instead prefers to use the term "emergency docket"); Jordan S. Rubin, *Kavanaugh Comment Ups Supreme Court Tension over 'Shadow Docket,'* BLOOMBERG L. (Feb. 8, 2022), https://news.bloomberglaw.com/us-law-week/kavanaugh-comment-ups-supreme-court-tension-over-shadow-docket [https://perma.cc/JRK7-TKMG] (arguing that Justice Kavanaugh's concurrence pushed back on criticism of the "shadow docket" as "worn out").

7. Because these cases are on the orders docket, it is unclear which Justices wrote the opinion or signed on to the majority and which dissented (unless the Justice formally files a concurring or dissenting opinion, which does not frequently happen). Failure to issue a dissent is not indicative that a per curiam opinion has been supported by all nine Justices. *See* Steve Vladeck, *Opinion: The 'Shadow Docket' Further Erodes the Supreme Court's Legitimacy*, CNN (Sept. 26, 2022, 6:19 PM), https://www.cnn.com/2022/09/26/opinions/supreme-court-shadow-docket-vladeck/index.html [https://perma.cc/SLZ7-HWQS].

8. We the People, *The Supreme Court's "Shadow Docket,"*, NAT'L CONST. CTR. (Oct. 7, 2021), https://constitutioncenter.org/interactive-constitution/podcast/the-supreme-courts-shadow-docket [https://perma.cc/28KJ-YB79] (discussing the legitimacy of the shadow docket with participants Jennifer Mascott and Stephen I. Vladeck and host Jeffrey Rosen).

its intended limits.[9] For example, recent orders on COVID-19 restrictions, unlike orders staying an execution, have the effect of expanding the applicability of legal policy beyond an individualized, discreet, and distinguishable fact set.[10] Vladeck points out that the concern regarding the impact would not be so problematic but for the fact that the Court appears to be treating this docket as having precedential effect by citing back and relying on its per curiam opinions or remanding the case to the lower court for further proceedings in line with the Court's order.[11]

Others have argued that the rise in the orders docket is not problematic in and of itself.[12] Professor Jennifer Mascott, in conversation with Vladeck, argues that it is unclear if the impact of the orders is anything but benign.[13] Mascott counters that in some instances, it may be better practice to allow Justices the space to be brief and issue an unsigned order, giving them time to formulate their understanding of the issues and alleged harms such that, should the issue arise on the merits docket, they will be better equipped to address it in full.[14] Those less skeptical further suggest that the increased use of the orders docket is a demonstration of the Court's restraint and recognition that policy making should be done within the elected branches.[15] In other words, the Court may be communicating that the issue needs to remain with the state or federal government, rather than intervening in actions better suited for elected officials so quickly.[16]

This debate, for the most part, has largely been situated around the review of emergency petitions. But the Court reviews many other cases on its orders docket, and, although not having engendered as much public scrutiny, summary reversals in contexts other than emergency petitions have also been on the rise.[17] And this much is true: lower courts are

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9. *Id.*

10. *Id.*; *see also infra* note 294 for a brief discussion on recent COVID-19 cases that were resolved on the orders docket and subsequently used in string cites to support the Court's revitalization of the major questions doctrine.

11. We the People, *supra* note 8.

12. *Id.* (arguing that it can be mutually beneficial to all parties to allow Justices to be brief and view these orders as preliminary to give the Justices the necessary space to reconsider or reevaluate highly consequential matters).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 1 (2021) (statement of Stephen I. Vladeck) [hereinafter *Texas's Unconstitutional Abortion Ban*] (suggesting that summary reversals, in addition to petitions for emergency relief, have also seen an uptick on the Court's orders docket).

regularly monitoring, studying, and citing to summary reversals issued on the orders docket in a way that bears upon the outcomes of day-to-day litigation.[18] This undertheorized portion of the Court's shadow docket thus deserves equal study.

Summary reversals are orders that reverse lower court decisions as clearly erroneous and are accompanied by a brief unsigned, and typically unanimous, per curiam opinion.[19] These orders and opinions are not intended to be—nor have they historically been treated as—decisions on the merits that expound upon existing law or alter substantive rights.[20] The limits of summary reversals are reinforced by the prohibition on advisory opinions; the Court is not permitted to intervene in a judgement issued by a lower court merely to provide guidance on the law but may only step in when the application of the law is incorrect and the final judgement would be affected.[21] This prohibition inherently limits the use of the orders docket to those cases where the law is already settled. In other words, by summarily reversing a case on the orders docket the Court is purportedly not conveying anything new to the parties or the lower courts, other than the fact that the lower court got the judgement wrong. The accompanying per curiam provides the relevant guidance as to *why* the lower court applied the law incorrectly in the instance at hand.[22]

But what happens when the Court's guidance is unclear or when some of the Justices disagree? If a Justice does not dissent or concur from a per curiam, do we have to assume that the entire court *did* agree? Which signal is more significant: the outcome of the summary reversal or the guidance issued in the per curiam opinion itself? Which signals can a lower court reasonably rely upon as indicative of the intent of the full Court?

There is growing scholarly consensus that the Court does not merely decide cases, it communicates critical concepts within its opinions.[23] In practice, lower courts and litigants depend a great deal on the Court to

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18. Federal circuit courts often have the final word given the limited number of cases the Supreme Court hears on appeal. *See About the U.S. Court of Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals#:~:text=In%20the%20federal%20system%2C%2094,federal%20appellate%20courts%20to%2013 [https://perma.cc/NC6L-529Z].

19. *See* Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 597 (2016).

20. *Id.*

21. The Court firmly stated that "[its] power is to correct wrong judgments, not to revise opinions." Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

22. *Cf.* Hewitt v. Helms, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" (emphasis in original)).

23. *See* authorities cited *supra* notes 4–6.

articulate and communicate signals as to how it may proceed in the future—through both its merits and orders dockets.[24] Where most scholars focus on the signals communicated to lower courts and litigants by way of the Court's merits opinions, this Article seeks to analyze the Court's signals more holistically, focusing instead on how lower courts interpret and respond to the Court's guidance that has been issued in the shadows.

At first blush, interpreting the language in an orders opinion may seem indistinguishable from a merits opinion, but a deeper look exposes the orders docket as a phenomenon worthy of study. For instance, assuming that the Court is only summarily reversing a lower court judgement to error-correct, when the Court issues a per curiam opinion it is issuing guidance about the basis for the correction.[25] This is no different than an opinion on the merits insofar as lower courts are used to interpreting majority opinions, concurrences, and dissents. Rather, it is due in part to the volume of repeat opinions as well as the opaque nature of the orders docket that legal observers are left questioning the purpose and legitimacy of the Court's actions as well as its capacity to provide reliable and consistent guidance.[26] In either case, the task of determining whether a signal is reliable is frustrated when dealing with orders opinions because they lack concrete markers of interpretation—e.g., identifiable authors, vote counts, and formalized engagement by each member of the bench.[27]

This Article offers a six-part taxonomy of signals that is based upon a study of the interpretations and applications of per curiam opinions by lower courts. In order to advance this taxonomy, this Article does not challenge the Court's purported basis for summarily reversing a lower court's judgement[28] (i.e., that it is only engaging in error-correction and

24. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 935–45 (2016) [hereinafter Re, *Narrowing*] (discussing four models of vertical stare decisis that lower courts apply when interpreting Supreme Court opinions).

25. The Court's practice of issuing a summary reversal has predominantly been to correct an error in a lower court's judgement; however, scholarship suggests that the Court has begun to utilize summary reversals as a means of providing further precedential guidance that it has been unable to do due to the limited number of cases that it accepts for review on its plenary docket. *See, e.g.*, Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 695–98 (2020) (arguing that the Court uses summary dispositions to provide lower courts with precedential guidance where it may not have the space to do so on its merits docket).

26. *Cf.* Richard M. Re, *Explaining SCOTUS Repeaters*, 69 VAND. L. REV. EN BANC 297 (2016) [hereinafter Re, *Explaining*] (discussing why the Court might choose to review a single case more than once on summary reversal); *see Texas's Unconstitutional Abortion Ban*, *supra* note 17, at 8, 34.

27. *Texas's Unconstitutional Abortion Ban*, *supra* note 17.

28. There is a strong basis to believe that the Court is doing more than simply error-correcting and establishing precedent through its orders docket. *See* Chen, *supra* note 25 (proposing that summary dispositions be reconceptualized as a mechanism for filling in the contours of more ubiquitous legal standards that are incapable of being addressed in a single merits case). This Article therefore works

not affecting substantive rights).[29] In this sense, the Court can broadcast to lower courts the nature of the error and the basis for the correction without providing a fulsome analysis of its prevailing view on the relevant doctrine.[30] By accepting this interpretation of the intended scope of the Court's orders docket decisions, we can better study the manner in which lower courts respond to particular signals and the insights those signals reveal. For example, per curiam opinions applied similarly across circuits can be a testament to the clarity of a signal. Lower courts may find transferability of signals in one doctrinal context and apply it to another, or some signals may be rejected by lower courts for different reasons and the circuit may adopt the most limited reading of a signal.[31] All signals have some degree of ambiguity, but it is not to say that simply because one signal appears to be less representative of the Court's current prevailing view means that it is wholly inaccurate or that it should not be applied. There may be good reason for lower courts to interpret signals in different ways, as varying applications can promote legal innovation, particularly in a doctrinal context where many courts do not agree.[32] Ultimately, the study of signals helps to guide both lower courts and litigants through day-to-day litigation and provide feedback to the Court based on the application of its signals. To that end, this Article will examine one body of doctrine—qualified immunity—to catalog and track the range of signals that lower courts receive based on their responses to a given per curiam opinion.

Qualified immunity offers a particularly intriguing area of study; the doctrine makes frequent appearances on the Court's orders docket, but those appearances are not without controversy.[33] The Roberts Court has

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to establish a baseline foundation for cataloging and analyzing signals transmitted from the orders dockets to assist in studying the further precedential impact this docket has on doctrinal development.

29. See *infra* Part I for a discussion on the Supreme Court's rules governing the orders docket and summary reversals.

30. Some scholars have attempted to create algorithms to predict authorship of per curiam opinions. Even still, a significant amount of guesswork remains inherent and questions regarding the reliability of certain signals remain prevalent. *See, e.g.*, William Li, Pablo Azar, David Larochelle, Phil Hill, James Cox, Robert C. Berwick & Andrew W. Lo, *Using Algorithmic Attribution Techniques to Determine Authorship in Unsigned Judicial Opinions*, 16 STAN. TECH. L. REV. 503 (2013) (establishing a novel empirical analysis that uses natural word processing to predict the authorship of unsigned judicial opinions).

31. *See infra* Part III.

32. See *infra* section III.A for a discussion on how ambiguous or minority signals can promote legal innovation. *See, e.g.*, Re, *Narrowing*, *supra* note 24, at 928 (discussing the process of lower courts narrowing precedent from below).

33. Court analysts have marked a growing trend in the Court's interest in addressing qualified immunity cases on its orders docket. *See* Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea

thus far summarily reversed and issued over a dozen per curiam opinions on qualified immunity cases, almost always favoring law enforcement by overruling lower courts' denials of summary judgment.[34] With the uptick in reversals so too comes an increase in critical dissents of the majority's approach that call into question whether a lower court's ruling was genuinely clearly erroneous.[35] Yet, despite the Court's one-sided pattern of per curiam opinions, the immediate effect of these orders has been fairly mixed, resulting in both beneficial and adverse outcomes for plaintiffs.[36] Thus, this comparatively rich body of opinions available on qualified immunity and the increasingly high degree of engagement by lower courts enables this doctrine to be a prime vehicle for studying the

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Januta & Guillermo Gomez, *For Cops Who Kill*, *Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ [https://perma.cc/2N9V-LK2G].

34. As of this writing, the following is a list of per curiam opinions relating to qualified immunity since the Roberts term: Ryburn v. Huff, 565 U.S. 469 (2012) (Fourth Amendment warrantless entry); Stanton v. Sims, 571 U.S. 3 (2013) (same); Tolan v. Cotton, 572 U.S. 650 (2014) (resolving question of qualified immunity at summary judgement); Carroll v. Carman, 574 U.S. 13 (2014) (Fourth Amendment warrantless entry); Taylor v. Barkes, 575 U.S. 822 (2015) (Eighth Amendment conditions of confinement); Mullenix v. Luna, 577 U.S. 7 (2015) (Fourth Amendment use of force); White v. Pauly, 580 U.S. 73 (2017) (same); Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148 (2018) (same); City of Escondido v. Emmons, 586 U.S. __, 139 S. Ct. 500 (2019) (same); Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020) (Eighth Amendment conditions of confinement); Rivas-Villegas v. Cortesluna, 595 U.S. __, 142 S. Ct. 4 (2021) (Fourth Amendment use of force); City of Tahlequah v. Bond, 595 U.S. __, 142 S. Ct. 9 (2021) (same).

35. *Luna*, 577 U.S. at 20–26 (Sotomayor, J., dissenting) (arguing that the Court's ruling supports a "shoot first, think later" policing culture); *Kisela*, 138 S. Ct. at 1155–62 (Sotomayor, J., dissenting) ("As I have previously noted, this Court routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" (quoting Salazar-Limon v. City of Houston, 581 U.S. __, 137 S. Ct. 1277, 1282 (2017)).

36. Interestingly, and seemingly cutting against the pattern of pro-law enforcement outcomes, the Supreme Court recently received noteworthy praise for reversing a lower court judgement that initially granted qualified immunity to prison officials in a conditions of confinement case which led to the subsequent remand for reconsideration in a second prison-related use of force challenge. *See, e.g.*, *In the Shadows:* McCoy v. Alamu, HARV. L. REV. BLOG (Mar. 13, 2021) [hereinafter *In the Shadows*], https://blog.harvardlawreview.org/in-the-shadows-_mccoy-v-alamu_/ [https://perma.cc/FE7K-K4A4]; Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1 (2021) (arguing that the Court's recent orders in *Taylor v. Riojas* and *McCoy v. Alamu* demonstrates the Court's efforts in "precluding some of the doctrine's most extreme consequences"). Beyond these two cases, the Court has also declined to grant certiorari in numerous other applications questioning the parameters of qualified immunity. *E.g.*, *Salazar-Limon*, 137 S. Ct. at 1278–83 (Sotomayor, J., dissenting from the denial of certiorari); Baxter v. Bracey, 590 U.S. __, 140 S. Ct. 1862, 1862–65 (2020) (Thomas, J., dissenting from the denial of certiorari); Hunter v. Cole, __ U.S. __, 141 S. Ct. 111 (2020) (denying certiorari); James v. Bartelt, 595 U.S. __, 142 S. Ct. 4 (2021) (Sotomayor, J., dissenting from the denial of certiorari); Cope v. Cogdill, 597 U.S. __, 142 S. Ct. 2573, 2573–76 (2022) (Sotomayor, J., dissenting from the denial of certiorari); Ramirez v. Guadarrama, 597 U.S. __, 142 S. Ct. 2571, 2571–73 (2022) (Sotomayor, J., dissenting from the denial of certiorari).

discourse occurring in the shadows from below.

This Article proceeds in three parts: Part I provides background on the Court's traditional use of summary reversals and per curiam opinions, identifying such opinions as carrying less authority than conventional precedent established through the merits docket. Part II examines the Court's recent qualified immunity summary reversals, beginning first with a brief assessment of where the doctrine of qualified immunity stands on the merits. Critically, this Part distinguishes the treatment across three separate subsets of qualified immunity summary reversals—Fourth Amendment warrantless entries, Fourth Amendment uses of force, and Eighth Amendment conditions of confinement—in order to better study the applications of signals by lower courts. Finally, Part III examines various lower court opinions that engage with the Supreme Court's curiam opinions. In doing so, this Article advances a six-part taxonomy of signals that represent the ways in which lower courts have interacted with and interpreted a signal. This taxonomy consists of the following categories: fact-bound, transsubstantive, heuristic, disruptive, siren, and prophetic signals. In brief, these signals may range from neutral to more divisive, therefore this Article discusses the benefits and shortcomings that result when lower courts rely on a particular category of signal. These interpretations represent the first stage of an iterative process of discourse between the Court and lower courts that has the potential to critically influence doctrinal development. This Part then concludes by offering initial insights into what this Article refers to as a "feedback loop"—a secondary stage of ongoing discourse that studies the percolation of signals occurring when the Court and/or litigants subsequently respond to a lower court's application of a prior per curiam opinion.

This Article makes two significant contributions. First, the taxonomy advanced provides the necessary groundwork for dissecting and categorizing the vectors of the Court's ongoing and increasingly prolific reliance on its order docket. This demonstrates that despite the ambiguity in its underlying process, it is a docket that *can* be studied, and provides a foundation that can be used regardless of methodology across a range of doctrinal contexts.[37] Second, this study reveals new patterns in the doctrine of qualified immunity that have gone unnoticed by legal scholars and adds critical insights to the existing scholarship surrounding Fourth and Eighth Amendment constitutional rights.

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37. See *infra* note 294 for a brief discussion applying this taxonomy to examine the Court's recent reliance on orders docket opinions in *West Virginia v. EPA*, 597 U.S. __, 142 S. Ct. 2587 (2022).

I. PER CURIAM OPINIONS AS PRECEDENT

How closely should lower courts and litigants be following and engaging with cases on the orders docket? Given the increasing number of per curiam decisions coming out of the Roberts Court, questions pertaining to their precedential value have piqued the interests of legal scholars and observers alike.[38] This Part discusses the Court's historical use of per curiam decisions in order to situate and understand the role the current practice will play in future doctrinal development.

Per curiam opinions, though instructive, do not carry as much authoritative weight as conventional precedent arising through the more formal merits process.[39] But whether certain statements carry more or less precedential authority is not dispositive of this threshold question posed to lower courts and litigation. Given how much flexibility the Court has in the administration of its orders practice, the answer depends on how much the Court itself chooses to utilize the orders docket as a method of communication.[40] Thus, it is logical to assume that the more likely the Court is to address a particular area of the law through its orders, the more relevant a particular line of per curiam opinions becomes. But even as their prevalence increases, problems pertaining to a lower court's ability to rely on a particular opinion remain given the fact that the signals arise through a less comprehensive litigation posture than its plenary counterpart.[41] To answer the question posed above in the context of today's Court, the following first analyzes patterns of prior per curiam applications.

As the Supreme Court changes Terms, so does its agenda. This is not limited to its merits docket but historically has also included its orders docket.[42] Scholars have identified noticeable changes in the Court's use of its orders docket ranging from increases and decreases in frequency of use to an ever-changing curated selection of substantive issues depending

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38. *See, e.g.*, Chen, *supra* 25, at 704–06 (analyzing the Courts increased reliance on summary dispositions).

39. Re, *Narrowing*, *supra* note 24, at 942 (discussing that the Supreme Court may communicate signals outside of conventional precedent through "summary orders, statements during oral argument, separate opinions, and dicta in majority opinions").

40. *Cf.* Harnett, *supra* note 19, at 615–16 (discussing the Court's refusal to self-limit its certiorari practice).

41. *See* authorities cited *supra* notes 4–6.

42. *See, e.g.*, Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 562–63 (2000) (discussing the historical shift in and prevalence of per curiam opinions by the Supreme Court).

on the concerns and needs of the Court.[43] These changes often fluctuate under the direction of each Chief Justice.[44] Aside from the prohibition on advisory opinions and Supreme Court Rule 10—which cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"[45]—there are few other limitations on how the Supreme Court can use its orders docket to resolve petitions for certiorari.[46] The broad parameters afforded to the Court in managing its orders docket provide the Court with flexibility to shift its approach and adjust course based on its agenda.[47]

For background, a case can arise on the orders docket in various forms and the docket may serve multiple functions. The orders docket, for example, is where denials of certiorari are documented and the vehicle through which petitions for emergency relief are processed on an expedited basis.[48] It is also the docket through which the Court may issue a summary disposition in which it grants certiorari in order to reverse and correct a lower court's application of settled law.[49] Although the Court

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43. *Id.* at 561–62 (noting the differences in approach to the use of per curiam opinions between the Burger and Rehnquist Courts).

44. *Id.* at 531–36.

45. SUP. CT. R. 10. The Court has a strict prohibition on advisory opinions. Advisory opinions are, in brief terms, the promulgation of law untethered to any factual analysis that does not affect the immediate parties to the suit. *See* Tolan v. Cotton, 572 U.S. 650, 661 (2014) (per curiam) (Alito, J., concurring) (expressing disagreement with the Court's use of the orders docket to intervene in factual disputes that are better left to the lower courts that commonly review motions for summary judgement).

46. Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 186 (2020) (noting that 28 U.S.C. § 2106 facially confers upon the Court "broad discretion to vacate and remand with no limit except the standard of justice").

47. *See* Ray, *supra* note 42, at 523.

48. This is intended to be a non-exhaustive list. 28 U.S.C. § 2106 establishes the broad counters of the Court's remand power. For an explanation of the Court's remand power, see Bruhl, *supra* note 46, at 219.

49. There are three common types of summary dispositions: summary orders, summary opinions, and reconsideration orders (commonly known as a GVR, for "grant, vacate, and remand."). Alex Hemmer, *Courts as Managers:* American Tradition Partnership v. Bullock *and Summary Disposition at the Roberts Court*, 122 YALE L.J. ONLINE 209, 211 (2013). Summary orders are orders issued without explanation whereas summary opinions, which this Article focuses on, are reversals that are accompanied by a per curium opinion. *Id.* GVR refers to the practice of granting certiorari, vacating the judgment, and remanding for the lower court to reconsider its opinion. *Id.* at 211–12. GVRs typically only occur when there has been an intervening event. *See* Sena Ku, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 390 n.34 (2008) ("[T]he Supreme Court has considered seven distinct categories of intervening events in historical GVR practice: (1) state decisions, (2) state statutes, (3) Supreme Court decisions, (4) federal statutes, (5) new interpretations by administrative agencies, (6) changed factual circumstances, and (7) confessions of error or new positions taken by the Solicitor General of the United States.").

argues that a case presented and disposed of through the orders docket is not a decision on the merits that establishes new precedent, at a minimum it telegraphs vital signals to lower courts.[50] Similarly, the Court's action or inaction may transmit relevant signals. For example, a denial of certiorari may convey the Court's unwillingness to address a particular issue on the merits.[51] Or the Court's affirmation of a stay pursuant to an emergency petition for relief could communicate that the applicant is likely to succeed on the merits.[52] Nonetheless, by resolving these more administrative matters on the orders docket the Court is able to operate more efficiently.[53]

The Court could have a number of reasons for reviewing cases on its orders docket beyond using it as an administrative mechanism for the sake of judicial economy. Historically, the orders docket has allowed the Court to insulate itself from societal critique of controversially fraught issues,[54] to shepherd the law in a particular direction,[55] or to foster constitutional innovation.[56] For example, following *Brown v. Board of Education*,[57] the Warren Court used its orders docket to expand desegregation laws from the public education sphere to carry precedential weight in cases involving the use of public facilities.[58] By strategically issuing per curiam opinions and summarily reversing lower court judgements, the Court was able to insulate itself from hotly disputed legal issues that flared racial tensions, which may have resulted in a divided court if reviewed on the merits docket.[59]

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50. *See, e.g.*, Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 846 (2021) ("While a summary affirmance is not necessarily an endorsement of the reasoning of the court below, a summary reversal carries clear repercussions for the lower court's opinion.").

51. *See, e.g.*, Harnett, *supra* note 19, at 609 (discussing the immateriality of acquiescence in the case of a summary reversal).

52. *See* McFadden & Kapoor, *supra* note 50, at 838.

53. *See* Chen, *supra* note 25.

54. *See* Ray, *supra* note 42, at 539 (identifying several cases issued on the Court's orders docket either affirming a desegregation policy or vacating a lower court judgment and remanding with the implication that attempts to preserve segregated facilities would be overturned).

55. *See, e.g.*, Baude, *supra* note 2, at 44 (observing that "[o]f the 56 summary reversals, there were sixteen state-on-top summary reversals in AEDPA [referring to the Antiterrorism and Effective Death Penalty Act of 1996] cases—the highest number of cases in any specific category"); Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 180 (2021) (examining the developments in direct collateral review of AEDPA on the orders docket).

56. *Cf.* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999) (discussing how qualified immunity encourages constitutional innovation without the risk of cost for remediation).

57. 347 U.S. 483 (1955).

58. Ray, *supra* note 42, at 539–40.

59. *Id.*

Through these post-*Brown* orders, the Court used its per curiam opinions to avoid a narrative of division amongst its individual judges, communicating consistently and unequivocally that segregation violates equal protection, no matter the environment.[60] Critically, the authority to engage in this form of strategic docketing rested on the premise that the full court supported the legal theory backing *Brown*.[61]

Scholars have previously observed that the Court's approach post-*Brown* is not the only time the Court has used its orders docket strategically with the expectation of compliance. Professor Aaron-Andrew Bruhl notes that the Court may use its discretionary power to grant certiorari to shepherd the law and explicitly guide lower courts where they believe there has been deviation from its precedent.[62] Professor Edward Hartnett similarly has identified four categories in which the Court may use its discretionary certiorari power, ranging from corrections of lower court defiance to clarifying instances in which the Court itself misspoke.[63] The Supreme Court has explained that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'"[64] D.C. District Judge Trevor McFadden, who recently examined emergency stays on the orders docket and their precedential weight, observed this statement to mean that "lower courts are not just bound by legal reasoning or the explication for a holding: the Supreme Court expects lower courts to defer even to its summary affirmances and dismissals encapsulated in one-line orders."[65] The bottom line is that when the Court reverses and corrects a lower court, it expects other courts to read the tea leaves or risk future reversals.[66]

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60. *See infra* note 76.

61. *See* Ray, *supra* note 42, at 533–35.

62. *See* Bruhl, *supra* note 46, at 181. Further, Edward Hartnett argues that application of the Federal Arbitration Act is one of several clear examples in which the Court has identified resistance by lower courts and has sought to error correct through summary reversal. Harnett, *supra* note 19, at 597–98.

63. Hartnett observes that an additional benefit of summary reversals is that it presents the Court with a greater opportunity to reach a consensus, or at least, prevent against critical public dissents. *See* Hartnett, *supra* note 19, at 609 ("[T]he rate of public dissent and separate opinions is considerably lower in summary reversals than in cases decided after full briefing and argument.").

64. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (alteration in original) (quoting Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973)).

65. McFadden & Kapoor, *supra* note 50, at 846.

66. Counter to this point, the Supreme Court has previously indicated that cases resolved on its orders docket do not carry the same precedential weight as a case resolved on the merits docket. *See, e.g.*, Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.'" (citation omitted)).

The task of assessing the majority's intent behind a signal is easier said than done. The same cannot be said today about the Court in terms of presenting a united front, as Justices continue to dissent in controversial orders opinions, demonstrating significant polarization on the Court.[67] Unlike the post-*Brown* orders decisions, the per curiam opinions issued from today's Court reveal an inability to converge on a discreet issue and therefore call into question the clarity of signals emitted from the Court's reversal.[68] Professor Laura Ray aptly observed that the use of the orders docket "has functioned most effectively when it allowed the Court to strike a balance between the institutional need for consensus and the individual need for personal expression."[69] Traditionally, the per curiam has been used to avoid individualism and demonstrate unity.[70] Further, it is not common practice for the Court to engage in frequent error correction.[71] Therefore it is fitting that the cases that have garnered the most public attention are ones that appear as applications for emergency petitions requiring expedited review—e.g., requests for a stay on the eviction moratorium, COVID-19 protocols, requests for stay of injunction preventing the implementation of a private right of action against abortion-providers, and stays for execution.[72]

Despite not being subject to emergency review, the Court's approach to qualified immunity should equally raise questions about the legitimacy of per curiam decisions as precedent. When addressed on the orders docket, a qualified immunity case arises in the form of a summary reversal in which a minimum of five Justices are required to grant certiorari in order to reverse the lower court's judgment.[73] This, however, does not mean that all Justices who supported summary reversal would have voted

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67. The first dissent in a per curiam opinion came from Justice Oliver Wendell Holmes in *Burlington & Quincy Railway Co. v. Williams*, 214 U.S. 492 (1909), where he demonstrated hesitancy in expressing his divergent view outside the need for a public statement or signal. *Id.* at 495. The practice, however, did not gain full momentum until the 1960s. For additional background on the development of the per curiam, see Ray, *supra* note 42, at 524.

68. *See Texas's Unconstitutional Abortion Ban*, *supra* note 17.

69. Ray, *supra* note 42, at 576.

70. *See id.*

71. *See, e.g.*, Tolan v. Cotton, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (voicing concern that error correction falls outside of the Court's certiorari practice).

72. Louis Jacobson, *The Supreme Court's 'Shadow Docket': What You Need to Know*, POLITIFACT (Oct. 18, 2021), https://www.politifact.com/article/2021/oct/18/supreme-courts-shadow-docket-what-you-need-know/ [https://perma.cc/8L7H-64WC].

73. Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 839 (2018) (discussing the "rule of five").

in favor of granting plenary review.[74] In fact, numerous combinations of concurring and dissenting opinions issued both in summary reversal cases and denials for certiorari suggest that Justices who support summary reversal would have voted against plenary review.[75] The approach the Court has taken over the past decade is antithetical both to the precedent shepherding that took place following *Brown* and to the requests for emergency relief that consume media attention today.

One could argue that the Court today is following a similar approach to the post-*Brown* Warren Court by addressing qualified immunity cases strictly on the orders docket in order to demonstrate that the law in this area is clearly settled.[76] But what the Roberts Court makes up for in efficiency through its orders docket, it sacrifices in terms of clarity. Transparency problems that always existed on this docket—such as limited briefing[77] and lack of identifiable authorship[78]—were easily excused because the appearance of a consensus seemed less controversial and more palatable.[79] For example, in the post-*Brown* line of orders, the Justices sacrificed their individual expression by choosing to issue summary reversals with no additional, signed concurring or dissenting statements to demonstrate a united front on the issue of segregation.[80] In other words, their message was clear and consistent, leaving no legal wiggle room for confusion amongst lower courts. But today, the narrative being conveyed by the Court is one of discord, divisiveness, and strong

74. *See, e.g.*, *Tolan*, 572 U.S. at 661 (per curiam) (Alito, J., concurring) (disagreeing with the Court's decision to grant plenary review); Taylor v. Riojas, __ U.S. __, 141 S. Ct. 52, 54 (2020) (per curiam) (Alito, J., concurring) (disagreeing with the Court's decision to grant review); Baxter v. Bracey, 590 U.S. __, 140 S. Ct. 1862, 1862–65 (2020) (Thomas, J., dissenting from the denial of certiorari).

75. *See* cases cited *supra* note 74.

76. Perhaps it is not so much that *Brown* was "settled," but rather that the Court needed to keep sending signals in order to calm the waters and to tell the states that, while the Court left it up to them to decide how to implement *Brown*, it was going to use the orders docket to keep them in check.

77. *See* Baude, *supra* note 2.

78. An immediate concern with precedent development on the orders docket is authorship, both in terms of name and numerical vote. Though it may not be problematic when lower courts limit their interpretations of a per curiam to a fact-bound application, such opinions clearly raise questions when read broadly. For example, it is difficult to identify who the author of a per curiam opinion might be and whether the author may have been the author of a dissent in a merits docket case. In a similar vein, per curiam opinions that have signed dissents do not necessarily convey all dissents, merely the fact that some Justices chose not to sign on to a dissent for whatever reason. In *Luna*, Justice Sotomayor was the sole author of a dissent, but that does not necessarily support the conclusion that the vote for *Luna* was eight-to-one, it merely indicates that, at minimum, five Justices voted in favor of the summary reversal, one penned a dissented and self-identified themselves, but the other three votes are left up to interpretation. Mullenix v. Luna, 577 U.S. __, 136 S. Ct. 305 (2015); *see also infra* section III.A for a detailed discussion on the various signals that lower courts may receive.

79. Ray, *supra* note 42, at 576.

80. *See id.*

disagreement in both procedure and substance.[81] The signals being sent to lower courts and litigants now lack even the most basic appearance of unanimity and, therefore, raise questions regarding the weight of authority that such opinions should carry.

Criticism over summary reversals has become limited in recent years as the Roberts Court has worked to normalize the practice and litigators have been advised to expect it as a possibility when applying for certiorari.[82] But as it pertains to qualified immunity, the Court appears to selectively grant certiorari only in instances where it believes the lower court applied the law incorrectly, typically skewed to favor law enforcement.[83] Although the Court is not required to follow any particular proscriptions in the pursuit of balance,[84] the anharmonic result of orders issued with signed dissents is at odds with the traditional per curiam practice and further discordant with the idea that the order is truly representative of the Court.

II. QUALIFIED IMMUNITY: THEN AND NOW

Qualified immunity is a form of legal immunity that protects government officials from lawsuits in which the official was acting in good faith. Determining whether to grant or deny qualified immunity requires courts to engage in a non-sequential two-part inquiry: (1) whether a constitutional right has been violated and (2) whether that right was clearly established at the time of the alleged violation.

This Part briefly summarizes the evolution of the law surrounding qualified immunity—as it pertains to police and prison law enforcement officers—on both the Court's merits and orders dockets. This evolution provides a backdrop to examine the range of signals received and applied by lower courts as a result of the Court's summary reversals.

A. The Merits Docket

Qualified immunity has never been a particularly stable doctrine and has already taken on many permutations since its judicial inception. Over the course of the Court's shifting application, qualified immunity has

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81. *See infra* Part II.

82. *See* Baude, *supra* note 2, at 19–22 (noting the Court's regularized practice of summary reversals, and that as a result, "wholesale criticism is fading"); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009).

83. *See* Baude, *supra* note 2.

84. *See* Bruhl, *supra* note 46.

come under well-deserved scrutiny by scholars,[85] litigators,[86] legislators,[87] and Supreme Court Justices.[88] Criticism of the doctrine is not immune to partisan lines, but it has been uniformly unpopular, albeit for differing reasons, with a growing list of approaches for reform constantly proposed.[89] Debates on qualified immunity are typically accompanied with conversations on police reform, with many classifying the doctrine as one of the primary hurdles to police accountability.[90]

Over its lifespan, the Court has more often than not overturned lower court opinions that initially denied law enforcement officers qualified immunity, making many tweaks to the doctrine and its application along the way.[91] Beginning with the inception of qualified immunity, the Court applied the concept as a response to the uptick in civil rights lawsuits in the 1960s.[92] Later, the Court justified qualified immunity as a legal backstop for preventing law enforcement officials from enduring the burdens of trial when acting in good faith.[93]

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85. *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021) (arguing that qualified immunity does not serve the purported purpose of shielding officers from the costs of civil litigation); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that qualified immunity is inconsistent with traditional principles of statutory interpretation).

86. *See, e.g.*, Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/P8Z6-LGHL] (advocating for the abolition of qualified immunity).

87. *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html (last visited May 30, 2023) (listing the various Senate bills proposed by Republican Senators to amend the qualified immunity doctrine).

88. *See infra* Part II.

89. The most common proposal for reform is to abolish qualified immunity. In recent years, some legislators have moved away from this stance and have proposed bills that would alter qualified immunity to allow victims to seek monetary damages. Where changes to qualified immunity are not proposed, legislators propose more transparency in reporting certain police-civilian incidents and further de-escalation training for officers. *See, e.g.*, Emily Cochrane & Luke Broadwater, *Here Are the Differences Between the Senate and House Bills to Overhaul Policing*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/us/politics/police-reform-bill.html (last visited May 30, 2023) (discussing the substantive differences between the bills proposed by the 2020 U.S. House and Senate aimed at addressing the excessive use of force by law enforcement officers).

90. *See, e.g.*, *id.* (noting that Democrats would support limitations to qualified immunity in order to allow plaintiffs to recovery monetary damages).

91. *See* Baude, *supra* note 2.

92. Pierson v. Ray, 386 U.S. 547 (1967); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 13 (2017).

93. The Court's justification for sustaining qualified immunity has shifted over the years, but most recently the Court has focused its efforts on its desire to protect defendants from the burdens

Although challenges to law enforcement practices can come in various forms—like those arising from unlawful searches, seizures or conditions of confinement—Fourth Amendment excessive force claims[94] were pivotal in shaping the doctrine of qualified immunity. For example, the objective reasonableness standard that we know today was established in *Graham v. Connor*,[95] a seminal case involving a civilian who had an insulin reaction that officers mistook as suspicious behavior.[96] Mr. Graham sustained several injuries including a broken foot, and injuries to his wrist, forehead, and shoulder when officers attempted to detain him.[97] Prior to *Graham*, for a significant period of time, courts frequently found that the due process clause of the Fourteenth Amendment established a right to be free from excessive force.[98] Although the issue had never been briefed before the Supreme Court,[99] the Court in *Graham* limited the source of rights under which police uses of force can be challenged to the Fourth Amendment—i.e. where a seizure is involved.

Following *Graham*, the Court frequently ruled in favor of law enforcement on one of two grounds: either on the basis that the lower court defined the right at issue too broadly or that the lower court applied precedent that did not implicate the precise circumstances required to sufficiently put an officer on notice of violating a clearly established

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associated with discovery and trial that could chill defendants from fully engaging in their role as public law enforcement officers. *See* Schwartz, *supra* note 85, at 9. Scholars have studied the efficacy of qualified immunity to dispose of cases in which officers arguably acted in good faith and have debunked the Court's theory that qualified immunity achieves this purpose. Professor Joanna Schwartz published a study in 2017 finding that "qualified immunity rarely served its intended role as a shield from discovery and trial in these cases" but rather that cases were primarily disposed of through traditional civil procedure tools such as motions to dismiss or motions for summary judgment. *Id.* Even as observed anecdotally in this Article, the Court's per curiam opinions did not seem to alter outcomes; circuit courts continued to rigorously assess applicable qualified immunity standards. *Id.* at 2.

94. The Court analyzes Fourth Amendment excessive use of force claims under the same umbrella and legal framework as if it were a seizure. Scholars have argued that this conception of force is not accurate and results in the law's inability to regulate police violence. *See, e.g.*, Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521 (2021) (arguing that not all uses of force are appropriately categorized as seizures).

95. 490 U.S. 386 (1989).

96. *Cf.* Schwartz, *supra* note 92 (discussing the impact that the reasonably objective standard has on discovery).

97. *Graham*, 490 U.S. at 390.

98. *See* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (holding that an "application of undue force by law enforcement officers deprives a suspect of liberty without due process of law").

99. *See Graham*, 490 U.S. at 393–94 (cautioning that the Court's holding in *Johnson v. Glick* is limited and does not address the applicability of an excessive force claim being brought on substantive due process grounds).

right.[100] The Court momentarily broke from its pattern of seemingly siding with law enforcement in 2002 in an Eighth Amendment case called *Hope v. Pelzer*.[101] With *Hope*, it seemed that the existing "case-on-point" standard was easing as the Court held that not every factual scenario leading to a constitutional violation need to have occurred in order for an officer to be on notice.[102]

The principle established by *Hope* seemed to be a one-off case, particularly when it came to addressing Fourth Amendment use of force challenges.[103] In *Scott v. Harris*,[104] the Court first addressed whether a constitutional right had been violated before determining whether the right had been clearly established.[105] The result of this two-prong analysis led to what some Justices bemoaned as an overtly broad articulation of a Fourth Amendment standard.[106] Here, the Court ultimately held that "a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of

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100. *See,* Baude, *supra* note 2, at 83. For twenty years following *Graham*, the Court maintained the practice of requiring that the constitutional inquiry be addressed before determining whether the officer violated a clearly established right. *See* Saucier v. Katz, 533 U.S. 194, 199 (2001). A primary driver for sequencing this test was to "support the Constitution's elaboration from case to case and to prevent constitutional stagnation." Pearson v. Callahan, 555 U.S. 223, 232 (2009) (internal quotations omitted). But in 2009, the Court, in *Pearson*, formally waived this sequencing requirement and permitted lower courts to use their discretion to skip step one of the inquiry. *Id.* The effect of this was astronomical and allowed qualified immunity doctrine to stagnate as courts opted-out of fact-bound assessments that would have established constitutional precedent regulating law enforcement. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 52–65 (2015) (proposing that courts be required to state their reasons for applying *Pearson* discretion when avoiding constitutional questions); *see also* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905 (2018) (proposing reforms to section 1983 municipal liability).

101. 536 U.S. 730 (2002).

102. *Id.* at 739.

103. *See, e.g.*, Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018) (holding the fact that plaintiff had his hands raised was not "enough to put [the officer] on notice that a canine apprehension was unlawful in these circumstances" despite prior precedent in *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012), which held that it is unconstitutional to deploy a canine against a suspect who was not fleeing or resisting in circumstances where the individual was lying down).

104. 550 U.S. 372 (2007).

105. *Scott* was decided two years prior to *Pearson* and was a catalyst for eliminating the sequencing rule as it demonstrated the tensions in first addressing the constitutional question when such a discussion on the merits may not be necessary. *Id.* at 387 (Breyer, J., concurring).

106. *Compare id.* at 374 (majority opinion), *and id.* at 386 (Ginsburg, J., concurring) (highlighting that *Scott* should not be read as creating a "mechanical, per se rule"), *with id.* at 387 (Breyer, J., concurring) (raising concerns regarding the "order-of-battle" rule established in *Saucier*), *and id.* at 389 (Steven, J., dissenting) (criticizing the majority's de novo review of factual determinations already made by the district court).

serious injury or death."[107] Although courts may choose to engage in the two-prong analysis, the desire to avoid the harshest consequences of determining whether a constitutional right was violated has now led to reticence amongst lower courts to proactively engage in this inquiry and, further, to identify obvious cases.[108] In turn, this limits recovery for plaintiffs seeking damages due to the inability to establish notice of a clearly established right.[109]

Graham v. Connor remains the seminal case governing challenges to Fourth Amendment excessive force violations, but this case and its progeny do little to provide explicit guidance on how lower courts should arrive at determining whether an officer was on notice that the alleged conduct was prohibited.[110] That is to say that in each case, the Court is focusing on whether a clearly established law has been violated—a general, higher-level question—but it does little to explicitly answer how it got there: how factually similar a prior case needs to be, which courts can establish precedent,[111] when is it obvious enough that prior precedent is not needed to establish a violation, and how might the analysis shift depending on the right at stake? Failure to answer these questions has long been considered the fatal flaw in the doctrine as it has developed on the merits. One theory is that the Court could be communicating critical signals to lower courts by providing implicit guidance on how to answer these more nuanced inquiries through its orders docket. Yet still the cases on the orders docket, discussed below, fall into the same trap as the merits cases and fail to remedy this central flaw within the existing qualified

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107. *Id.* at 386 (Ginsburg, J., concurring).

108. *See* Blum, *supra* note 100, at 1905 (identifying the failure of courts to establish factually similar precedent in qualified immunity cases as a Catch-22 for civil rights plaintiffs seeking recourse).

109. In sum, the combination of the objective reasonableness standard and the clearly established prong makes it difficult for plaintiffs to satisfy either of the separate *Pearson* inquiries. *See generally* Seth W. Stoughton, Kyle McLean, Justin Nix & Geoffrey Alpert, *Policing Suspicion: Qualified Immunity and "Clearly Established" Standards of Proof*, 112 J. CRIM. L. & CRIMINOLOGY 37 (2022) (discussing the intersection of low-certainty standards of proof, such as reasonable suspicion and probable cause, with the high-certainty requirements of the clearly established prong).

110. Scholars have critiqued *Graham* as inadequate precedent for establishing notice on its own. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1820 (2018) (explaining how *Graham's* ability to provide sufficient notice to law enforcement officials is overstated and limited in the context of excessive force cases).

111. Justice Thomas has often hinted that perhaps not all courts can establish precedent sufficient to overcome qualified immunity. For example, in *Reichle v. Howards*, Justice Thomas, writing for the Court, stated "[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . . ." 556 U.S. 658, 665 (2012). A similar phrase was repeated in *Taylor v. Barkes*, a 2015 per curiam opinion, in which the Court stated "[a]ssuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals . . . ." 575 U.S. 822, 826 (2015) (per curiam).

immunity analysis.

The following section analyzes the continuum of qualified immunity cases as presented on the orders docket and the signals that these cases could plausibly telegraph to lower courts in light of the body of precedent established on the merits docket.

B. The Orders Docket

When qualified immunity is discussed, it is often analyzed with little distinction between cases involving police—invoking the Fourth Amendment—and correctional officers—invoking the Eighth Amendment.[112] But not all constitutional violations are treated

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112. Scholars have predominantly critiqued qualified immunity through the lens of Fourth Amendment excessive force cases. Most argue that the current formation of the doctrine is incapable of permitting courts to grasp the real-life circumstances that result in uses of force. For example, Professor Rachel Harmon argues that the use of force, and in particular nondeadly force, "is often not a singular event but a series of choices made by an officer, sometimes in quick succession, over the course of an interaction." *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1130 (2008). Harmon points out that the *Graham* factors therefore do little to indicate when and how much force is justified and, further, what kind of force, given the circumstances, is reasonable. *Id.*; *see also* Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1297 (2019) (summarizing critical scholarship that documents the role race and racism play in the development of criminal procedure doctrine, particularly in the context of analyzing Fourth Amendment uses of force). Professor Brandon Garrett argues that qualified immunity adds a secondary layer of "constitutional reasonableness" that is at odds with the constitutional right that was violated. *See* Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 65 (2017) ("Once all three dimensions are set out, one sees just how problematic constitutional reasonableness can be in operation. It provides no coherent direction to advise police officers that if they use deadly force, they must do so reasonably under the circumstances; but, if they do so unreasonably, the Fourth Amendment violation may be deemed by a judge reasonable for qualified immunity purposes."). Professor Seth Stoughton identifies a fundamental misalignment in the aims of the Fourth Amendment's protection from unreasonable seizures and its ability to regulate uses of force. *See* Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521 (2021). Professor Brandon Hasbrouck provides an additional diagnosis arguing that the law's inability to protect civilians against excessive force is the systemic result of unquestioning deference given to law enforcement officials, allowing them to act as self-serving lawmakers. *See* Brandon Hasbrouk, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 246 (2021) ("Because the vast majority of low-level offenses never receive any review whatsoever, police lawmaking in such situations is as much a consequence of procedure as the doctrinal considerations that constitutionalize police conduct around more serious crimes. Police departments are often left to review themselves, with predictable results."). A common theme in each of these critiques is that the Court never seems to grasp the full picture, resulting in a failure to appreciate the broader legal ramifications that even a non-decision in a qualified immunity case may have in a civil, criminal or prison confinement case. STEPHEN M. SHAPIRO, KENNETH GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 357 (10th ed. 2013) ("[A] respondent concerned over the possibility of a summary disposition is well advised to concisely demonstrate that the decision below is correctly decided, in addition to explaining why the case is not 'certworthy.'"). States have begun to respond to these

equally, particularly in the law enforcement-qualified immunity context. To better illuminate that which operates in the shadows, this section takes a critical step in qualified immunity scholarship by breaking down the recent summary reversals into three categories of cases—Fourth Amendment warrantless entries, Fourth Amendment uses of force, and Eighth Amendment conditions of confinement—and examines the Court's approach to each through the orders docket.[113]

1. Fourth Amendment Warrantless Entry Exceptions

When the Roberts Court initially began reviewing qualified immunity cases on its orders docket, it addressed three cases—*Ryburn v. Huff*,[114] *Stanton v. Sims*,[115] and *Carroll v. Carman*[116]—that focused solely on exceptions to the presumption against Fourth Amendment warrantless entries. This trio of cases did not create much cause for attention among the legal community—no dissenting opinions were entered and the facts of each case did not appear so controversial as to raise serious questions about the reasonableness of the officers' actions at the time.[117] But these

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criticisms. For example, Maryland recently abolished its Law Enforcement Officers' Bill of Rights (LEBOR) that provided officers with notice prior to an investigation based on the theory that a civilian suspected of criminal conduct would not be afforded the same notice before his/her questioning. *See Maryland Police Accountability Act of 2021—Police Discipline and Law Enforcement Programs and Procedures*, MD. GEN. ASSEMBLY (Aug. 2, 2021, 12:10 PM), https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0670/?ys=2021rs [https://perma.cc/6D64-GGU5].

113. The cases discussed in this section are not intended to be an exhaustive list of per curiam opinions that lower courts may rely upon. Rather, these cases are representative as an example of the manner in which lower courts analogize and contrast the factual discussion in these opinions as signals on how to apply mixed questions of fact and law. Further, this Article makes an effort to raise awareness of the plaintiffs who challenge instances of police or prison misconduct. In order to do so, this Article will shorten citations to highlight the plaintiff's name while still following appropriate citation standards. This decision is consistent with a growing scholarly effort to highlight the individuals who have not only suffered a harm, but also have the courage and tenacity to pursue legal redress. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021).

114. 565 U.S. 469 (2012) (per curiam) (reversing the Ninth Circuit's denial of qualified immunity where an officer was investigating rumors regarding a school shooter, presenting exigent or emergency circumstances of imminent violence).

115. 571 U.S. 3 (2013) (per curiam) (reversing the Ninth Circuit's denial of qualified immunity and holding that the law on warrantless entry to a home, while in hot pursuit of a suspect that an officer has probable cause to arrest for a misdemeanor, is not a clearly established violation of the Fourth Amendment).

116. 574 U.S. 13 (2014) (per curiam) (reversing the Third Circuit's denial of qualified immunity on the grounds that the law is not clearly established as to whether a police officer must conduct a "knock and talk" at the front door of a property when any entrance may be open to visitors).

117. *E.g.*, the per curiam opinion in *Huff* was issued the same day as the Court's decision in *United*

cases quickly set a tone for how the Court could easily pilot the orders docket and guide the contours of Fourth Amendment jurisprudence through civil litigation.

Beginning with *Huff*, the Court addressed the issue of whether exigent circumstances permitted officers to conduct a warrantless entry into the home of a high-school student rumored by a third party to be planning a school "shoot up."[118] The Court relied heavily on its earlier precedent established in *Brigham City v. Stuart*,[119] a 2006 criminal case heard on the merits docket in which the Court unanimously held that the exigency exception applies where the officers have a reasonable basis to believe that an occupant of the home is "seriously injured or threatened with such injury."[120] In *Stuart*, officers were responding to a noise violation at a house party and observed a juvenile being physically beaten by four adults from the window of the home and entered to break up the fight.[121] One reading of the Court's opinion in *Huff* could be that the Court merely applied its earlier precedent in *Stuart* to hold that the exigency exception equally applied in the context of a rumored school shooter, where the threat of serious injury may have a large-scale and devastating impact on the community. Another reading of this case could arguably be that the Court used *Huff* as an opportunity to expand the exigent circumstances exception articulated in *Stuart* to provide greater deference to officers. By modifying the standard applied in *Stuart* and including language such as "rapidly unfolding chain of events" in *Huff*, the Court could be seen as expanding the scope of necessary facts required from those observed first-hand to communications by a third party to justify the officer's decision to enter a home without a warrant.[122]

In *Sims*, the Court similarly showed a desire to preserve another exception to the warrantless entry prohibition—this time relating to the "hot pursuit" exception.[123] Here, the occupant of a home was injured when law enforcement officers kicked down the front gate to her yard in hot pursuit of an individual alleged of a misdemeanor offense.[124] The Ninth Circuit relied on Supreme Court precedent established in *Welsh v.*

States v. Jones—the seminal Fourth Amendment search case holding that officers were required to obtain a search warrant in order to place a GPS tracking device on a suspect's vehicle. *See Huff*, 565 U.S. 469; *see also* United States v. Jones, 565 U.S. 600 (2012).

118. *Huff*, 565 U.S. at 470.

119. 547 U.S. 398 (2006).

120. *Id.* at 403.

121. *Id.* at 400–02.

122. *Id.* at 477.

123. Stanton v. Sims, 571 U.S. 3, 6 (2013) (per curiam).

124. *Id.* at 4.

Wisconsin[125] for the proposition that exceptions to the Fourth Amendment's prohibition on warrantless entry, particularly of an individual suspected of a minor offense, should rarely be afforded, and further were limited to the pursuit of a civilian suspected of committing a felony.[126] The Court used the facts in *Sims* to elaborate upon its holding in *Welsh*, stating that *Welsh* did not create a clearly established right and that it "did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is 'usually' required."[127] Again, a narrow reading of *Sims* would merely show that the Court did not find any cases on point that clearly established that an officer violated the Fourth Amendment when in hot pursuit of an individual suspected of a misdemeanor offense. But a broad reading of this case may show that the Court used *Sims* to clarify and say what it did not in a prior criminal case that established limitations to the hot pursuit exception, giving itself more flexibility in future cases. Despite remaining silent on the constitutionality of whether the hot pursuit exception applies in cases of a suspected minor offense, the Court could be signaling through this per curiam opinion that such an exception would not be off the table, inviting further litigation on this issue.[128]

Finally, in *Carmen*, the Court remained silent on the constitutionality of yet another exception to the warrantless entry prohibition: the knock-and-talk exception.[129] *Carmen* involved a situation in which police were following up on a report that an individual who had stolen a vehicle and possessed two loaded guns had fled to a third party's property.[130] Upon arriving at the property, located on a corner lot (the factual record makes no mention of a fence around the property), officers approached a shed on the property and after no answer went to another side of the house and approached a sliding glass door that opened onto a ground-level deck.[131] Plaintiffs argued that the officers' entry was illegal on the basis that the

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125. 466 U.S. 740 (1984).

126. *Id.* at 750.

127. *Sims*, 571 U.S. at 8 (quoting *Welsh*, 466 U.S. at 750).

128. In 2021 the Court held in *Lange v. California*, 594 U.S. __, 141 S. Ct. 2011 (2021), that hot pursuit of a fleeing misdemeanant does not automatically qualify as an exigent circumstance justifying warrantless entry into a home and left open the door for officers to claim a potential exigent circumstance (beyond flight) when in hot pursuit of a suspected misdemeanant. *See id.* at 2019 (resolving a prior circuit split, as noted in *Sims*, and reasoning that the same exigency that is almost always present in fleeing-felon cases may not always be present in fleeing-misdemeanant cases where offenses can widely differ in seriousness).

129. Carroll v. Carman, 574 U.S. 13, 20 (2014) (per curiam).

130. *Id.*

131. *Id.*

sliding glass door was on the backside of the property.[132] Relying on its own circuit precedent, the Third Circuit reasoned that because officers did not begin their attempts at the front door, the officers' actions violated a clearly established right and should not be granted qualified immunity.[133] Upon summary reversal, the Court held that the Third Circuit's reliance on its own precedent was far-reaching.[134] The Court stated that although the Third Circuit may have found that an unsuccessful knock and talk does not necessarily allow officers to go to other parts of the property the Third Circuit's precedent cannot be read to obligate officers to *begin* their approach with the front door.[135] Again, without having to address the constitutional limitations of the exception, the Court may be telegraphing multiple signals, such as the fact that the knock-and-talk exception may be much broader than the lower court anticipated it to be or that the Court may be questioning the lower court's ability to establish its own circuit precedent when it comes to warrant exceptions.[136]

2. Fourth Amendment Uses of Force

Of the per curiam opinions issued thus far, *Mullenix v. Luna*[137] and *Kisela v. Hughes*[138] sparked the most controversy. Both cases involved uses of force and were openly contested by several Justices, raising substantial concern amongst legal observers regarding the summary reversal process, generally, and the cases' precedential impact, specifically.

In *Luna*, petitioners, on behalf of the deceased Mr. Israel Leija, brought a section 1983 suit against an officer, claiming that the officer used excessive force in violation of the Fourth Amendment when he fatally shot the fleeing motorist that was involved in a high-speed pursuit.[139] Mr. Leija was involved in an eighteen-minute car chase, reaching speeds of up to 110 miles an hour, during which time he made several threats that he would kill any officer he saw.[140] Officers prepared spike strips to stop the car chase, but Officer Mullenix fired from an overpass above, killing

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132. *Id.*

133. Carman v. Carroll, 749 F.3d 192, 198 (3d Cir. 2014), *rev'd*, 574 U.S. 13 (2014) (citing Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003)).

134. *Carmen*, 574 U.S. at 18–19.

135. *Id.* at 17–18.

136. This holding potentially allows secondary doors that could plausibly be accessible to the public to be broached by officers. *See id.*

137. 577 U.S. 7 (2015) (per curiam).

138. 584 U.S. __, 138 S. Ct. 1148 (2018) (per curiam).

139. *Luna*, 577 U.S. at 7.

140. *Id.*

Mr. Leija, seconds before his car would reach the spike strips.[141]

The district court denied qualified immunity and the Fifth Circuit affirmed, stating that the "immediacy of the risk posed by [the deceased plaintiff] is a disputed fact that a reasonable jury could find either in the plaintiffs' favor or in the officer's favor, precluding [it] from concluding that [the officer] acted objectively reasonably as a matter of law."[142] The Supreme Court reversed the judgement and identified Mr. Leija's conduct as justification for prompting Officer Mullenix's response, ultimately holding that "none of [its] precedents 'squarely governs' the facts here" sufficient to establish a protected right.[143] Justice Sotomayor dissented, arguing that her colleagues misapprehended the objective of the qualified immunity inquiry[144] and as a result incorrectly framed the scope of the inquiry on the deceased as opposed to the reasonableness of the officer's actions.[145] The Court also notably rejected the Fifth Circuit's reliance on its own precedent, indicating that the court incorrectly analogized whether Officer Mullenix faced an imminent threat based on prior precedent.[146] Ultimately, the Court classified the circumstances that Officer Mullenix was forced to navigate as part of a "hazy legal backdrop," implying that anytime there is not a clearly shocking set of facts, the draw must go in favor of the officer.[147]

Justice Sotomayor portrayed the circumstances differently. Critically, Justice Sotomayor pointed out that Officer Mullenix was not authorized

141. *Id.*

142. Luna v. Mullenix, 765 F.3d 531, 538 (5th Cir.), *overruled by* 773 F.3d 712 (5th Cir. 2014), *rev'd*, 577 U.S. 7 (2015).

143. *Luna*, 577 U.S. at 15 ("Leija in his flight did not pass as many cars as the drivers in Scott or Plumhoff; traffic was light on I-27. At the same time, the fleeing fugitives in Scott and Plumhoff had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did.").

144. *Id.* at 21 (Sotomayor, J., dissenting) ("This Court has rejected the idea that 'an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.' Instead, the crux of the qualified immunity test is whether officers have "fair notice" that they are acting unconstitutionally." (internal citations omitted)).

145. *Id.* at 25 ("Instead of dealing with the question whether Mullenix could constitutionally fire on Leija's car rather than waiting for the spike strips, the majority dwells on the imminence of the threat posed by Leija. The majority recharacterizes Mullenix's decision to shoot at Leija's engine block as a split-second, heat-of-the-moment choice, made when the suspect was 'moments away'").

146. *Id.* at 16–17 ("The Fifth Circuit here principally relied on its own decision in Lytle v. Bexar County, 560 F.3d 404 (5th Cir. 2009), denying qualified immunity to a police officer who had fired at a fleeing car and killed one of its passengers. That holding turned on the court's assumption, for purposes of summary judgment, that the car was moving away from the officer and had already traveled some distance at the moment the officer fired.").

147. *Id.* at 14.

to shoot at the time—a fact, among others, that was omitted in the per curiam opinion. The fact-specific nature of the qualified immunity inquiry is heavily dependent on the narrative crafted. In recognizing this concern, Justice Sotomayor warned that *Luna* takes a step beyond *Scott* and "sanction[s] a 'shoot first, think later' approach to policing."[148]

Kisela v. Hughes followed three years after *Luna*. Here, the Court again skipped the constitutionality inquiry and addressed whether the officers violated a clearly established right.[149] In *Hughes* an officer responded to a call regarding a woman acting erratically, and upon arriving, found Ms. Hughes with a kitchen knife.[150] The officer fired his weapon following Ms. Hughes' refusal to respond to two verbal commands to drop her knife.[151] In summarily reversing the Ninth Circuit's denial of qualified immunity, the Court, like in *Luna*, rejected the Ninth Circuit's reliance on its own precedent that excessive force was clearly established.[152]

Again, Justice Sotomayor dissented, joined by Justice Ginsburg. In her opinion, Justice Sotomayor called into question the Court's practice of dodging the issue of constitutionality and, further, reframing the clearly established inquiry in a manner that is disengaged from the fair notice objectives of qualified immunity.[153] The primary basis for her dissent centered on the majority casting aside the lower court's reliance on its own precedent. Justice Sotomayor also took issue with the majority's characterization of the relevant facts—including that Ms. Hughes was not suspected of committing any crime.[154] An alternate categorization of the facts, which Justice Sotomayor suggests as more accurate, would have brought the case at hand closer in-line to precedent initially relied upon by the Ninth Circuit.[155] Justice Sotomayor also drew upon cases from other circuits—namely the Third, Fifth, and Eleventh—to support the Ninth Circuit's finding that the officer's conduct was unreasonable and

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148. *Id.* at 26 (Sotomayor, J., dissenting).

149. Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148 (2018) (per curiam).

150. *Id.* at 1150.

151. *Id.*

152. *Id.* at 1153.

153. *Id.* at 1158 (Sotomayor, J., dissenting) ("Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the 'clearly established' prong of the qualified-immunity analysis.").

154. *Id.* at 1155 ("Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.").

155. *Id.*

that he violated clearly established law.[156]

Luna and *Hughes* are cases in which the Court failed to find a clearly established right. In each case, the analysis that the per curiam majority deployed varied, allowing little room for future courts to draw any bright-line rules on how similar a case needs to be to existing precedent or whether circuit precedent is sufficient to overcome qualified immunity. These opinions, instead, require lower courts to draw their own conclusions in piecemeal fashion.

3. Eighth Amendment Conditions of Confinement

Not all cases on the orders docket have garnered as much pessimism as *Luna* and *Hughes*. Despite not being substantively contested, *Taylor v. Riojas*,[157] an Eighth Amendment conditions of confinement case, is considered an anomaly as it deviates from the Court's typical pattern of pro-law enforcement summary reversals.[158]

In *Taylor*, a detainee was subjected to, as described by the Court, some of the most humiliating, deplorable, and unsanitary prison conditions one could imagine for six days.[159] The Fifth Circuit held that the conditions of confinement that Mr. Taylor was forced to endure violated the Eighth Amendment's prohibition on cruel and unusual punishment.[160] Nonetheless, the Fifth Circuit went on to hold that detaining someone in such conditions did not violate a clearly established right given that prior precedent established a violation only where an individual was exposed to such conditions for several months as opposed to days.[161] The Supreme Court reversed the Fifth Circuit's judgement on the second prong of the qualified immunity test, relying on its earlier precedent in *Hope v. Pelzer* that the exact circumstances need not be established in precedent so long as the officers had fair warning that their actions were unconstitutional.[162]

Notice, however, the Court was silent regarding the generality of the constitutional right as framed by the Fifth Circuit, merely acquiescing it exists by affirming the circuit court's finding as to the first prong of the

156. *Id.* at 1155–61.

157. 592 U.S. __, 141 S. Ct. 52 (2020) (per curiam).

158. *Cf.* Baude, *supra* note 2, at 82 ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials.").

159. Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019), *vacated sub nom.* Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52, 53 (2020) (describing the conditions of confinement as "extreme circumstances" and "deplorably unsanitary").

160. *Id.* at 220–22.

161. *Id.*

162. *Taylor v. Riojas*, 141 S. Ct. at 53.

qualified immunity analysis.[163] Although this conveys to the lower courts that a right exists and that it was clearly established, the problem with relying on this type of reversal is highlighted by the fact that the Court has not fully elaborated on its basis for the reversal of judgement, as it would have on the merits docket. But by contrast, each of the Fourth Amendment cases discussed above involved much higher levels of specificity in the articulation of the clearly established right at issue, also making the ability to find precedent on point nearly prohibitive.[164] As such, the Supreme Court's guidance again fell short as it made no effort to reconcile what is becoming an obvious patchwork of variegated qualified immunity cases that lack coherence.

C. Ambiguity in Guidance

In comparison to most orders, the lengthier page counts of the per curiam opinions that accompany these summary reversals indicate that the Court intended to provide a more explicit and detailed explanation of its fact and legal application. For example, *Luna* totaled eleven pages of text, including concurring and dissenting statements, and *Hughes* totaled thirteen pages, including a dissenting statement.[165] Despite this, the Court has done an inadequate job of providing clarity where it believes obvious errors have been committed.

One gaping hole in these decisions is that the Court has not provided explicit guidance on, and scholars have failed to track distinctions to, the Court's approach towards qualified immunity based on the right at issue that could help lower courts analyze the more nuanced and pressing questions: what degree of factual similarity is required to provide notice, when can circuit precedent establish notice, or what alleged conducted is obvious enough to be clearly established as unconstitutional when addressing a Fourth versus Eighth Amendment violation?[166] The contextual distinctions between the types of qualified immunity cases are critical to understanding their capacity to be interpreted as a cohesive

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163. *Taylor v. Stevens*, 946 F.3d at 220 (stating that the first prong of the qualified immunity analysis in an Eighth Amendment case requires the plaintiff to demonstrate that the defendant denied the plaintiff a minimal civilized measure of life's necessitates, placing the plaintiff in substantial harm).

164. *Cf.* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–59 (2010) (discussing the "level of generality" paradox created by the Court in an effort to find precedent on point and protect qualified immunity doctrine).

165. These are approximate page counts based on the reporter citation.

166. These questions are not intended to be an exhaustive list but are representative of the underlying questions that must be frequently addressed when determining whether a right is clearly established.

body of law versus individual cases.

For example, in Fourth Amendment cases, as demonstrated in *Luna* and *Hughes*, Justice Sotomayor paints a substantively different factual picture than the majority. The facts, and how they are framed, become increasingly relevant, particularly at summary judgment, when they should be viewed in favor of the non-moving party to determine whether a material dispute exists. The facts also play a role in which precedent the lower court can reasonably rely upon or whether it may only turn to precedent originating from the Supreme Court itself.

On the other hand, in the Eighth Amendment context, unlike in the prior two categories of Fourth Amendment cases, the Court accepted the Fifth Circuit's analysis and reversed course on the second prong where it had been so quick to rectify what it believed to be mistakes by the lower court in denying qualified immunity. In this vein, one possible explanation for the outcome in *Taylor* is that the Court is attempting to find some degree of equilibrium after *Luna* and *Hughes* to signal to the public that law enforcement officials will always be held liable for blatantly unreasonable acts.[167]

But how should *Taylor* be read in conjunction, if at all, with the Fourth Amendment summary reversals? On the one hand, it is cases like *Luna* and *Hughes* that establish the parameters for the degree of force that the law is willing to tolerate. The vast majority of cases that drive the legal conversation and shape the doctrine of qualified immunity involve police uses of force against individuals who were suspected of criminal activity.[168] As a result, challenges to cruel and unusual punishment

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167. *See, e.g.*, Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1 (2021) (arguing that the "Court is taking tentative steps forward by precluding some of the doctrine's most extreme consequences"); *In the Shadows*, *supra* note 36 (suggesting that the Court is "incrementally modifying its current doctrine to account for social costs").

168. The majority of cases that involve obviously excessive use of force by police result in high-profile settlements that never result in creating judicial precedent. *See e.g.*, Rukmini Callimachi, *Breonna Taylor's Family to Receive $12 Million Settlement from City of Louisville*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html (last visited April 1, 2023) (settling for twelve million dollars); Nicholas Bogel-Burroughs & John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for $27 Million*, N.Y. TIMES (Mar. 30, 2021), https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html (last visited Apr. 29, 2023) (settling for twenty-seven million dollars); Vera Haller & Matt Pearce, *Eric Garner's Mother on $5.9-Million Settlement: 'Don't Congratulate Us'*, L.A. TIMES (July 15, 2015), https://www.latimes.com/nation/la-na-eric-garner-family-settlement-20150714-story.html [https://perma.cc/V4YK-QYAC] (settling for 5.9 million dollars); Keith L. Alexander, *Baltimore Reaches $6.4 Million Settlement with Freddie Gray's Family*, WASH. POST (Sept. 8, 2015) https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a_story.html (last visited Apr. 1, 2023) (settling for 6.4 million dollars); *Michael Brown's Family Received $1.5 Million Settlement with Ferguson*, NBC NEWS (June 23, 2017, 6:58 AM),

(including excessive use of force) in the prison context have played a minimal role in shaping qualified immunity doctrine and instead, have likely been shaped by the Fourth Amendment analysis.[169] On the other hand, the Court could be signaling that the qualified immunity analysis is right-dependent; that is, it is only willing to apply the broader, pro-plaintiff principles from *Hope v. Pelzer* and *Taylor v. Riojas* when the circumstances are so undeniably "extreme" or solely in the prison context.[170] This much remains unclear.

Notwithstanding having dedicated a comparatively significant portion of its orders docket cases to qualified immunity, the Court has left so much unanswered. This leaves lower courts to intuit signals to the more nuanced questions that are inherently embedded in the Court's more general two-prong analysis regarding clearly established rights. By only broadly addressing whether an officer's conduct violates clearly established law, the Court is sending signals to lower courts on how to answer the more idiosyncratic factual issues that are necessary to complete the qualified immunity inquiry. But context matters. Thus, despite the cases above painting a picture of pro-law enforcement outcomes particularly in Fourth Amendment cases, the guidance provided in the per curiam opinions communicates and impacts different legal concepts that demands a more searching analysis into signals communicated—not merely the outcome of the summary reversal. The following Part addresses how lower courts have interpreted and applied the Court's per curiam opinions to resolve these more nuanced inquiries.

III. INTERPRETING PER CURIAM SIGNALS

This Part first provides a taxonomy of signals that lower courts may receive from the Court's summary reversals and concludes by sharing initial insights into the percolation of signals between circuit courts, the

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https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-family-received-1-5-million-settlement-ferguson-n775936 [https://perma.cc/UN39-DW3S] (settling for 1.5 million dollars); Mitch Smith, *Philando Castile Family Reaches $3,000,000 Settlement*, N.Y. TIMES (June 26, 2017) https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html (last visited Apr. 1, 2023) (settling for three million dollars); Carma Hassan & Holly Yan, *Sandra Bland's Family Settles for $1.9M in Wrongful Death Suit*, CNN (Sept. 15, 2016) https://www.cnn.com/2016/09/15/us/sandra-bland-wrongful-death-settlement/index.html [https://perma.cc/AUU7-DWUZ] (settling for 1.9 million dollars).

169. See *supra* note 112 for a discussion on the primary focus of qualified immunity scholarship.

170. Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52, 53 (2020). It is unsurprising that the Court might treat qualified immunity cases raising Eighth Amendment claims as an opportunity for testing judicial innovation. Unlike the Fourth Amendment, affecting the rights of civilians more visibly, Eighth Amendment applications of law are less scrutinized by the public because it impacts individuals who are incarcerated.

Supreme Court, and litigants. Analyzing the signals from below is becoming increasingly critical as circuit court interpretations make their way back to the Court. In this vein, this Part further discusses the resultant feedback loop of discourse that provides the Court with additional opportunities to either reaffirm or correct course based on how a signal was applied below. This taxonomy can be applied in any context, certainly within the orders docket, but potentially outside it as well.

A. Signals Applied

Federal courts have already cited to cases like *Luna* and *Hughes* thousands of times, with many of these lower court opinions substantively discussing the Court's reasoning in great detail.[171] Some federal courts have crafted string cites to the Court's per curiam opinions, showing signs of solidifying a pattern of precedent.[172] The increasing application of and engagement with these opinions by lower courts reveals critical insights about the orders docket. And as it pertains to the scope of this Article, this analysis sheds light on how the growing anharmonicity of the orders docket further fragments the doctrine of qualified immunity itself.[173] Lower courts are now faced with the undesirable task of sifting through the Court's guidance, deciphering how much weight to give each opinion, determining which factors matter most, and whether to read all of the opinions as a collective body of precedent.[174]

This section identifies six categories of signals—factbound, transsubstantive, heuristic, disruptive, siren, and prophetic signals—that lower courts have received when subsequently interpreting and applying what it believes to be the Supreme Court's prevailing signal. This taxonomy does not claim to be an exhaustive list, but rather provides a set of descriptive identifiers that allows for cataloging and analyzing the various trends and directions that lower courts have taken the Court's orders.

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171. For perspective, as of a May 18, 2023 Westlaw search, *Luna* was cited 4,083 times by federal courts, including fourteen times by the Supreme Court, and thirty-six times by state courts; *Hughes* was cited 1,701 times by federal courts and fifteen times by state courts; and *Taylor v. Riojas* was cited 285 times by federal courts and three times by state courts.

172. See *infra* discussion on *Ramirez v. Guadarrama*, 2 F.4th 506, 514–15 (5th Cir. 2021).

173. See *infra* section II.C.3 for a brief analysis on how lower courts have applied these per curiam opinions in analogous cases.

174. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 408 (S.D. Miss. 2020) ("To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting.").

1. Factbound Signals

This Article refers to factbound signals as those in which the lower court limits its application to comparing or contrasting the factual guidance provided by the Court. The interpretation of a factbound signal is much less controversial—and generally less susceptible to Court review[175]—when a lower court solely applies the factual guidance as it reduces the likelihood that the court may make an error pertaining to the legal issue.[176] Because qualified immunity presents a mixed question of fact and law where review is de novo, the Court spends a significant amount of its opinions recounting the facts and discussing how certain factual patterns interact and impact clearly established law. Despite not knowing what exactly the Justices intend to convey, relying on a signal that is limited to applying the per curiam opinions as factual anchors—whether to compare or to distinguish the case at hand—for determining whether an officer's actions were objectively reasonable is the simplest and most obvious function of a signal.[177] Applications limited to fact signals can eliminate the likelihood of extraneous propositions, such as dictum,[178] from unduly influencing the lower court's assessment of qualified immunity.

In recent per curiam opinions, the Court has been unambiguous in its message that qualified immunity is not available to the plainly incompetent but that in the face of such a high standard, a clearly established right can only be violated if near identical precedent exists to have sufficiently put an officer on notice that his actions were unreasonable.[179] The resultant outcomes of these cases have thus leaned notably pro-law enforcement.[180] But despite a majority of the cases on the

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175. *See, e.g.*, Cavazos v. Smith, 565 U.S. 1, 16–17 (2011) (Ginsburg, J., dissenting) ("But even if granting review qualified as a proper exercise of our discretionary authority, I would resist summary reversal of the Court of Appeals' decision. The fact-intensive character of the case calls for attentive review of the record, including a trial transcript that runs over 1,500 pages. Careful inspection of the record would be aided by the adversarial presentation that full briefing and argument afford.").

176. *Cf.* Re, *Explaining*, *supra* note 26.

177. *See, e.g.*, Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 831 (1983) ("[E]ven if a case does no more than apply a well-settled rule to a particular set of facts, the decision, together with others, will help in delineating the contours of the rule.").

178. *See infra* section III.A.3.

179. This is the case predominately for Fourth Amendment applications of qualified immunity. *E.g.*, Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality." (internal citations omitted)).

180. *See, e.g.*, Salazar-Limon v. City of Houston, 581 U.S. __, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (citing to five recent per curiam opinions in which the Court reversed a lower court's denial of qualified immunity and criticizing the Court for its one-sided approach, rarely intervening when a lower court wrongly grants qualified immunity).

orders docket favoring defendant-officers, some courts have not taken this pattern as a signal to grant qualified immunity wholesale to officers. Instead, the lengthier fact discussion provided by the Court (and respective dissents) has allowed lower courts to continue to rigorously assess and question the reasonableness of an officer's actions by utilizing the Court's per curiam opinions as factual analogs, not necessarily broad pronouncements of law.

For example, in the use of force context, the Washington State Court of Appeals reversed its lower court's grant of summary judgment on qualified immunity grounds in a 2018 case, *Sluman v. State*,[181] distinguishing the case at hand from the factual analysis articulated in the Supreme Court's per curiam in *Luna*. *Sluman* involved a police-chase of a motorcyclist cited for speeding by aerial radar.[182] The officer on the ground used a "door-check" maneuver to apprehend the motorcyclist, resulting in the motorcyclist sustaining substantial bone injuries and physical impairments requiring multiple surgeries.[183]

The scenario seems all too familiar. In other motorist-pursuit scenarios the Supreme Court has often defended the officer involved based on the purported threat the motorist could have on another officer or unrelated third-party on the highway—*Scott*, *Plumhoff*, and *Luna* being prime examples. Nonetheless, the court in *Sluman* critically approached the facts and analysis by the *Luna* Court and distinguished the case from *Luna*. For example, the court drew clear distinctions between the lack of a known weapon or threats to officers by the civilian being pursued.[184] Specifically, the Washington court determined that the facts did not demonstrate a significant enough potential for harm to other officers or civilians, as the Court found in *Luna*. The Washington court determined that the officer's conduct violated clearly established law and that a genuine dispute of material fact remained regarding whether the officer's conduct was the proximate cause of Mr. Sluman's injuries, and therefore precluded

181. 3 Wash. App. 2d 656, 418 P.3d 125 (2018).

182. *Id.*

183. *Id.* at 667, 669, 418 P.3d at 133–34 ("[Mr. Sluman] sustained fractures of the tibia and fibula of his right leg, pubic bone, tailbone, and left elbow. The tibia and fibula breaks required multiple surgeries to implant and replace hardware and to graft skin and muscle. Sluman spent one year in a wheelchair while recovering. He suffered permanent physical impairments.").

184. *Id.* at 688, 418 P.3d at 143 ("The Court defended Trooper Mullenix's actions by highlighting that fellow officers stood below the overpass, that Mullenix knew of the officers' presence, that Leija had twice threatened to shoot officers, and that Leija raced toward an officer's location. The facts in our appeal lack any of these or similar details. Thomas Sluman never threatened to shoot anyone, let alone officers, and never appeared armed.").

summary judgement.[185]

Similarly, in 2022 the U.S. District Court of Maine reviewed a case, *Baker v. Goodman*,[186] in which an officer shot and killed a man in a mall parking lot after receiving a 911 call that a civilian appeared to be carrying a firearm. Both the plaintiff and defendant discussed the applicability of *Hughes* in their summary judgement briefing[187] requiring the court to engage in a detailed discussion on the Supreme Court's factual application. The district court ultimately distinguished *Hughes* from the case before it by focusing on the distance between the officer and the civilian as a precursor for the officer's ability to assess a threat and therefore the reasonableness to use deadly force. The district court cited to the fact that Ms. Hughes was only six feet away from the officer and Mr. Baker posed even less of a risk to the officer because he was forty yards away, further limiting the officer's ability to assess first-hand whether Mr. Baker was even acting in a threatening manner.[188] Again, the district court here narrowly applied the Court's per curiam as a factual contrast to assess reasonableness, careful not to conflate the nature of the weapon with a heightened degree of dangerousness, and instead more precisely emphasizing the officer's ability to observe an imminent threat in real time based on the proximity of the civilian to the officer.

Factbound signals can cut both ways, but that is not to say that any particular lower court's interpretation is an illegitimate application of the Court's signaling. Another court used the same facts in *Hughes* to grant

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185. Scholars have argued that a factbound analysis regarding whether the conduct at issue was constitutional, like that in *Sluman*, are necessary to help establish a line of precedent for future plaintiffs raising similar challenges. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1904 (2018) ("If cases with factual similarity in particular contexts are needed to make out clearly established law to overcome the second prong of qualified immunity, then courts should not shy away from decisions holding specific fact-bound conduct unconstitutional. At the very least, holdings rendered in fact-bound cases may serve to shrink the 'gray areas.'").

186. Baker v. Goodman, No. 2:19-CV-00251-JAW, 2022 WL 580471, at *29 (D. Me. Feb. 25, 2022).

187. *E.g.*, Plaintiff's Response to Defendant's Motion for Summary Judgement at 20–21, Baker v. Goodman, 2021 WL 4247844 (D. Me. Feb. 25, 2022) ("The case of *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), presents a different factual scenario than this case. In *Kisela* the officer believed the suspect was an immediate threat to a civilian standing within feet of the suspect, who she took steps towards while armed with a knife and acting erratically. The facts create one of immediacy of a threat in *Kisela* not present in [this case]. Mr. Baker took no threatening action towards anyone at the time he was shot and killed.").

188. *Baker*, 2022 WL 580471, at *63 (comparing *Baker* to the facts in *Hughes*, in which an officer was entitled to have qualified immunity where the suspect holding a knife was within six feet, or "striking distance," of another person (citing Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148, 1151, 1154 (2018) (per curiam))).

qualified immunity. In *James v. New Jersey State Police*,[189] the Third Circuit, also considering the proximity between officer and civilian, used the facts of *Hughes* to grant an officer qualified immunity where a civilian was holding a gun to his own temple—threatening his own life, not the life of an officer—but within shooting range of the police officer.[190] After reviewing *Hughes*, the Third Circuit identified four key facts that the Supreme Court considered pivotal in calculating whether a clearly established right was violated—whether the civilian was armed, ignored the officer's orders, was in striking distance of another individual, and whether the situation was quickly unfolding.[191] Using these four factors, the court analogized the facts in *Hughes* to the threat officers faced in *James* and found that no clearly established right was violated.[192]

Each of these examples demonstrate substantial engagement and discussion with the facts in the Court's per curiam opinions. Notwithstanding the accuracy of the applications discussed above, lower courts have primarily limited themselves to drawing factual distinctions that are less about extrapolating larger propositions or rules that might impact future litigants in unanticipated ways. This practice seems to make sense and conform with the Court's traditional use of summary reversals—which is to signal an example of proper fact-to-law application without changing the trajectory or interpretation of the law itself.

2. *Transsubstantive Signals*

"Transsubstantive signals" can occur when a lower court applies one of the Court's summary reversals across a different, but tangentially related, legal context. This phenomenon has been described by Professors Jonathon Masur and Lisa Ouellette as "deference mistakes" in which courts may confuse the holding resulting from one deference regime and apply that holding to another deference regime.[193] Following some of the

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189. James v. N.J. State Police, 957 F.3d 165 (3d Cir. 2020), *cert. denied sub nom.* James v. Bartelt, 595 U.S. __, 142 S. Ct. 4 (2021).

190. *Id.* at 170–71. Although certiorari was denied in this case, Justice Sotomayor issued a dissenting statement disagreeing with the lower court's analysis regarding an officer's ability to use deadly force when the officer's own life is not threatened. *James v. Bartelt*, 142 S. Ct. at 4 (Sotomayor, J., dissenting from the denial of certiorari) ("[Qualified immunity] does not protect an officer who inflicts deadly force on a person who is only a threat to himself.").

191. *James v. N.J. State Police*, 957 F.3d at 170–71.

192. *Id.* at 171 ("Many of the same distinguishing facts are present here: (1) Gibbons was armed with a gun; (2) Gibbons ignored Trooper Bartelt's orders to drop his gun; (3) Gibbons was easily within range to shoot Troopers Bartelt or Conza; and (4) the situation unfolded in 'seconds.'").

193. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 678–79 (2015) (discussing the differences in deference standards in criminal procedure cases and qualified immunity cases).

Court's qualified immunity summary reversals—typically in the context of Fourth Amendment warrantless entry cases—lower courts have applied the Court's orders in criminal cases.

For example, upon review of a criminal appeal from a defendant who accepted a plea for the charge of felon in possession of a firearm, the Tenth Circuit turned to *Huff,* a warrantless entry case discussed above, to determine whether the officer's actions were reasonable.[194] The defendant argued that the district court erred when it denied his motion to suppress because the officer's protective frisk was not based upon reasonable suspicion, therefore resulting in the illegal discovery of a firearm.[195] The Tenth Circuit discussed the significance of *Huff* and ultimately held that the totality of the circumstances indicated that the officer did not perceive any imminent danger that would justify a protective frisk, therefore suppressing the evidence.[196] Interestingly, despite the fact that *Huff* did not decide whether the unwarranted intrusion at issue met Fourth Amendment standards, the dissent read the case to expand the circumstances under which officers can act out of concern for their own safety, regardless of reasonable suspicion or probable cause.[197]

In a similar case, the Court of Appeals of Ohio reviewed an appeal from a defendant who entered a no-contest plea after a denial of his motion to suppress, in which he was convicted on drug possession and manufacturing charges.[198] The evidence supporting the conviction was recovered by officers subsequent to a warrantless entry into the defendant's fenced-in back patio.[199] The Court relied on *Carmen*, a warrantless entry case discussed above, to hold that "there is no clearly established Fourth Amendment violation if police officers conducting a knock[-]and[-]talk attempt to make contact by approaching the back or sides of a dwelling."[200] At first blush, this may seem like a pure

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194. United States v. House, 463 F. App'x 783, 784, 792 (10th Cir. 2012).

195. *Id.* at 784.

196. *Compare id.* at 790 (drawing a line between "equating being armed with being dangerous regardless of the circumstances"), *with id.* at 793 (Baldock, J., dissenting) (arguing that *Ryburn* alters the exigency circumstances exception and "indicates that officer safety renders certain police actions reasonable regardless of probable cause or reasonable suspicion that criminal activity is afoot").

197. *Id.* at 793 (Baldock, J., dissenting).

198. State v. Davis, 2017-Ohio-7572, 96 N.E.3d 1280.

199. *Id.* ¶ 5 ("The officers entered through a fenced in backyard, although they testified the gate was open.").

200. *Compare id.* ¶ 17 (majority opinion) (relying on *Carroll v. Carman* as controlling precedent), *with id.* ¶ 31 (Hoffman, J., dissenting) ("[Unlike *Carmen*, here] the officers had no reasonable belief the sliding door in back of the house was used by visitors in approaching the home. The area was fenced in, near a pool, and under an upper deck with another sliding door, accessing the main living area of the home.").

application of factbound signals, but the Ohio court in effect understood the holding of *Carmen*—made in the context of whether a right was clearly established to recover civil damages—to be an expansion of the knock-and-talk exception in criminal investigations, fundamentally alerting Fourth Amendment protections that civilians have come to expect.

Like factbound signals applied by lower courts, transsubstantive signals can go both ways. But unlike factbound signals, transsubstantive signals present different legal problems because applications reach across different deferential spheres of the law.[201] Some Justices have previously expressed the concern that the transsubstantive analysis between qualified immunity and criminal procedure rights in the Fourth Amendment context may unduly dilute the latter, because it adds an additional, and unnecessary inquiry that is already cooked into the constitutional right without the need for qualified immunity.[202] Many have criticized the pro-law enforcement leaning Court as stifling the ability for plaintiffs to recover monetary damages, but this analysis further demonstrates that the far-reaching nature of the Court's per curiam opinions may also impact a defendant's constitutional rights, and therefore liberty interests at stake in a criminal case.

3. *Heuristic Signals*

The Court may occasionally use abbreviated legal phrases to serve as a quick short-hand summary to describe the law. This Article refers to these as "heuristic signals."[203] Although these phrases may serve as helpful mental shortcuts, such phrases can often be distracting and encourage lower courts to shift the burden of a difficult factual analysis.[204] Reliance

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201. *See* Masur & Ouellette, *supra* note 193.

202. Anderson v. Creighton, 483 U.S. 635, 664 & n.20 (1987) (Stevens, J., dissenting) (observing that assessing whether an officer had probable cause through the lens of qualified immunity "is to confuse the jury and give the defendants two bites at the apple" because probable cause already requires that a jury find that the officer reasonably believed the facts before him (quoting Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc))).

203. This is somewhat similar in concept to lower courts relying on dicta, but rather that this particular type of signal is more forceful because it reinforces principles of the law that may not necessarily had been intended to carry forward to future applications.

204. Professor Thomas Healy cautioned that summary reversals of qualified immunity, along with habeas cases, are perhaps more advisory than scholars give these opinions credit. Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 902–03 (2005). Healy explained that there are three possible outcomes which can occur in a qualified immunity case: (1) the right exists and is clearly established; (2) the right exists, but is not clearly established; and (3) the right does not exist, and is not clearly established. *Id.* at 902. Based on these potential outcomes, the Court need not ever decide the constitutional issue because the first outcome implies that the right exists, and, with respect to the latter two outcomes, if the right does not exist, addressing the constitutional

on such statements that have little explanation and act as conclusory statements should be limited as they may result in inconsistent applications across cases and circuits.

Consider, for example, the following application of *Luna* by the Third Circuit in *Thompson v. Howard*.[205] In *Thompson*, the court was faced with a rather peculiar fact pattern in which the plaintiff was a passenger in a vehicle that was stopped.[206] Ultimately a tense interaction with the officers led to a residential car chase involving the plaintiff.[207] Though the case presented some analogous facts to *Luna*, in as much that an individual was fleeing in a vehicle, there are arguably material distinctions between *Thompson* and *Luna*. Instead of engaging in an in depth factual analysis, like the court in *Sluman*, discussed above, the Third Circuit analyzed the legal discussion provided by the Supreme Court in *Luna*, citing to the Court's statement that it has "*never* found the use of deadly force in connection with a *dangerous* car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."[208] Based on the record, arguably, a material dispute of fact existed regarding whether either officer believed Mr. Thompson was driving towards the officers.[209] Whether Mr. Thompson was driving towards officers is a critical fact that is ripe for resolution by a jury because it goes towards the reasonableness of believing an imminent threat existed to warrant the use of force. Using the abbreviated legal phrases articulated in *Luna* as a guiding principle for

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question is unnecessary because the case has already been disposed by determining whether the right is clearly established. *Id.* at 902–03. Healy argued that "a court always knows in advance that its decision on the constitutional issue will not affect the outcome of the case" allowing it to "proceed straight to the non-constitutional issue to fulfill its duty of resolving the case." *Id.* at 903. As such, if the Court does not distinguish between the latter two scenarios, lower courts are reasonably free to interpret that no constitutional right exists at all. Some scholars have further theorized that the Court's orders on summary judgment are less about procedural standards and more about altering the course of substantive doctrine. *See, e.g.*, Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. 1331, 1350 (2014) (suggesting that repeat summary reversals in qualified immunity cases might be the Court signaling how lower courts should define the factual context when assessing whether a right is clearly established).

205. 679 F. App'x 177 (3d Cir. 2017).

206. *Id.* at 178.

207. *Id.* at 182. Though it is not considered in the court's factual analysis, it is interesting to note that officers placed Mr. Thompson under arrest because they got word from another officer that he was known to be "dangerous" despite not having any first-hand knowledge of such—i.e., no open warrants or engaging in any behavior that would indicate dangerousness. *See infra* Part III for a discussion on how this information may impact litigations in future cases.

208. *Id.* (emphasis added) (citing Mullenix v. Luna, 577 U.S. 7, 15 (2015)).

209. Brief of Appellant James S. Thompson at 23, Thompson v. Howard, 679 F. App'x 177 (3d Cir. 2017) (No. 15-3338) (arguing that "it is evident that a genuine issue of material fact exists as to whether, at the time that [the officer] fired the shots, a reasonable officer would have concluded that Thompson posed an imminent threat" to the safety of officers on the scene or bystanders).

assessing reasonableness, the Third Circuit ultimately determined that the officers' actions of shooting at the fleeing motorist fell within the "hazy" realm of reasonableness, and thus sufficient to warrant immunity from standing trial.[210] Further the court seemingly accepted the conclusion that all car chases are inherently "dangerous."[211]

If one were to agree that a material dispute of fact existed as to whether the chase was imminently dangerous to the officers on the scene or the general public, the Third Circuit's application of *Luna* may have been misguided, relying too heavily on attractive heuristic phrases like "hazy legal backdrop" that were employed in *Luna*.[212] As a result, the Third Circuit shifted the factual analysis when a car chase is involved on the premise that such cases will always present a degree of danger.[213] Since *Luna*, many lower courts have similarly granted qualified immunity and grounded their justification by employing the Court's more accessible short-hand descriptions of the law to describe whether a prior factual scenario is clearly established.[214]

Simply because a heuristic signal could have been misapplied is not to say that such signals do not have their benefits. Some courts have taken the heuristic signals to prompt deeper inquiries that led to innovative outcomes towards establishing balancing tests in furtherance of consistent factual assessment. For instance, in order to accommodate the varying signals communicated by the Court, the Tenth Circuit adopted its own sliding-scale test applicable to use of force cases where the factual analysis can seem fraught.[215]

4. *Disruptive Signals*

"Disruptive signals" can best be described as signals that may lead to an unintended consequence as a result of the per curiam outcome being misconstrued by lower courts. The most significant problem resulting

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210. *Thompson*, 679 F. App'x at 182.

211. *Id.*

212. *Id.* (citing Mullenix v. Luna, 577 U.S. 7, 14 (2015)) (referencing the term "hazy").

213. *Id.* at 182–84.

214. *See, e.g.*, Schantz v. DeLoach, No. 20-10503, 2021 WL 4977514, at *10 (11th Cir. Oct. 26, 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 1418 (2022) ("[O]bvious clarity is a narrow exception to the rule requiring particularized case law, applicable where an officer's conduct extends 'far beyond the *hazy border* between excessive and acceptable force.'"(emphasis added) (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000))).

215. The Tenth Circuit articulated a new sliding scale test that is applied in excessive use of force claims, stating, "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *See* Easter v. Cramer, 785 F. App'x 602, 607 (10th Cir. 2019) (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007)).

from the Court summarily reversing such a large quorum of cases that lean heavily in favor of one actor is that any deviation from that pattern may be irrationally discounted as an outlier. Thus, disruptive signals are most apparent when lower courts are trying to piece together or make sense of signals arising from various cases that may not necessarily fit together. This is where distinguishing between the type of the right impacted—e.g., Fourth Amendment versus Eighth Amendment—may become relevant in order to derive the true import of the signal that the Court wishes to communicate.[216]

Recall *Taylor v. Riojas*, a prison case originating out of the Fifth Circuit which was the Supreme Court's first pro-plaintiff qualified immunity case in sixteen years. Immediately following *Taylor*, the Fifth Circuit was presented with another prison case, *Cope v. Cogdill*,[217] this time involving the death of a pretrial detainee who was known to be suicidal.[218] *Cope* highlights a systemic failing of intervention protocols within correctional facilities when law enforcement officials are confronted with prisoner mental health concerns. Correctional officers were aware that Mr. Derrek Monroe, the deceased, was experiencing suicidal tendencies upon admission to the jail.[219] The correctional officer on duty observed Mr. Monroe begin to strangle himself and instead of calling emergency medical services called another officer.[220] Approximately two to three minutes after strangulation began, Mr. Monroe's body stopped moving and throughout the following five minutes the on-duty correctional officer looked into the cell several times but never unlocked it to attempt resuscitation.[221]

The Fifth Circuit granted qualified immunity and turned to *Taylor* as a critical signal that immunity from suit should *only* be denied in the most "egregious" or "extreme circumstances" where the court lacks prior precedent.[222] Judge Dennis of the Fifth Circuit dissented, stating that his colleagues on the bench misconstrued the thrust of *Taylor*, claiming that the per curiam opinion limits the protections available to officers rather than expanding their immunity from suit.[223]

Several days prior to issuing the opinion in *Cope*, the Fifth Circuit

216. *See supra* section II.B.

217. 3 F.4th 198 (5th Cir. 2021).

218. *Id.* at 206.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id*. at 221 (Dennis, J., dissenting) ("Where the violation at issue is intentionally disregarding a known suicide risk, this standard is clearly met.").

issued another opinion denying en banc review in *Ramirez v. Guadarrama*,[224] a case that raised an excessive force Fourth Amendment claim when police used force against a civilian who was suicidal.[225] Although many of the judges agreed as to the tragic nature of the facts, the Fifth Circuit ultimately denied appellate review. Nonetheless, *Ramirez* is noteworthy for the discussion that takes place between Judge Oldham (concurring) and Judge Willet (dissenting) on the relevance of *Taylor*.[226]

The concurrence by Justice Oldham in *Ramirez*[227] takes the language from the Court's per curiam in *Taylor* as the majority did in *Cope*—applying it only to "'particularly egregious facts' where there is 'no evidence' of 'necessity or exigency.'"[228] The concurrence justified this interpretation by placing significance on the Court's trend of rarely denying qualified immunity and classifying *Taylor*'s application of the obvious-case as an "exception."[229]

As Judge Oldham attempts to string together a coherent rule from the sprawling range of the Supreme Court's recent per curiam opinions, he makes one troubling implication in *Ramirez*: that if the "obvious-case" is an exception, it will rarely prevail in the context of policing.[230] The concurrence explicitly draws a distinction between the facts in *Ramirez* and *Taylor* using the time differential—decisions made within a "split-second" versus knowledge of a risk of harm over the course of several days.[231] This interpretation implicitly creates a much broader shield against remedies for Fourth Amendment police uses of force, as arguably all instances of police interaction will require action within "seconds."[232]

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224. 2 F.4th 506 (5th Cir.), *denying en banc rev. of* 3 F.4th 129 (5th Cir. 2021).

225. *See Ramirez*, 3 F.4th at 131–32 ("This case arises out of the tragic death of Gabriel Eduardo Olivas. While responding to a 911 call reporting that Olivas was threatening to kill himself and burn down his family's house, Officers Guadarrama and Jefferson discharged their tasers at Olivas, striking him in the chest. Olivas had doused himself in gasoline, which ignited when the prongs of Guadarrama's taser came into contact with it. Olivas was engulfed in flames. The house burned down. Olivas died of his injuries several days later.").

226. *Ramirez*, 2 F.4th at 514–15 (Oldham, J., concurring); *id.* at 522–24 (Willet, J., dissenting).

227. *Id.* at 514 (Oldham, J., concurring).

228. *Id.* at 514–15 (quoting Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52, 54 (2020)). Note here that there may be some overlap in categories of signals, as phrases like "egregious facts" might be relied upon more heavily by lower courts given their overall brevity and quick-handed catchiness.

229. *Id.* at 514.

230. *Id.* at 514–15.

231. *Id.* at 512.

232. It is possible that others may believe in this distinction between policing and prison practices. For example, Judge Dennis, who dissented in *Cope* on the grounds of *Taylor,* voted with the majority to deny rehearing en banc and allow the grant of qualified immunity to stand. This could suggest that some judges do see a distinction between the limited time police officers have to make a decision

The concurrence attaches a string citation for support, beginning with *Hughes*[233]—a use of force case—in which a decision to shoot was made over the course of less than one minute, and *Huff*[234]—a warrantless entry case—in which officers entered a home without a warrant and remained for approximately five to ten minutes.[235]

The dissent, alternatively, did not interpret *Taylor* as a case confined to prison walls. The dissent observed that "the Court seems determined to dial back the doctrine's harshest excesses. If not reconsidering [the doctrine], the Court is certainly recalibrating. Most importantly here, the Court is warning us to tread more carefully when reviewing obviously violative conduct."[236]

The dissent picked up on the implicit distinction in case law that the concurrence drew upon and reframed the "obviousness" standard as a "principle" rather than an exception.[237] Specifically, the dissent capitulated that the Supreme Court's recent message was at minimum "low-key but loaded."[238] The dissent argued the fact that the Court vacated the judgement in a second case[239] in light of *Taylor* made clear that lower courts should, at minimum, be reticent to granting qualified immunity in novel cases until the facts have been fully developed—i.e., after discovery—to better enable courts to assess whether a constitutional violation exists.[240]

Regardless of how lower courts treat the line of Fourth and Eighth Amendment per curiam cases, these cases demonstrate the complexity of deciphering the underlying signals and how many questions the Court has failed to affirmatively answer. These questions range from how lower courts should interpret distinctions between the rights at issue and the amount of time needed to distinguish between an obvious case

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versus correctional officials who often have the ability to assess a risk of harm by isolating a situation. Judge Dennis did not publish or join a separate concurring opinion therefore this interpretation is speculative.

233. Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148, 1151 (2018).

234. Ryburn v. Huff, 565 U.S. 469, 472 (2012).

235. *Ramirez*, 2 F.4th at 514–15 (Oldham, J., concurring).

236. *Id.* at 522 (Willet, J., dissenting).

237. *Id.* at 523.

238. *Id.*

239. *McCoy v. Alamu*, 842 F. App'x 933 (5th Cir. 2021), was remanded to the District Court for the Southern District of Texas on April 6, 2021. The case proceeded to a jury trial and the jury entered a verdict in favor of the defendant-officer after a two-day trial on August 23, 2022. McCoy v. Alamu, No. 3:17-CV-00235 (S.D. Texas Aug. 23, 2022), ECF No. 126.

240. *Ramirez*, 2 F.4th at 522–24 (Willet, J., dissenting).

versus a "hazy" case, etc.[241] This is a critical consequence of interpreting and applying potentially disruptive signals from the orders docket as the potential range of applications would surely impact a plaintiff's ability to recover remedies for harm suffered.[242]

5. *Siren Signals*

One critical distinction between opinions the arise from the courts merits versus its orders docket is that the latter raises concerns with regard to transparency of authorship. In an area of the law that is hotly contested, significant consequences can arise if the author of the per curiam opinion happens to be the author of a dissent on a merits case and begins to slowly lay the groundwork for an alternate reading of case law that lower courts rely on but that may not necessarily be supported by the majority in reasoning, if on the merits docket. Like the Sirens in Greek mythology whose song would lead sailors to crash upon the rocks, this Article refers to such signals as "siren signals." Siren signals are a perennial and intractable problem unique to the orders docket due to the inherent ambiguity of authorship in any given per curiam opinion.

Consider, for the sake of example, if Justice Gorsuch were the author of *Taylor* or *Luna*.[243] Given his dissent[244] in *Torres v. Madrid,*[245] a Fourth Amendment seizure case, reliance on the idea that *Taylor* is an outlier or an exception to the rule or the proposition that qualified immunity protects officers against a "hazy legal background" could be misplaced and wholly inaccurate. In *Torres*, Gorsuch articulates a

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241. *See, e.g.*, Frasier v. Evans, 992 F.3d 1003, 1021 (10th Cir. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 427 (2021) ("*Hope*'s holding historically has been applied to only the 'rare "obvious case[]"' involving 'extreme circumstances[]' or 'particularly egregious' misconduct." (first quoting District of Columbia v. Wesby, __ U.S. __, 138 S. Ct. 577, 590 (2018); and then quoting Taylor v. Riojas, __ U.S. __, 141 S. Ct. 52, 54 (2020))). For an analysis of the Court's conceptions regarding policing facts, see for example Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 852 (2014) ("With regard to uses of force, the Court believes that officers use violence in an environment that demands 'split-second judgments,' justifying significant deference to an officer's decision of whether to use force and what force to use. However, only a very small percentage of use-of-force incidents resemble the Court's intuitions, suggesting that the standard used to review police violence may not often fit the circumstances of the incident itself.").

242. John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 117 (2009) ("For [some] rights, money damages are central. For those rights, refusal to reach the merits of constitutional tort claims will cut to the bone. Going directly to qualified immunity will not only inhibit the development of constitutional doctrine, but will also degrade existing rights to a least-common-denominator understanding of their meaning.").

243. This assertion is a hypothetical that is used as an example to demonstrate the consequences of adopting a siren signal.

244. *See* Torres v. Madrid, 592 U.S. __, 141 S. Ct. 989, 1003 (2021) (Gorsuch, J., dissenting).

245. 592 U.S. __, 141 S. Ct. 989 (2021).

preference for a due process-based framework.[246] Similar language moving towards a due process framework could be found in *Taylor* or *Luna*, though it is not overtly clear. If Justice Gorsuch is the author of both, lower courts following the guidance of either case are actually following the guidance of a dissent from a merits case.[247]

The following plays this hypothetical out in more concrete terms. *Torres v. Madrid*, a merits case, raised the question of what constitutes a seizure within the meaning of the Fourth Amendment, specifically whether a suspect has been seized when an officer intentionally uses force to detain that suspect but is unsuccessful and the suspect evades arrest.[248] How a seizure is defined in the criminal context would substantially impact the test applied in a section 1983 claim. In other words, if an unsuccessful intentional use of force constitutes a seizure within the meaning of the Fourth Amendment, then the objective reasonableness test applies when assessing qualified immunity. If, however, an unsuccessful intentional use of force is not deemed a seizure within the meaning of the Fourth Amendment but results in injury to the civilian who evades seizure, then the Fourteenth Amendment's due process test applies.[249] Limiting such claims to the Fourteenth Amendment would result in a higher threshold standard for assessing officer liability, which is whether the officer's actions shocked the conscience. Justice Roberts, writing for the *Torres* majority, ultimately held that the facts presented a Fourth Amendment seizure and remanded the assessment of reasonableness back to the lower court.[250]

Justice Gorsuch, joined by Justices Thomas and Alito, dissented, arguing that the Fourth Amendment has always deemed a seizure as affirmatively "taking possession of someone or something."[251] Giving a nod to those concerned with limiting section 1983 remedies, Justice Gorsuch further argued that plaintiffs in Ms. Torres' position would not be precluded from bringing state tort claims such as assault or battery and further would not be limited from bringing a Fourteenth Amendment due process cause of action under his interpretation.[252] Justice Gorsuch further

246. *See id.* at 1004.

247. Based on an analysis of both merits and orders docket cases Justices Gorsuch and Alito seem inclined to accept a due process-based analysis. There is of course no way to know who authored these per curiam opinions but statements on the merits docket make it plausible that one, or both, of these two Justices are spearheading a more due process based approached. Justice Alito is not named in this example because he authored a concurrence in *Taylor*.

248. *See Torres*, 141 S. Ct. at 993–94 (majority opinion).

249. *See id.* at 1004 (Gorsuch, J., dissenting).

250. *Id.* at 1003.

251. *Id.*

252. *See id.* at 1016.

accused the majority of coming to its holding as a response purely motivated by societal protests against policing, stating:

> Maybe it is an impulse that individuals like Ms. Torres should be able to sue for damages. Sometimes police shootings are justified, but other times they cry out for a remedy. The majority seems to give voice to this sentiment when it disparages the traditional possession rule as "artificial" and promotes its alternative as more sensitive to "personal security" and "new" policing realities.[253]

The dissent in *Torres* presents a unique look into the fight over regulating remedies and the possibilities of how it might impact substantive rights—either in civil litigation, limiting avenues of relief, or have evidentiary implications in the criminal context.[254]

Now, let us consider what a due process framework might look like in qualified immunity cases. In *Cole v. Carson*,[255] a Fourth Amendment use of force case, Mr. Cole alleged that officers violated his constitutional rights when they fired at him without warning.[256] The Fifth Circuit remanded the case for trial, affirming the denial of the officer's motion for summary judgement on grounds that material disputes of fact remained and finding that the officer violated a clearly established right.[257] By contrast, the dissent would have granted summary judgment, precluding a jury from resolving the disputed facts. Leaning on language in *Luna* that could be construed as due process-leaning, the dissent argued that "[*Luna*] aptly summed it up for our purposes: 'qualified immunity protects actions in the hazy border between excessive and acceptable force.'"[258] In other words, if it is not a straightforward case, even where a dispute of facts exists, such facts may not be material to the reasonableness assessment given the fast-paced nature of policing,

253. *Id.* at 1015–16 (emphasis in original); *see* PETER G. BERRIS, CONG. RSCH. SERV., LSB10552, *TORRES V. MADRID*: POLICE USE OF FORCE, FOURTH AMENDMENT SEIZURES, AND FLEEING SUSPECTS 4 (2021) ("Oral arguments in *Torres* brought up some issues that have been of interest to many in Congress in recent months, such as the legal limitations on the use of force by police officers, and the recourse available when officers exceed those limits.").

254. Where a seizure begins and ends could impact the evidence a defendant may legally move to exclude during a criminal trial. *Cf.* Utah v. Strieff, 579 U.S. 232 (2016) (holding that discovery of a valid warrant after an illegal stop attenuated the connection between the initial constitutional violation and the evidence seized pursuant to the search incident to lawful arrest, and allowing the evidence to be admitted against the defendant).

255. 935 F.3d 444 (5th Cir. 2019).

256. *Id.* at 447.

257. *See id.* at 453 (identifying a material dispute of fact as to whether the plaintiff posed a sufficient threat that created a question of fact for the jury regarding the reasonableness of the officer's failure to provide the plaintiff with warning and opportunity to disarm himself prior to the officer firing).

258. *Id.* at 468 (Jones, J., dissenting) (quoting Mullenix v. Luna, 577 U.S. 7, 18 (2015)).

resulting in qualified immunity almost always protecting the officers' conduct.[259]

Reliance on phrases like "hazy [legal] border" could have the impact of invoking a heightened due process standard with the potential of discouraging fact-driven analysis. It could also be argued that this might be how some Justices intended obvious violations to be analyzed. Justice Powell made a similar observation in the context of capital punishment, distinguishing between a due process-based test and an Eighth Amendment test regarding the Court's early approach to determining the constitutionality of the death penalty. Justice Powell intuited that what shocks the conscience and what society deems as cruel and unusual punishment are virtually indistinguishable, observing that "a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided."[260] The statement made by the Court in *Luna* draws a striking similarity to the manner in which a due process analysis might be carried out and the potential road qualified immunity litigants may face in the future. The language in *Taylor* similarly leads lower courts to compare blatantly obvious conditions of confinement that are clearly outside the bounds of acceptable to conditions of confinement to those that involve transient or temporary discomforts.[261]

Though we may never know for certain when a siren signal is being sent, there should be some mild comfort in knowing that the adoption of siren signals by lower courts will, like disruptive signals, increase the likelihood of facing course correction in future orders or merits cases by the Supreme Court.[262]

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259. *See id.* at 465 ("No doubt there are rare 'obvious' cases of Fourth Amendment violations committed by officers who are plainly incompetent or who knowingly violate the law. In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in 'tense, uncertain and rapidly evolving' split-second situations, rather than stand down and jeopardize community safety." (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)); *see also id.* at 474 (Ho, J., dissenting) ("[T]he Supreme Court to date has never identified an 'obvious' case in the excessive force context. And the majority thinks this is the first?").

260. *See* Furman v. Georgia, 408 U.S. 238, 423–24 (1972) (Powell, J., dissenting) ("Mr. Justice Frankfurter, unwilling to dispose of the case under the Eighth Amendment's specific prohibition, approved the second execution attempt under the Due Process Clause. He concluded that 'a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided.'" (quoting State *ex rel.* Francis v. Resweber, 329 U.S. 459, 469–70 (1947) (Frankfurter, J., concurring))).

261. *See* Edge v. Mahlman, No. 1:20-CV-892, 2021 WL 3725988, at *5 (S.D. Ohio Aug. 23, 2021).

262. See *infra* section III.B for further discussion on the feedback loop of discourse between lower courts and the Supreme Court.

6. *Prophetic Signals*

Concurrences and dissents in per curiam opinions are uncommon, but are perhaps the most unambiguous in messaging given that they do not present the same issue that unsigned per curiam opinions present with regard to authorship. Their novelty has the effect of foreshadowing future changes to a particular doctrine or diluting the weight of other signals plausibly being transmitted by the majority. Because of the accompanying dissents, cases like *Luna* and *Hughes* that could have had a more chilling impact on Fourth Amendment excessive force challenges demonstrate significant disagreement as to how the Court wishes to approach such constitutional questions. But the discord can be less distracting and more illuminating, particularly for lower courts or litigants. This Article refers to such signals as "prophetic signals."

Justice Sotomayor has been a frequent dissenter in Fourth Amendment use of force cases on the orders docket, expressing her disagreement with the one-sided approach the Court has taken in only summarily reversing cases to favor law enforcement.[263] For example, in *Hughes*, Justice Sotomayor further elaborated on the consequences of this Court's recurrent reversal of qualified immunity cases:

> This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." . . . Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.
>
> The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.[264]

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263. See *supra* section I.B for a discussion on *Luna* and *Hughes*. Justice Thomas has also recently dissented on the orders docket to express his frustration with the Court's adoption of qualified immunity and its lack of justification in historical common law understandings. *See also* Baxter v. Bracey, 590 U.S. __, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

264. *See* Kisela v. Hughes, 584 U.S. __, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (citations omitted).

In lamenting the actions of her colleagues, Justice Sotomayor's dissent gives validity and voice to other lower courts whose views regarding qualified immunity resonate with hers. For example, following *Hughes*, Judge Browning of the U.S. District Court for the District of New Mexico expressed discontent with the Supreme Court's recent summary reversals in a use of force case involving a police officer that struck a civilian's head with his knee subsequent to an arrest.[265] In holding that the officer violated the Fourth Amendment, Judge Browning unequivocally indicated that he felt constrained by the Court and forced to find, regardless of the constitutional violation, that the officer was immune from suit because there was no clearly established law notifying the officers that his actions were objectively unreasonable.[266] Judge Browning cited to Justice Sotomayor's dissent in *Hughes* and stated:

> It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: "Are the facts here anything like the facts in *York v. City of Las Cruces*?" Thus, when the Supreme Court grounds its clearly-established jurisprudence in the language of what a reasonable officer or a "reasonable official" would know, yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create "an absolute shield for law enforcement officers." The Court concludes that the Supreme Court is doing the latter, crafting its recent qualified immunity jurisprudence to effectively eliminate § 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong.[267]

Although dissenting statements may not initially produce the prevailing signal that is adopted by a lower court, such signals certainly play a role in shaping the law in future cases, and simply put, may prove to be prophetic.[268] In *Luna*, and echoed again in *Hughes*, Justice Sotomayor emphasizes that the inquiry in what constitutes a legitimate government interest is not whether the civilian must be apprehended, but *how* the civilian must be apprehended. Her dissent argues for a more particularized

265. *See* Stevenson v. City of Albuquerque, No. CIV 17-855 JB\LF, 2020 WL 1906065 (D.N.M. Apr. 18, 2020).

266. *Id.* at 21 n.27.

267. *Id.* (citations omitted).

268. See *infra* note 294 for a discussion on *West Virginia v. EPA*, which includes an example of a prophetic concurrence pertaining to the Court's new clarification and fortification of the major questions doctrine.

approach, one in which the legitimate government interest in using force cannot be so broadly defined in anticipation of danger to the officer or the public.[269] By reframing the qualified immunity inquiry into a process-based question that focuses on the reasonableness of the officer's actions, Justice Sotomayor may be conveying signals to legal observers to engage in additional fact development when filing a suit which may go further towards targeting the methods that law enforcement officials use.

B. The Feedback Loop

The hierarchy of authority would indicate that the Supreme Court is the actor most qualified to authoritatively issue signals to all other legal actors.[270] This might be true if we were discussing conventional precedent. Lower courts have always acted as a critical intermediary between the Court and litigants. But their role becomes more pronounced on the orders docket, where shorter decisions, often with limited factual development, are issued at more frequent intervals within a singular area of the law. The foregoing sections have demonstrated how lower courts play a unique role in the percolation of signals that has only become recently evident with the uptick in orders decisions, and particularly the increase in nonunified decisions. Further, because the precedential authority of the per curiam remains secondary to merits cases, the Court's interest in relying on the lower court to interpret its signals becomes heightened and lower courts may perhaps be more influential in doctrinal development. Interpretations by the lower courts will inevitably percolate back to the Supreme Court by way of appeals, giving the Court an opportunity to affirm or correct the interpretation of the signal. Likewise, litigants will take cues from the lower courts and modify their legal strategy in the hopes of influencing the current doctrinal discourse. This iterative process of engaging in signal interpretation and application is what I refer to as a feedback loop.

1. Communicating with the Supreme Court

The prolific use of the orders docket is a relatively new phenomenon unique to the Roberts Court. As a result, the trickle down of signals from the Supreme Court to lower courts and gradual percolation back to the Supreme Court has historically been limited, inevitably leaving analysis in this area premature. But despite the limited number of data points, it is worth noting the relevance of such a feedback loop as it will certainly be impactful in cases to come.

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269. Mullenix v. Luna, 577 U.S. 7, 23 (2015) (Sotomayor, J., dissenting).

270. *See* Re, *Narrowing*, *supra* note 24, at 936.

The most likely signals to garner attention by the Court, at least initially, are those that some Justices view as casting disruptive or siren signals. For example, *Taylor* has been marked as an outlier by most lower courts, generating significant debate as to the scope of its applicability amongst circuit judges.[271] It is therefore no surprise that the debates in circuit opinions surrounding *Taylor* have already caught the attention of the liberal contingent on the bench.

At the conclusion of the 2021–2022 Term, Justice Sotomayor issued two dissents opposing the denial of certiorari: a seven-page dissent in *Cope v. Cogdill*[272] and a three-page dissent, notably joined by both Justices Kagan and Breyer, in *Ramirez v. Guadarrama*.[273] Both cases, discussed above, invoked a heavy debate about the intended signals drawn from *Taylor* amongst the circuit judges. In her dissents, Justice Sotomayor argued that the circuits misapplied the "obvious-case" precedent that was reiterated by the Court in *Taylor* and believed that neither petitioners' claims should have been defeated based upon pretrial motions.[274] A grant of certiorari in either of these cases could have definitively clarified the "obviousness" rule. Perhaps it was simply not the right time, or perhaps, their denial may be yet another signal telegraphed back to lower courts and litigants as to how the majority might view the limitations in identifying a case that presents obviously violative conduct.

2. *Communicating with Litigants*

Like the feedback loop that filters signals from lower courts back to the Supreme Court, there is also a feedback loop that exists when lower courts filter signals to litigants.[275] This type of feedback loop is most easily

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271. *See supra* note 226 and accompanying text.

272. *See* Cope v. Cogdill, 597 U.S. __, 142 S. Ct. 2573, 2573 (2022) (Sotomayor, J., dissenting from the denial of certiorari).

273. *See* Ramirez v. Guadarrama, 597 U.S. __, 142 S. Ct. 2571, 2571 (2022) (Sotomayor, J., dissenting from the denial of certiorari).

274. *See Cope*, 142 S. Ct. at 2575 (Sotomayor, J., dissenting) ("This Court has repeatedly held, nevertheless, that 'a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.'" (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)); *see also* Ramirez, 142 S. Ct. at 2572 (Sotomayor, J., dissenting) ("For the reasons ably set forth by Judge Willett, I would summarily reverse the Fifth Circuit's grant of qualified immunity at the motion-to-dismiss stage, a stage at which petitioners' well-pleaded allegations must be accepted as true.").

275. There are many strains of disclosure that occur through the percolation of signals leading litigants to react based on their best interests. This is one example. Alternatively, litigants can receive other signals, such as which courts are more likely to rule in a litigant's favor. For example, recent arguments have been made that litigants have begun forum shopping their emergency petitions given the outcome of prior orders docket cases and calculated likelihood of success. *See, e.g.*, Brief for

identified where lower courts feel confined by existing precedent. If such circumstances exist, the lower court may implicitly signal to litigants in dicta a desire to see cases developed through an alternate lens. Courts demonstrate this desire by expressing discontent with precedent or even explicitly inviting litigators to present a new case under a different legal theory or with additional facts, suggesting it may yield a different result.

For example, some lower courts have found the Court's overall pattern of reversals incoherent and have simultaneously raised anti-subordination concerns with the current application of qualified immunity.[276] Although race is rarely a focal point in the context of Fourth Amendment seizures,[277] particularly by the time a case gets to the Supreme Court,[278] lower courts are beginning to appreciate the importance and context that race plays into the qualified immunity analysis, perhaps inviting litigators to engage in similarly aligned legal theories. Judge Carlton Reeves, writing for the U.S. District Court for the Southern District of Mississippi in *Jamison v. McClendon*[279] recounts the racialized history under which section 1983 was first created and places the plaintiff's claim of a warrantless search and prolonged detention within this history, stating that "[f]or Black people, this isn't mere history. It's the present."[280] But like many other lower courts, feeling constrained by the Court's demanding standard for precise precedent on-point, even in holding that the officer's actions violated the Fourth Amendment, Judge Reeves was bound to find that qualified immunity still protected the officer.[281]

Although sharing this history did little to change the outcome for Mr. Jamison, the district court may be communicating a signal that goes

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Professor Stephen I. Vladeck as Amicus Curiae Supporting Petitioners, United States v. Texas, No. 22-40367 (U.S. argued Nov. 29, 2022) (arguing that the State of Texas has abused the federal courts by engaging in strategic judicial forum-shopping).

276. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 405 (S.D. Miss. 2020) ("Although the Court held in 2002 that qualified immunity could be denied 'in novel factual circumstances,' the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement." (quoting *Hope*, 536 U.S. at 741)).

277. *See* David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 247 (2021).

278. Tolan v. Cotton, 572 U.S. 650, 654, n.2 (2014) (per curiam) (mentioning that the plaintiff raised an equal protection claim that was dismissed and not before the Court that asserted that the officer's excessive use of force was motivated by the plaintiff's race).

279. 476 F. Supp. 3d 386 (S.D. Miss. 2020).

280. *Id.* at 414.

281. Notably, Judge Reeves suggests that litigants might approach constitutional challenges to excessive force under 42 U.S.C. § 1981 as opposed to § 1983. *See id.* at 420. Litigants may be interested in exploring this option as the Supreme Court has provided little guidance on the viability of 42 U.S.C. § 1981 as an appropriate legal vehicle for challenging race-based law enforcement violations.

towards the type of fact development he believes necessary to bring race-based constitutional claims—something that may be appealing to some Justices on the bench.[282] For example, Judge Reeves concerns could be a nod to similar points Justice Sotomayor voiced when she questioned the impact that the Court's current course of Fourth Amendment jurisprudence would have on marginalized communities in street policing cases. In *Utah v. Strieff*,[283] a case limiting the applicability of the exclusionary rule in pretextual searches, Justice Sotomayor dissented, discussing the increased frequency of which people of color are disproportionately subject to greater scrutiny by police despite the fact that neither the parties nor amici discussed race.[284] Other Justices have made similar passing comments regarding group-based rights impacting racial minorities in the context of the Fourth Amendment. The Supreme Court engaged with the impact of racial discrimination most prominently in *Terry v. Ohio*,[285] where the majority explicitly acknowledged that police disproportionately target minorities.[286] Justice Stevens, concurring

282. These notable mentions of group-based rights that appear in Fourth Amendment criminal appeals are even less frequent in the context of use of force cases that arise in civil suits, where the race of the complainant is usually not mentioned in the complaint. *See, e.g.*, Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583, 2633 (2021) (noting that in *Tolan v. Cotton* "[w]hether or not race was involved in Edwards initial decision to follow Robbie and Cooper, once they exited their car [the officer] knew that he was dealing with two African American males in a predominantly white, middle-class neighborhood at a late night hour"). Amicus briefs also have not discussed the impact of qualified immunity on race until recently. *See, e.g.*, Brief for Constitutional Accountability Center as Amici Curiae in Support of Petitioner at 17, Taylor v. Riojas, 592 U.S. __, 141 S. Ct. 52 (2020) ("Notably, people of color are hit particularly hard by the effects of qualified immunity, as they continue to be disproportionately victimized by certain forms of government overreach. Today, for example, [B]lack Americans are more likely than white Americans to be the victims of excessive force by police officers."). Race is most often discussed in the lower courts if the complainant brings a claim of racial discrimination. Those claims are often dismissed and race is not discussed at the Supreme Court level. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (precluding evidence of the officer's subjective intentions from the Fourth Amendment analysis); *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (analyzing the impact of delinking racial motivations from the Fourth Amendment qualified immunity analysis). Race may be alluded to in briefings or opinions discussing the backdrop under which the Fourteenth Amendment and 42 U.S.C. § 1983 were passed. But ultimately, if the race of the party is mentioned, it is never in the context of a discussion greater than a mere recitation of the facts.

283. *See* Utah v. Strieff, 579 U.S. 232 (2016) (holding five-to-three that the discovery of a valid arrest warrant sufficiently broke the casual chain between the officer's unlawful stop and the discovery of drug-related evidence, rendering the evidence admissible).

284. *See id.* at 254 (Sotomayor, J., dissenting) ("As the Justice Department notes, . . . many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny." (citations omitted)).

285. 392 U.S. 1 (1968).

286. *See id.* at 14–15 ("The wholesale harassment by certain elements of the police community, of

in *Illinois v. Wardlow*,[287] acknowledged the realities that race plays in day-to-day community interactions including the fact that minorities may flee from police for reasons other than being guilty.[288]

Reliance on signal percolation from lower courts is much easier said than done as access to counsel in civil suits can often be difficult to obtain and resource demanding. Recall the Third Circuit case, *Thompson v. Howard*. Mr. Thompson litigated his section 1983 case pro se from 2009 to 2014, until he was appointed counsel by the district court when the case proceeded to discovery.[289] In his complaint he alleged that the officers involved threatened him and used "racial slurs."[290] Beyond the initial complaint, there was no additional mention by the court of Mr. Thompson's race or the racial slurs made by officers against him. Mr. Thompson sought counsel several times throughout his litigation based on his indigency to no avail.[291] Had counsel been timely provided, counsel could have used the initial complaint to preserve additional causes of action that may have spoken to some of the racialized outcomes in policing as expressed by both lower court judges and the dissenting Justices on the Supreme Court.[292]

Further research and scholarship on signals originating from the Court's per curiam opinions may help to make the orders docket more accessible to litigants and counteract against its more amorphous features. There is every indication that the Roberts Court intends to continue to rely heavily on its orders docket as a mechanism for communication and apply its certiorari power to reaffirm or correct lower courts' interpretations of its signals.[293] As the orders docket grows in prominence, the necessity of

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which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.").

287. 528 U.S. 119 (2000).

288. *See id.* at 132 (Stevens, J., concurring) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.").

289. Notice of Appearance, Thompson v. Howard (W.D. Penn. 2009) (No. 2:09-cv-01416), ECF No. 115.

290. Amended Complaint at 7, Thompson v. Howard (W.D. Penn.) (No. 2:09-cv-01416), ECF No. 65–3.

291. Memorandum Opinion on Motion to Certify Class Action and Motion for Appointment of Counsel at 1–2, Thompson v. Howard (W.D. Penn. 2009) (No. 2:09-cv-01416), ECF No. 10.

292. This Article does not propose definitive avenues of litigation but puts forward some observations based on signals that litigants should be cognizant of as litigation strategies are assessed.

293. Although the feedback loop within the orders docket can be beneficial, perhaps the strongest objection to the Court's prolific use of summary reversals, particularly in the development of an entire area of the law, is that the Court does not have the whole picture as it does when it is adjudicating a

engaging in and contributing to the conversation that has the ability to influence outcomes and merits opinions will become a vital part of doctrinal development for years to come.

CONCLUSION

In presenting this taxonomy for assessing per curiam signals, this Article attempts to demystify the Court's communications that have been quietly lurking in the shadows. The purpose of this Article is to provide meaningful guidance in furtherance of categorizing and tracking the impact of the Court's signals as the orders docket becomes a critical channel for final adjudication across various doctrinal contexts. Qualified immunity serves as a prime vehicle for this analysis, but the conversation should not end here and should be applied to other doctrinal contexts ripe for study.[294] My hope is that this Article impresses the need for a larger,

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case on the merits. In other words, briefing is scant. Justice Marshall understood the inherent immaturity of resolving matters via summary reversals and wrote in *Montana v. Hall*, "I believe that when the Court contemplates a summary disposition it should, at the very least, invite the parties to file supplemental briefs on the merits, *at their option*." 481 U.S. 400, 410 (per curiam) (Marshall, J., dissenting) (emphasis in original). That caution has yet to be heeded. *See* Hartnett, *supra* note 19, at 592–93. Thus, going forward, parties to 42 U.S.C. § 1983 suits should no longer be litigating merely to oppose certiorari, but also summary reversal. This will certainly require more effort on the part of litigators to fully flesh out merits-based arguments and scour through the records of lower court opinions that resulted in Supreme Court per curiams, but it could be well worth the trouble.

294. The Court has begun to take a similar approach to the major questions doctrine, deciding two cases on its orders docket before issuing a third on the merits this past term. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. __, 141 S. Ct. 2485 (2021) (per curiam) (holding the COVID-19 eviction moratorium unlawful); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. __, 142 S. Ct. 661 (2022) (per curiam) (holding the COVID-19 vaccine and testing mandate unlawful); West Virginia v. EPA, 597 U.S. __, 142 S. Ct. 2587 (2022) (citing to both *Alabama Association of Realtors* and *National Federation of Independent Business (NFIB)* in concert with merits opinions, treating the per curiam opinions as precedent). Interestingly, Justice Gorsuch, writing a concurring opinion to the *NFIB* per curiam seemed to issue a prophetic signal that the Court might be revitalizing the major questions doctrine. In *NFIB*, Justice Gorsuch cites back *Alabama Association of Realtors* to point out that the Court "established [] one firm rule: 'We expect Congress to speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'" *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring). He then referred to this rule as the major questions doctrine, citing back to his own dissent in *Gundy v. United States* from 2019. *Id.* at 668. Within just a few years, the major questions doctrine meets a point of inflection and is cemented with greater clarity in *West Virginia v. EPA*. *West Virginia*, 142 S. Ct. at 2609. Of course, it is unclear who authored *Alabama Association of Relators* (perhaps it could have been Justice Gorsuch, moving the Court towards this rule); nevertheless, the signal from his concurrence in *NFIB* was incredibly clear and likely done to forecast changes in the doctrine in order to soften the blow and demonstrate that the outcome in *West Virginia* was not out of the blue. *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 264 (2022) (pointing out that "[t]o knowledgeable observers . . . the Court's fortification of the old major questions exception into this new clear statement rule would not have come as a surprise").

and longer, conversation by legal scholars on the discourse occurring on the orders docket between the Supreme Court, lower courts, and litigants alike.