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Aldaba v. Pickens: Police Excessive Force and Mentally Disturbed Individuals

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ALDABA V. PICKENS: POLICE EXCESSIVE FORCE AND MENTALLY DISTURBED INDIVIDUALS

ABSTRACT

In *Aldaba v. Pickens*, the Tenth Circuit effectively destroyed the protection that qualified immunity is meant to afford law enforcement officers. The Supreme Court vacated the judgment of *Aldaba* due to the decision's reliance on unclear law less than one year after the Tenth Circuit issued this muddled opinion. This Comment explores *Aldaba* and explains how the Tenth Circuit took great liberty with the doctrine of qualified immunity in its decision and how its decision affects situations where police officers are responding to requests for help in subduing aggressive, mentally disturbed individuals. This Comment will discuss the ways in which the court skewed material facts in order to rely on ambiguous law, misapplied qualified immunity standards, and distorted precedent. This Comment explains that the Tenth Circuit's ruling inappropriately created a new standard for police use of force in circumstances involving mentally disturbed individuals. Under the Tenth Circuit's decision in *Aldaba*, police officers must fear every choice they make when it involves a mentally unstable individual. To rectify this, it is necessary to depart from the Tenth Circuit trends *Aldaba* set and to develop an alternative examination of use of force that reinstates the purpose of qualified immunity and provides police officers with a more reasonable standard to rely on in use-of-force determinations when responding to the mentally disturbed.

INTRODUCTION

Imagine that you are a health care worker in a hospital setting. The duties of your job require you to provide medical care and comfort to the patients of the hospital. While working, a patient becomes agitated, aggressive, and mentally unstable. This patient becomes so disturbed that he removes the tubes and needles from his arm, which were providing medication and liquids he desperately needs. He refuses to allow you to help him and leaves his medical bed. He is in such an aggressive frenzy that you feel you must seek help from others in order to calm him down and prevent him from hurting himself, you, or others. You call the police because you expect them to be able to handle the situation and subdue this hysterical patient.

Now imagine you are the police officers who arrive on scene. You are expected to calm down a patient who has already refused to calm down for medical staff. The patient is screaming, dripping blood, wandering the halls, and refusing to listen to anyone. You are told that if he leaves the hospital, he may die due to his medical condition. How do you

react in a split second in order to determine the best course of action? You ask the patient to calm down and to cooperate more than once, but he refuses. What do you do next? You fear that if you use any amount of force, you may be sued, but you are left with no other choices. You must either react to the situation or let the patient leave without the medical care he needs. If you are unable to use force to subdue this individual, but the duties of your job require you to protect him and those around him, do you feel that your hands are tied?

Under 42 U.S.C. § 1983, individuals may seek damages from government officials, including police officers, who have violated constitutional or statutory rights.[1] However, in order "to ensure that a fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" police officers may claim qualified immunity.[2] If the officers "have not violated a 'clearly established' right, they are shielded from personal liability."[3] Even in instances where a police officer may have proximately caused the deprivation of a constitutional right, the officer will not be held liable under § 1983 unless he or she did so in an objectively unreasonable manner.[4] With regard to excessive force, the Supreme Court has held that "claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard."[5] Under this standard, a police officer "might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."[6]

Recently, the Tenth Circuit took such great liberty with this doctrine that it almost completely negated the purpose of qualified immunity. Rather than affording police officers reasonable discretion in interpreting the appropriate amount of force to employ during the course of their duties, it created new review standards regarding the use of force involving individuals of diminished capacity. In *Aldaba v. Pickens*,[7] the Tenth Circuit denied qualified immunity to police officers who tased an uncooperative and aggressive hospital patient, yet the Tenth Circuit only accomplished this by creating an unwarranted factual dispute; relying on unclear law; and by stating, in effect, that it is always unreasonable to use a taser on mentally disturbed individuals. This decision implied a shift in the Tenth Circuit toward a heightened standard of review for officers

1. Camreta v. Greene, 131 S. Ct. 2020, 2030 (2011).
2. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).
3. *Id.* at 2031 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
4. *See* Champion v. Outlook Nashville, Inc., 380 F.3d 893, 900–01 (6th Cir. 2004).
5. Graham v. Connor, 490 U.S. 386, 388 (1989).
6. Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 192–93 (2008) (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)).
7. Aldaba v. Pickens, 777 F.3d 1148, 1156 (10th Cir. 2015) cert. granted, judgment vacated, 136 S. Ct. 479 (2015).

evaluating a situation and deciding the appropriate level of force to use in a split second, even though, as both the Supreme Court and the Tenth Circuit acknowledge, the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[8] The Tenth Circuit imposed an injudicious ruling that raises the use-of-force standard to an unrealistic level of care specifically when dealing with mentally disturbed individuals despite the stress, potential danger of the situation, and lack of hindsight. The Supreme Court vacated the judgment of *Aldaba* due to its reliance on unclear law [9] just nine months after the Tenth Circuit issued its deficient opinion. This Comment will show that *Aldaba* misapplied qualified immunity standards by ignoring material facts and relying on ambiguous law. Furthermore, *Aldaba* distorted precedent to effectively destroy the purpose of qualified immunity by inappropriately creating a new standard for police use of force in circumstances involving mentally disturbed individuals. An alternative examination of use of force when dealing with mentally disturbed individuals is now required in order to reinstate the purpose of qualified immunity and to provide police officers with a more reasonable standard to use in their use-of-force determinations.

Part I of this Comment will discuss the background of qualified immunity, the mental health of an individual, and the use of tasers in relation to use of force. Part II will examine the relevant details of *Aldaba*. Part III will explore *Aldaba's* qualified immunity examination, the Tenth Circuit's ruling, its inconsistencies with other circuits, and the problems that it created. Part III will also briefly suggest an alternative standard to employ when examining taser use in situations involving the mentally disturbed.

I. BACKGROUND

A. Qualified Immunity in Relation to Use of Force

Over time, qualified immunity has evolved, and different jurisdictions now employ varying levels of qualified immunity.[10] Police officers are immune from liability for violating constitutional principles that they could not have reasonably known at the time of the violation.[11] An examination of this generally consists of two distinct principles: first, whether

8. *Id.* at 1155 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).
9. Pickens v. Aldaba, 136 S. Ct. 479 (2015).
10. *See, e.g.*, Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1034–36 (2005); David R. Cleveland, *Clear As Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45, 45–48 (2010); Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope's Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563, 563–64 (2006).
11. Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 186 (2008).

an officer's conduct violated a constitutional right; and second, whether that right was clearly established at the time such that the officer should have known of it.[12] Qualified immunity for executive officials developed through the case of *Pierson v. Ray*.[13] In *Pierson*, the Court ruled that where officers are "sued under the Fourth Amendment . . . [s]o long as they are reasonably mistaken . . . [they] are immune from personal liability."[14] The Supreme Court has indicated that this doctrine is intended to protect "all but the plainly incompetent or those who knowingly violate the law."[15] While originally examined from both subjective and objective views, qualified immunity has evolved into a purely objective standard.[16]

The Supreme Court has held that excessive force, deadly or not, should be analyzed under the Fourth Amendment's reasonableness standard.[17] This examination requires careful consideration of the nature and quality of the intrusion weighed against applicable governmental interests.[18] In *Graham v. Connor*, the Supreme Court described three factors in determining whether use of force is excessive: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officers or others; and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[19] The Court acknowledged, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[20]

While the analysis put forth in *Graham* is generally sufficient for cases involving typical criminal arrests, a slightly different approach is prescribed for cases dealing with protective custody issues given that the governmental interest presented is in preventing a mentally disturbed individual from harming him or herself.[21] Examinations must take this additional factor, risk of self-harm, into account.[22] Further, circuits have acknowledged that the actual extent of an individual's mental illness

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12. *Id.* at 185–86.
13. *Id.* at 186.
14. *Id.*
15. Malley v. Briggs, 106 S. Ct. 1092, 1096 (1986).
16. Stacey Haws Felkner, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 AM. JURIS. PROOF OF FACTS 3D SERIES 291 (2000) (citing Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982)).
17. Graham v. Connor, 490 U.S. 386, 395 (1989).
18. *Id.* at 396.
19. *Id.*
20. *Id.*
21. *See* Giannetti v. City of Stillwater, 216 F. App'x 756, 762 (10th Cir. 2007) ("Determining whether force used to effect a particular seizure is reasonable under the Fourth Amendment requires *a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake*."); Pino v. Higgs, 75 F.3d 1461, 1468 (10th Cir. 1996) ("The state has a legitimate interest in protecting the community from the mentally ill and in protecting a mentally ill person from self-harm.").
22. *Id.*

should be taken into account in addition to the standard *Graham* analysis factors.[23]

B. Mental Health in Relation to Use of Force

The Tenth Circuit examined mental health of a detainee in relation to use of force in *Giannetti v. City of Stillwater*.[24] In *Giannetti*, a woman diagnosed with bipolar disorder was taken to a municipal jail after avoiding arrest for traffic violations.[25] She exhibited odd behavior, including a statement that she would eat one of the officers with liver and onions.[26] At the jail, she was defensive and aggressive; when she refused to change into a jumpsuit, officers handcuffed her and struggled with her, using physical force to change her clothes as she kicked and dug with her nails.[27] The woman died after the struggle; the declared cause of death was anoxic encephalopathy resulting from probable cardiac dysrhythmia due to restraint and positional asphyxia.[28] The Tenth Circuit recognized that "a detainee's mental health must be taken into account when considering the officers' use of force and it is therefore part of the factual circumstances."[29] With this in mind, the Tenth Circuit held that the officers did not use excessive force.[30] The court reasoned that in light of the woman's "evidently irrational behavior and assuming the officers' familiarity with her mental history, we cannot conclude that the officers used excessive force given the 'tense, uncertain, and rapidly evolving' situation presented."[31]

Circuits do not rule consistently on situations involving questions of excessive force in dealing with mentally ill individuals.[32] In a situation similar to that in *Giannetti*, the Sixth Circuit found an opposite result.[33]

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23. *See, e.g.*, *Giannetti*, 216 F. App'x at 764; Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004).

24. *Giannetti*, 216 F. App'x at 764.

25. *Id.* at 758–60.

26. *Id.* at 758.

27. *Id.* at 758–60.

28. *Id.* at 761. The cause of death here is a medical condition where a person's body position results in an impaired ability to breath, lack of oxygen in the brain, and erratic heartbeat or heart rhythm, which can ultimately lead to death. *See*, *Cardiac Dysrhythmia*, ONLINE-MEDICAL-DICTIONARY.COM, http://www.online-medical-dictionary.org/definitions-c/cardiac-dysrhythmia.html; *Encephalopathy*, EMEDICINEHEALTH, http://www.emedicinehealth.com/encephalopathy/page2_em.htm; U.S. NAT'L LIBRARY OF MED., *Cerebral Hypoxia*, MEDLINEPLUS (Sept. 2014), https://www.nlm.nih.gov/medlineplus/ency/article/001435.htm. See U.S. DEP'T OF JUSTICE, NATIONAL LAW ENFORCEMENT TECHNOLOGY CENTER: POSITIONAL ASPHYXIA—SUDDEN DEATH, (Jun. 1995), for more information on positional asphyxia.

29. *Giannetti*, 216 F. App'x at 764.

30. *Id.* at 766.

31. *Id.* at 765 (citation omitted).

32. *Compare Giannetti*, 216 F. App'x at 764 (finding reasonable force used in physical struggle with handcuffed woman diagnosed with bipolar disorder), *with* Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004) (finding Fourth Amendment rights violation when officers pepper sprayed a handcuffed, nonverbal man diagnosed with autism).

33. *Champion*, 380 F.3d at 896.

The Sixth Circuit held, in *Champion v. Outlook Nashville, Inc.*, that police were not entitled to qualified immunity in an excessive force claim that arose in dealing with a nonverbal man, diagnosed with autism, who was physically struggling with officers even after being handcuffed, bound at the ankles, and sprayed with pepper spray.[34] The man died due to cardiac arrest.[35] In this situation, involving the death of a mentally ill individual after a physical struggle with police officers similar to *Giannetti*, the Sixth Circuit held that the use of force violated clearly established rights.[36]

The Ninth Circuit has also stated that the mental state of an individual must be considered when examining the constitutionality of a particular use of force. In *Deorle v. Rutherford*, the Ninth Circuit explained that in instances where an "emotionally disturbed individual is 'acting out' and inviting officers to use deadly force . . . the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual," as opposed to an individual who has committed a crime against others.[37] The court declined to "adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals."[38] Instead, the court stated, "[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."[39] There, the court held it was objectively unreasonable for an officer to fire a less-than-lethal bean bag round at "an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such . . . force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals."[40] In *Deorle*, the court emphasized the mental state of the man in light of the lack of threat posed by him and the lack of warning before use of the less-than-lethal bean bag round.[41] The *Deorle* holding illustrates that the distinction between situations with and without a threat of harm and with and without a warning before using force is key to use-of-force determinations.

C. Tasers in Relation to Use of Force

The examination of excessive force with regard to the use of tasers also requires special consideration. Tasers, also known as "conducted energy devices (CEDs)" or "electro-muscular-disruption (EMD) technol-

34. *Id.* at 895–98.
35. *Id.* at 898.
36. *Id.* at 896.
37. Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001).
38. *Id.*
39. *Id.*
40. *Id.* at 1285.
41. *Id.*

ogy," are devices that transmit an electrical impulse when in contact with the body or clothing, generally resulting in an immediate loss of the person's neuromuscular control and the ability to perform coordinated action for the duration of the impulse.[42] These devices are generally considered a less lethal option that "enable police to defuse a potentially violent situation without resorting to deadly force."[43] On countless occasions, these devices have allowed officers to neutralize potentially dangerous situations with "decreased injuries to suspects and officers," and they "have repeatedly been documented in dramatic life-saving stories."[44] Concerns regarding the use of tasers and their overall safety have been raised.[45] A review of medical and epidemiological data indicates that the results, while inconclusive overall, suggest that the benefits of taser use outweigh the suggested risks.[46] An examination of taser use noted:

> Even assuming that all 213 suspect deaths studied . . . were "Taser-related," this number must be compared with the 606,000 . . . deployments on suspects and 758,000 on volunteers. . . [resulting in a] fatality rate of .0156%. Such a low fatality rate . . . demonstrate[s] that the Taser, while not without risk, is a relatively safe weapon, or at least a weapon whose benefits outweigh its risks.[47]

> In some instances, circumstances leave an officer with two options: use a taser or shoot the individual; many, with good reason, avidly advocate for the use of the taser over the shooting.[48]

Police have not reached a consensus on appropriate taser use.[49] Law enforcement agencies often reference a Use-of-Force-Continuum to establish appropriate levels of officer force, yet across agencies, "the minimum stage for acceptable [t]aser use range[s] from the passive-resistance stage to the assaultive (physical injury) stage."[50] Across circuits, the split is just as defined.[51] The level of force necessitated by the situation dictates whether the level of responding force, including use of a taser, is appropriate, but "different circuits hold that [t]asers constitute different levels of force, most holding that [t]asers are a gray area be-

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42. Donald L. Nevins, III, *Municipal Liability Under 42 U.S.C. § 1983 for Failing to Equip Police with Tasers*, 28 QUINNIPIAC L. REV. 225, 227–29 (2009).
43. *Id.* at 227.
44. *Id.* at 230–231.
45. *See, e.g.*, Aaron Sussman, *Shocking the Conscience: What Police Tasers and Weapon Technology Reveal About Excessive Force Law*, 59 UCLA L. REV. 1342, 1345 (2012).
46. *See, e.g.*, Nevins, *supra* note 42, at 226 (arguing that failure to supply police officers with tasers could amount to deliberate indifference exposing municipality liability).
47. *Id.* at 240.
48. *Id.* at 225.
49. *E.g.*, Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285, 285–91 (2012) (examining the lack of consensus regarding taser use).
50. *Id.* at 291.
51. *Id.* at 304.

tween trivial and lethal force."[52] In some instances, the taser has been viewed as substantial force, yet analogized to the use of pepper spray.[53] In other instances, there has been a strong implication that tasers are more than a *de minimis* level of force but less than substantial force.[54] In evaluating the reasonableness of taser use, "many cases result in qualified immunity since the law is still evolving, and local law enforcement agencies across the country reflect differing views . . . some units only allowing for [t]asers when deadly force is allowed and others when any use of force is justified."[55]

With such ranging views on taser use and its degree of force, it logically follows that taser use in the context of situations involving mentally disturbed individuals is also extremely varied. It has been suggested that individuals with diminished mental capacity are particularly vulnerable to the effects of tasers because such individuals "are more likely to react to the unfamiliar, painful, and frightening sensation of being tased, or threat of being tased, with panic that escalates the situation. . . [and] tasers may have unpredictable effects--or no effects--on mentally ill suspects."[56] Still, whether or not mentally disturbed or mentally sound individuals are involved, most use-of-force examinations turn on the circumstances of the situation itself; while mental state is a factor that is taken into account, it is not dispositive over the actual events that occurred.[57]

II. *ALDABA V. PICKENS*

A. Facts

On the morning of March 24, 2011, Johnny Manuel Leija was hospitalized due to dehydration and severe pneumonia.[58] The pneumonia was causing low oxygen levels, affecting his mental state.[59] While he was initially pleasant, cooperative, and responsive, his behavior later

52. *Id.*
53. *Id.* at 314 (discussing Landis v. Baker, 297 F. App'x 453, 455 (6th Cir. 2008)).
54. *Id.* at 315 (citing Lewis v. Downy, 581 F.3d 467, 475, 479 (7th Cir. 2009)).
55. *Id.* at 317.
56. Sussman, *supra* note 45, at 1360–61.
57. *Compare* Rudlaff v. Gillispie, 791 F.3d 638, 639 (6th Cir. 2015) (ruling use of taser and physical force was not unreasonable in light of qualified immunity with individual resisting arrest), *and* Zivojinovich v. Barner, 525 F.3d 1059, 1073 (11th Cir. 2008) (ruling use of taser was reasonably proportionate to need for force when dealing with belligerent individual in light of qualified immunity), *with* Bussey-Morice v. Gomez, 587 F. App'x 621, 622, 627 (11th Cir. 2014) (per curiam) (ruling use of taser with mentally disturbed individual refusing to cooperate in hospital did not violate of clearly established law in light of qualified immunity), *and* Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 507 (6th Cir. 2012) (ruling use of taser with individual under the influence of cocaine and resisting arrest did not violate of clearly established law in light of qualified immunity).
58. Aldaba v. Pickens, 777 F.3d 1148, 1152 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015).
59. *Id.*

changed.[60] That evening, "a nurse found that he had disconnected his oxygen and cut his intravenous tube" and was bleeding from his arms such that "there was blood on the floor and the toilet."[61] At that time, Mr. Leija was confused and anxious but refused to take medication to control his anxiety and "accused the nurse of telling him lies and secrets."[62] He then "became increasingly uncooperative and aggressive," and he shouted that staff was attempting to poison him.[63] The female nurse informed the doctor of the situation, and the doctor sent a male nurse to Mr. Leija's room.[64] Upon arrival, the male nurse discovered Mr. Leija had again removed his oxygen and intravenous tubes and was "yelling, 'I am Superman. I am God. You are telling me lies and trying to kill me.'"[65] The male nurse attempted to calm Mr. Leija and persuade him to return to his bed, but Mr. Leija refused.[66] Mr. Leija's doctor directed the nurse to give Mr. Leija medication to calm him down, but again Mr. Leija refused.[67] The male nurse did not believe Mr. Leija could be restrained, and with the doctor's approval, he called law enforcement officials to assist with "a disturbed patient."[68] The doctor was "increasingly concerned for Mr. Leija's health given the behavioral and personality changes in Mr. Leija from earlier in the day."[69] Subsequently, Mr. Leija left his hospital room and began walking down the hospital halls.[70]

Three police officers arrived to find Mr. Leija in the hall, visibly agitated and upset.[71] Medical personnel informed Officer Brandon Pickens that "Mr. Leija was ill and could die if he left the hospital."[72] Officer Pickens attempted to persuade Mr. Leija to calm down and return to his room.[73] Mr. Leija refused and continued to insist that hospital staff were trying to kill him.[74] Officer Pickens tried to reassure Mr. Leija and stated that no one was trying to kill him, but Mr. Leija continued to walk through the hallway toward the hospital lobby until he stopped, pulled out the intravenous ports from his arms, and clenched and shook his fists while saying, "This is my blood."[75] Deputies James Atnip and Steve Beebe testified in district court that they repeatedly ordered Mr. Leija to calm down and get on his knees.[76] Mr. Leija did not comply, despite be-

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* (citation omitted).
66. *Id.*
67. *Id.*
68. *Id.* (citation omitted).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1152–53.
74. *Id.* at 1153.
75. *Id.* (citation omitted).
76. *Id.*

ing warned several times that they would use a taser.[77] After Mr. Leija failed to comply with commands, Deputy Beebe deployed his taser, striking Mr. Leija in the upper torso with one of the two taser probes.[78] The taser had no effect, and a struggle ensued.[79]

After the ineffectual taser strike, the officers grabbed Mr. Leija by the arms and thrust him against the wall, at which point one of the officers tased him again on the back of the shoulder with a "dry" sting by making direct contact to Mr. Leija with the electrical nodes of the taser without launching the penetrating barbs.[80] This second taser attempt also appeared ineffectual.[81] Thus, Deputy Atnip pushed his leg into the back of Mr. Leija's knee and caused him and all three officers to fall to the floor.[82] Mr. Leija continued to resist even after falling to the floor.[83] The officers managed to restrain one of Mr. Leija's arms in a handcuff and the other by holding it, allowing the male nurse to give Mr. Leija medications in order to calm him down.[84] After medications were administered, Mr. Leija went limp, grunted, and vomited clear fluid.[85] The officers moved away, and medical personal began CPR on Mr. Leija.[86] CPR efforts failed, and Mr. Leija was pronounced dead.[87]

Mr. Leija's cause of death was determined to be "respiratory insufficiency secondary to pneumonia, with the manner of death being natural."[88] The medical examiner testified that the taser shots could have increased Mr. Leija's need for oxygen and further stated that Mr. Leija's physical exertion exacerbated his underlying condition.[89] Mr. Leija's physician testified that Mr. Leija's handcuffed, facedown position on the floor could compromise the body's ability to get oxygen.[90]

B. Procedural History

The district court held that the seizure of Mr. Leija was lawful; probable cause existed for taking him into protective custody based on his mental state and the threat he posed to his own health.[91] The district court decided that there were "several material disputed facts relating to the objective reasonableness of the force the officers applied to seize Mr.

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

Leija."[92] The court stated the degree of resistance by Mr. Leija, in particular, was disputed; the surveillance footage of the encounter did not capture the entire event because Mr. Leija moved out of the frame of view.[93] Further, the district court concluded the record was "in dispute as to the threat Mr. Leija allegedly posed to the officers or the public."[94] It also held that the allegations that Mr. Leija was using his blood as a weapon were inconclusive because there was no evidence that his blood spattered the officers.[95] It determined that "these material disputed facts precluded the issuance of summary judgment."[96]

C. Majority Opinion

Judge McKay wrote for the majority joined by Chief Judge Briscoe.[97] The majority examined excessive use of force and qualified immunity under the standards developed in *Graham*.[98] It also added a factor to the *Graham* analysis by stating that the evaluation of use of force must take into account the fact that Mr. Leija was mentally disturbed and a risk to himself.[99] It acknowledged that when "an individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes."[100] It also referenced the Ninth Circuit, stating that even when "an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual."[101] Additionally, the majority stated, referencing the Ninth Circuit, that causing "grievous injury" to individuals being taken into protective custody does not serve the object of protecting the individual.[102] The court expressed that it must consider whether or not the police officers knew or should have known of the individual's special susceptibility to harm from the particular type of force.[103] The majority explained that, in *Cruz v. City of Laramie*, the Tenth Circuit established that officers may not use hog-tie restraints on individuals with an apparent diminished capacity because the restraints are likely to result in significant risk to the individual's health due to the risk of positional asphyxia.[104] The majority opinion did not provide a more concrete explana-

92. *Id.*
93. *Id.*
94. *Id.* at 1154.
95. *Id.*
96. *Id.*
97. *Id.* at 1151.
98. *Id.* at 1154.
99. *Id.* at 1155–56.
100. *Id.* at 1155.
101. *Id.* at 1156 (citing Deorle v. Rutherford, 272 F.3d 1272, 1282–83 (9th Cir. 2001)).
102. *Id.* (citing Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir.2003)).
103. *Id.*
104. *Id.* (citing Cruz v. City of Laramie, 239 F.3d 1183, 1188 (10th Cir.2001)).

tion of how the risk of positional asphyxia is increased when dealing with individuals of diminished mental condition.

With this background, the majority determined that "the severity and immediacy of the threat Mr. Leija posed to himself . . . weighs in favor of the application of some force."[105] It stated, however, that the use of a taser, when Mr. Leija was "clearly delusional and mentally disturbed, weighs against the reasonableness" of force used.[106] The majority decided that when faced with mentally ill individuals, officers "should make a 'greater effort to take control of the situation through less intrusive means.'"[107] It added that the diminished physical condition of Mr. Leija also weighed against the use of a taser.[108]

Further, the majority declared Mr. Leija did not pose a threat to the officers or anyone else.[109] The court stated that the use of a taser has been appropriate in instances where an individual actively resists arrest but not in instances where an individual does not exhibit active resistance.[110] The majority claimed the "facts indicate some level of resistance," but went on to state that "nothing suggests Mr. Leija's resistance was anything more than passive."[111] The majority then continued, "On appeal, the parties raise several arguments regarding the struggle that followed the initial taser strike" but that the court "need not address these arguments because we conclude that Plaintiff has sufficiently demonstrated an excessive force violation."[112]

With regard to clearly established law, the majority stated that the analysis of excessive force under *Graham* is "necessarily fact-specific, and thus prior cases do not need to involve all of the same factual circumstances or factors in order for an excessive force violation to be clearly established."[113] Instead, the court explained that a "sliding scale" should be utilized where the more egregious the conduct, the less specificity required from prior case law to establish a violation.[114]

The majority relied primarily on five cases to show that the law was clearly established, such that the officers could not reasonably tase Mr. Leija.[115] First, the majority distinguished *Hinton v. City of Elwood*, where officers used reasonable force when a misdemeanant ignored an officer's orders to stop, shoved the officer, then resisted arrest by biting the of-

105. *Id.* at 1157.
106. *Id.*
107. *Id.* (citing Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir.2010)).
108. *Id.*
109. *Id.* at 1158.
110. *Id.*
111. *Id.*
112. *Id.* at 1158–59.
113. *Id.* at 1159.
114. *Id.*
115. *Id.* at 1160.

ficer.[116] The court stated that this is different from the situation at hand because Mr. Leija did not actively resist or flee.[117] Beyond that, the majority looked favorably upon the four remaining cases. It analogized *Casey v. City of Federal Heights*, where it was unreasonable that a nonviolent, nonthreatening misdemeanant was tased without warning.[118] Then, it turned to the Eleventh Circuit's decision in *Oliver v. Florino*, where the court held it was unreasonable for officers to tase a mentally unstable individual when he was suspected of no crime, was compliant, and posed no immediate threat.[119] Next, the majority looked at the District Court of Colorado's opinion in *Asten v. City of Boulder*, where it was unreasonable to tase a mentally unstable woman when she posed no threat to officers or others, was suspected of no crime, and was tased in her home after she did not allow officers to enter.[120] Finally, the majority turned to *Borton v. City of Dotham*, where it was unreasonable to tase a boisterous, disturbed individual who was restrained to a gurney when she had committed no crime, was outnumbered, and posed no danger or threat.[121]

Beyond merely listing the relevant cases, the majority did not compare or contrast the details of each with the situation at hand. Rather the court stated that the cases cited "do not exactly mirror the factual circumstances of our case" but that "the qualified immunity analysis involves more than a 'scavenger hunt for prior cases with precisely the same facts.'"[122] It then stated, "[W]e conclude that *Graham*, *Casey*, *Cruz*, and the other pertinent authorities sufficiently put Appellants on notice that it is not objectively reasonable to employ a taser" in this case.[123] The majority further asserted that factual issues still need to be resolved, including whether Mr. Leija was slinging blood at the officers, the extent the officers knew of Mr. Leija's illness, and whether Mr. Leija showed more than passive resistance in the moments before he was tased.[124] Upon this basis, the majority denied qualified immunity but stated that if the facts are proven different, an excessive force analysis may "yield a different result."[125]

D. Dissenting Opinion

Judge Phillips wrote the dissent.[126] The dissent reached an opposite conclusion in light of the circumstances, Mr. Leija's actions, and an inquiry of excessive force and qualified immunity. Judge Phillips stated, "I

116. *Id.* (citing Hinton v. City of Elwood, 997 F.2d 774, 781 (10th Cir.1993)).
117. *Id.*
118. *Id.* (citing Casey v. City of Fed. Heights, 509 F.3d 1278, 1281 (10th Cir. 2007)).
119. *Id.* (citing Oliver v. Fiorino, 586 F.3d 898, 901, 906–07 (11th Cir. 2009)).
120. *Id.* (citing Asten v. City of Boulder, 652 F.Supp.2d 1188, 1203 (D. Colo. 2009)).
121. *Id.* (citing Borton v. City of Dothan, 734 F.Supp.2d 1237, 1249–50 (M.D. Ala. 2010)).
122. *Id.* (citation omitted).
123. *Id.* 1160–61.
124. *Id.* at 1161.
125. *Id.*
126. *Id.* (Phillips, J., dissenting).

disagree with the majority's characterizations that '[Mr. Leija] posed no threat to the police officers or anyone else'; that the 'officers tased a subject who was not detained or not exhibiting active resistance'; [and] that . . . 'nothing suggests Mr. Leija's resistance was anything more than passive.'"[127] He also disagreed with the characterization of Mr. Leija as nonviolent and nonthreatening.[128] Instead, the dissent explained, "[T]he facts show that during this episode Mr. Leija . . . was out of control."[129] Mr. Leija was "anything but passive, non-violent, and non-threatening."[130] Mr. Leija yelled, screamed, and frightened the nurse and doctor with his aggressive behavior such that the doctor felt the need to retreat from the room.[131] Mr. Leija was bleeding enough to leave blood on the floor, wall, and toilet.[132] His behavior was not passive when the officers arrived, and "the majority [did] not consider the effect this had on the welfare of other patients in the hospital or consider the possibility that someone in Mr. Leija's disturbed state might pose a threat to them."[133] The district court determined that the officers did in fact command Mr. Leija several times to calm down and get to his knees, and they warned him that if he did not comply he would be tased.[134] It was only after Mr. Leija's failure to comply that the officer fired the taser.[135] The taser had no effect, causing the officers to resort to grabbing Mr. Leija's arm, turning him to the wall, and using a dry sting from the taser.[136] The dissent expressed that "[t]o say that Mr. Leija was passive in this encounter is more than the facts can bear."[137]

The dissent went on to note that the majority did not acknowledge the danger to the officers that Mr. Leija's "steady stream of blood" posed and that the officers "feared with good reason" a physical struggle would put them in contact with the blood.[138] Judge Philips stated, "I believe the officers acted reasonably for their own safety," and noted that the officers employed the taser after Mr. Leija refused their commands and all else failed; alternatively, using only physical force or letting Mr. Leija walk out the door, were "hardly attractive" options.[139] Judge Philips explained that the reasonableness of the officers' actions is demonstrated "by a simple question: What else should the officer have done?"[140] The district court "merely (and without explanation) found that genuine is-

127. *Id.* at 1163 (quoting the majority).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 1163–64.
135. *Id.* at 1164.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1164–65.

sues of material fact existed about Leija's degree of resistance . . . [and] concluded that the officers' testimony was 'inconsistent' but never described in what way."[141]

With regard to clearly established law, the dissent refuted all of the majority's claims and reliance on case law. The dissent explained that the extreme case of *Casey* involved shocking facts: a man challenged a traffic ticket; lost; and upon going to his truck and returning to pay his fine, an officer intercepted him and ordered him to his truck.[142] When the man replied he needed to return, in part to get his daughter, the officer grabbed Casey's arm, put it in a painful lock, and jumped on his back.[143] Another officer arrived and almost immediately tased him twice, with a third attempt even after the officers took the man to the ground and repeatedly banged his face into the concrete.[144] Judge Philips stated, "I fail to understand how the majority likens the peaceful Mr. Casey to the combative Mr. Leija . . . [where] Mr. Casey was tackled and tasered twice for no apparent reason."[145]

Judge Philips explained that none of the cases the majority relied on resemble Mr. Leija's actions and they "provide no basis for a conclusion that the three officers should have known that their actions violated clearly established law. None of the cited cases involved the same medical emergency . . . or a corresponding need for force to subdue a combative person."[146] He stated that the "majority [failed] to acknowledge the urgency of Mr. Leija's medical condition and the danger he posed to the officers and others."[147] "Despite the tragic death of Mr. Leija," the officers acted reasonably and were entitled to summary judgment on their qualified immunity defense.[148]

III. ANALYSIS

In *Aldaba*, the Tenth Circuit denied qualified immunity to police officers who used a taser when dealing with a non-compliant, aggressive, mentally disturbed individual.[149] In doing so, the court departed from common trends and placed greater weight on the individual's mental state than has been generally done in other circuits until now. In effect, the Tenth Circuit perverted the original purpose of qualified immunity. The next sections illustrate that *Aldaba* ignored undisputed, material facts and relied on vague law in order to deny qualified immunity. It dis-

141. *Id.* at 1166 (quoting the majority).
142. *Id.* at 1169 (citing Casey v. City of Fed. Heights, 509 F.3d 1278, 1280–86 (10th Cir. 2007)).
143. *Id.*
144. *Id.*
145. *Id.* at 1170.
146. *Id.*
147. *Id.* at 1171.
148. *Id.* at 1161.
149. *Id.* at 1159–61.

torted precedent, effectively destroying the purpose of qualified immunity and inappropriately creating a new standard for police use of force in situations involving altercations with mentally disturbed individuals. An alternative method of examining use of force involving mentally disturbed individuals is more appropriate.

A. Aldaba Ignored Uncontested Material Facts and Relied on Ambiguous Law

There are significant concerns with the majority's examination of *Aldaba*. The Tenth Circuit has recognized a defendant may immediately appeal a denial of qualified immunity based on a "determination that the law allegedly violated by the defendant was clearly established at the time of the challenged actions."[150] Similarly, a defendant may immediately appeal a denial of qualified immunity based on a "determination that under either party's version of the facts the defendant violated clearly established law."[151] If neither party's version of the facts supports a denial of qualified immunity, a case is rightfully and immediately appealable.[152] Further, if no cases "squarely govern[] the case" at hand, this may suggest that the circumstances fall within the "hazy border between excessive and acceptable force" such that the law is not clearly established.[153]

First and of utmost concern, the majority ignored material, undisputed facts established in the district court that heavily weigh in favor of qualified immunity. The lower court plainly stated that "[t]he events that transpired . . . are, in large part, undisputed."[154] Mr. Leija voluntarily presented to the emergency room and was initially "cooperative, responsive, and in full agreement with the decision to admit him into the hospital for treatment."[155] As evening approached, his mood and demeanor changed.[156] Leija disconnected his oxygen, severed his IV tubing, and was bleeding from his arms to the point that blood was on the floor and toilet.[157] He became confused, anxious, and refused to take medication to relieve his anxiety.[158] His oxygen and IV tubing were reconnected, but he continued to remove them.[159] He refused treatment and yelled at hospital

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150. Shroff v. Spellman, 604 F.3d 1179, 1186–87 (10th Cir. 2010) (quoting Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir.1997)).
151. *Id.*
152. *See id.* at 1186–87, 1189.
153. *See* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).
154. Aldaba v. Bd. of Marshall Cty. Comm'rs, No. CIV-12-85-FHS, 2013 WL 1403333, at *1 (E.D. Okla. Apr. 5, 2013) aff'd sub nom. Aldaba v. Pickens, 777 F.3d 1148 (10th Cir. 2015) cert. granted, judgment vacated, 136 S. Ct. 479 (2015).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*

staff claiming he was being told lies and secrets.[160] He "continued to be uncooperative and his aggressiveness increased.[161] Leija continued yelling and told the nursing staff not to approach him.[162] He claimed the staff was trying to poison him."[163] Staff "attempted to calm Leija, but Leija began yelling 'I am Superman. I am God. You are telling me lies and trying to kill me.'"[164] The doctor believed Leija was harming himself by removing his oxygen and IV and refusing medication.[165] Mr. Leija would not allow staff to administer medication, and because the staff did not believe they could restrain Mr. Leija, they called law enforcement for assistance.[166] The doctor "observed Leija's aggressive behavior and left Leija's room when Leija started to step towards him.[167] It was [the doctor's] opinion that he and [his staff] could not secure Leija to his bed to treat and evaluate him without the assistance of law enforcement officials."[168] Mr. Leija then left his room in his hospital gown and began walking down the hall; when the officers arrived, they observed him "standing in the hall, yelling and screaming that people were trying to poison and kill him. Leija was visibly agitated and upset."[169] Officer Pickens "was informed by medical personnel that Leija was ill and that he could die if he left the hospital. Pickens attempted to persuade Leija to return to his room, but Leija refused and said the hospital staff was trying to kill him."[170] Despite Officer Pickens's attempts to talk to Mr. Leija, he continued down the hallway toward the lobby, and he "continued with his aggressive behavior by pulling the remaining IV from his arms causing blood to come out."[171] Mr. Leija then "faced the officers and clenched and shook his fists. Leija caused more bleeding when he removed the gauze and tape from his arms, and he raised his arms and stated that this was his blood."[172] Mr. Leija did not comply with the officers' commands and did not heed warnings that the officers would tase him if he did not comply.[173] The first attempt to tase Mr. Leija did not appear to affect Mr. Leija.[174] The officers then attempted to restrain Mr. Leija, and Mr. Leija resisted, leading to a physical struggle where officers used a "dry" sting with no effect.[175]

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160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at *2.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

These undisputed facts, as the dissent pointed out, are contrary to the majority's presentation of Mr. Leija's noncompliance as passive. The district court explained that Mr. Leija did more than just ignore the officers' commands—he clenched and shook his fists, raised his arms, and engaged in a physical struggle with the officers. The majority skirted these issues by arguing that prior to the initial taser use and before the physical struggle escalated, Mr. Leija was only passively resisting.[176] Therefore, the first use of the taser prior to the primary physical struggle was excessive force.[177] The majority stated that the video footage only indicated that Mr. Leija was walking away from officers but did not show more because the events moved outside the camera's view.[178] The majority also stated that the officers' testimony was inconsistent in regards to events not depicted in the video footage, but neither the majority nor the lower court explained how the testimony was inconsistent.[179] This arbitrary finding of inconsistent testimony without providing support from the evidence is of great concern. In asserting this, the majority found that Mr. Leija exhibited only passive resistance, and thus, the initial taser deployment sufficiently demonstrated excessive force.[180] The majority supported this argument by citing previous cases where force was excessive and where the individuals involved were largely compliant, posed no threat, and only resisted when they did not allow officers into a home or when they were restrained to a gurney.[181]

In its determination, the majority completely ignored the undisputed fact that Mr. Leija was behaving aggressively in addition to walking away and ignoring officer commands. Unlike the previous cases the majority cited, Mr. Leija was not largely compliant, merely denying officers access to his home, or restrained in any way. Rather, he was actively attempting to leave the hospital while making aggressive gestures and fitful statements. This is not mere passive resistance. The dissent supported this assertion and stated, "[T]he facts show that during this episode Mr. Leija (because of his medical condition) was out of control. . . . [and] the evidence shows that Mr. Leija was anything but passive, nonviolent, and non-threatening."[182] The dissent explained:

> The doctor and male nurse called law enforcement for help in restraining Mr. Leija after concluding that they could not do it them-

176. Aldaba v. Pickens, 777 F.3d 1148, 1158–59 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015).

177. *Id.*

178. *See Aldaba*, 777 F.3d at 1153; *Bd. of Marshall Cty. Comm'rs*, 2013 WL 1403333, at *6; *see also*, *Aldaba*, 777 F.3d at 1166 (Phillips, J., dissenting).

179. *Id.*

180. *Aldaba*, 777 F.3d at 1158–59.

181. *Id.* at 1160 (citing Oliver v. Fiorino, 586 F.3d 898, 901, 906–07 (11th Cir. 2009); Asten v. City of Boulder, 652 F.Supp.2d 1188, 1203 (D. Colo. 2009); Borton v. City of Dothan, 734 F.Supp.2d 1237, 1249–50 (M.D. Ala. 2010)).

182. *Aldaba*, 777 F.3d at 1163 (Phillips, J., dissenting).

> selves. . . . Mr. Leija yelled and screamed delusional claims and accusations. . . . He had frightened the nurse and doctor with his aggressive behavior, causing the doctor to retreat from Mr. Leija's room after Mr. Leija acted aggressively and began stepping toward him. Even . . . before tearing the IV needle from his arm . . . , Mr. Leija was bleeding sufficiently to leave blood on the floor, wall, and toilet. Nor did Mr. Leija's behavior become passive after the officers arrived. When the officers first encountered Mr. Leija, he was still yelling about being God and Superman and claiming that the hospital staff was trying to poison him. . . . [T]he majority [did] not consider the effect this had on the welfare of other patients in the hospital or consider the possibility that someone in Mr. Leija's disturbed state might pose a threat to them. Mr. Leija was visibly agitated and upset.[183]

As the dissent pointed out, the undisputed facts are sufficient to award qualified immunity. Despite this, the majority stated a factual dispute existed. In actuality, any factual dispute that existed does not materially affect the timeline of events the majority relied on in asserting the officers sufficiently demonstrated excessive force when they first decided to tase Mr. Leija. The factual issues the majority claimed still need to be resolved, including whether Mr. Leija was slinging blood at the officers and the extent the officers knew of Mr. Leija's illness, do not warrant a denial of qualified immunity. If Mr. Leija was not slinging blood, the facts already indicated that he was not merely passive. If he was slinging blood, this only adds support to using a taser. Further, the facts, disputed or undisputed, do not suggest that if the officers had more extensive knowledge of Mr. Leija's illness this knowledge would have or should have changed the circumstances. The officers knew Mr. Leija was ill and he risked dying if he left the hospital. There is no indication that the hospital staff knew or reasonably should have known that Mr. Leija's specific medical condition made him more susceptible to a taser. Further, the hospital staff did not communicate any information to the officers that would have led them to suspect using a taser would risk any more harm to Mr. Leija than it would to anyone else. Additionally, the medical examiner's testimony only indicated that the taser could have increased Mr. Leija's need for oxygen, not that it did increase his need or that medical staff or police officers should have known it could increase his need. In fact, the medical examiner also testified that the "exertion caused by Mr. Leija's physical struggle with the officers 'exacerbated his underlying pneumonia.'"[184] Mr. Leija's own actions in physically resisting the officers after the initial taser deployment exacerbated his condition while the facts show that the first taser use itself had no effect.[185] This does not support the majority's assertion that the initial taser deployment consti-

183. *Id.*
184. *Aldaba*, 777 F.3d at 1153.
185. *See id.* at 1164.

tuted excessive force. Nothing in the events that transpired alerted the officers that Mr. Leija's medical condition weighed against taser use in this situation.

Further, prior cases involving individuals exhibiting only passive resistance do not mirror the circumstances here, making it difficult to understand why the majority characterizes Mr. Leija's resistance as such. For instance, in *Cavanaugh v. Woods Cross City*, the Tenth Circuit found that the use of a taser was unreasonable when an individual exhibited only passive resistance.[186] In *Cavanaugh*, officers responded to a non-emergency call requesting help in finding Ms. Cavanaugh after a domestic dispute where she had consumed alcohol and pain medication and stormed out of her home.[187] When an officer found Ms. Cavanaugh walking outside towards her home, he tased her.[188] The officer was told Ms. Cavanaugh may have a knife, but he did not see a knife in her hands and gave no warning before deploying the taser.[189] Ms. Cavanaugh was not actively resisting, fleeing arrest, acting aggressively, or threatening the officer. [190] Based on these facts, the court held that the use of force was objectively unreasonable.[191] This instance is similar to Mr. Leija's in that Ms. Cavanaugh was walking away from the officer, but it is very different in that Ms. Cavanaugh was not ignoring an officer's commands and was not given a warning prior to the taser use. Mr. Leija was acting aggressively, and he was purposefully ignoring the officers' commands and warnings while attempting to leave the hospital.

In the Ninth Circuit, Judge Wardlaw's concurring opinion to a denial of rehearing in *Bryan v. MacPherson* provided a thorough analysis of passive resistance and taser use. The opinion stated that an officer used excessive force when he deployed his taser in order "to apprehend Carl Bryan for a seatbelt infraction, where Bryan was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist arrest or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer."[192] The opinion explained that a taser is an intermediate level of force, which must be justified by the circumstances and governmental interests involved.[193] In doing so, the opinion recognized that it is a "settled principle that police officers need not employ the 'least intrusive' degree of force,"[194] but the court will consider the presence of feasible alternatives.[195]

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186. Cavanaugh v. Woods Cross City, 625 F.3d 661, 665–66 (10th Cir. 2010).
187. *Id.* at 662–63.
188. *Id.* at 663.
189. *Id.* at 663–63.
190. *Id.* at 665.
191. *Id.* at 666.
192. Bryan v. MacPherson, 630 F.3d 805, 809 (9th Cir. 2010) (Wardlaw, J., concurring).
193. *Id.* at 810.
194. *Id.* at 813 (citation omitted).
195. *Id.*

In Mr. Leija's case, the majority clearly stated that the undisputed facts warranted some level of force, but it failed to suggest what level and type of force would have been appropriate. In absence of further explanation, the majority appears to suggest that physical force may have been appropriate, yet the dissent pointed out that the officers would have risked exposure to Mr. Leija's blood if they had attempted to restrain him physically first. Mr. Leija was undisputedly dripping with blood. It is thoughtless to require officers to expose themselves to an individual's blood, purely to avoid using a less-lethal alternative means of force—a taser—that could prevent their contact with blood. In light of the principle that officers need not use the lowest level of force available, risk of exposure to blood weighs in favor of officers choosing to deploy a taser instead of physically engaging. Additionally, studies indicate that the risk of harm to both officers and individuals being apprehended is significantly higher when physical force is used compared to situations when a taser is deployed in lieu of physical force.[196] Furthermore, the undisputed fact that Mr. Leija was dripping blood also supports a more urgent need to prevent him from entering the hospital lobby where he would have risked accidentally flinging his blood on members of the public or at the very least dripping blood all over the floor of a public area. Protecting the general public from exposure to a mentally incapacitated individual's blood in his attempt to escape medical treatment is a legitimate and significant interest weighing in favor of taser use.

Given the undisputed facts, the majority opinion created a factual dispute in order to avoid addressing more fully the legal standards set by precedent. While the majority claimed the law is clearly established that it was unreasonable for officers to deploy a taser in this situation, in reality, the law is ambiguous. The majority made broad generalizations based on cases with factual circumstances vastly different from the facts in *Aldaba*. Shortly after the Tenth Circuit decided *Aldaba*, the Supreme Court rejected such broad assertions of law in *Mullenix v. Luna*,[197] causing the *Aldaba* judgment to be vacated and remanded for further consideration in light of *Mullenix*.[198] In *Mullenix*, the Supreme Court explained that courts must not define clearly established law at a high level of generality.[199] The dispositive issue is whether the nature of the particular conduct is a clearly established violation in light of the specific context of the case rather than in the context of broad, general propositions.[200] In

196. *See, e.g.*, ERIC H. HOLDER, JR. ET AL, NAT'L INST. OF JUSTICE, POLICE USE OF FORCE, RESEARCH IN BRIEF: TASERS AND OTHER LESS-LETHAL WEAPONS 13–14 (2011), https://www.ncjrs.gov/pdffiles1/nij/232215.pdf (indicating the use of conducted energy devices ("CEDs") such as tasers "substantially decreased the likelihood of suspect injury" where as "physical force and hands-on control increase the risk of injury to officers and suspects").

197. Mullenix v. Luna, 136 S. Ct. 305, 312 (2015).

198. Pickens v. Aldaba, 136 S. Ct. 479 (2015).

199. *Mullenix*, 136 S. Ct. at 308.

200. *Id.*

Mullenix, the Supreme Court considered a Fifth Circuit ruling that an officer violated clearly established law prohibiting the use of deadly force against a fleeing felon who did not pose a sufficient threat of harm to the officer or others.[201] The Court declared that it had already rejected qualified immunity formulations that define clearly established law at a high level of generality.[202] The Court explained that it previously established, in its 2004 decision in *Brosseau v. Haugen*, that the proper inquiry is whether the law is clearly established such that it prohibits the officer's conduct in the situation confronted.[203] Additionally, the Court has held an officer is entitled to qualified immunity in instances where none of the cases examined "*squarely govern[]*" the case at hand.[204] "The relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably in these circumstances 'beyond debate.'"[205]

In *Aldaba*, the majority stated that the cases it examined "do not exactly mirror the factual circumstances of our case, but 'the qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts.'"[206] This is directly contrary to the Supreme Court's ruling in *Mullenix* prohibiting broad statements of law, and as the dissent explained, the law in these circumstances is not beyond debate. Even prior to *Mullenix*, the majority should have been aware of the Supreme Court's assertion in *Brosseau* that a court should not base a denial of qualified immunity on general characterizations of law.[207] Instead, the majority relied on earlier Supreme Court rules from *Hope v. Pelzer*, as it has done in previous cases,[208] to justify its broad conclusions of law based on factually distinct cases. This is inappropriate. In *Brosseau*, the Supreme Court explained that the proposition of *Hope* "that there need not be materially similar case[s] for the right to be clearly established," is only appropriate in instances where the constitutional violation is "obvious."[209] If the case is not obvious, generalized Fourth Amendment standards are inappropriate.[210] *Aldaba's* muddled reasoning clearly does not support that the use of force was excessive in any obvious way.

In finding clearly established law, the Supreme court has declared, "[W]hat is necessary absent controlling authority: a robust 'consensus of

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201. *Id*. at 308–09.
202. *Id*. at 308 (citing Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).
203. *Id*. at 308–09.
204. *Id*. at 309 (citing Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam)).
205. *Id*. (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).
206. Aldaba v. Pickens, 777 F.3d 1148, 1160 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015) (quoting Cavanaugh v. Woods Cross City, 625 F.3d 661, 666 (10th Cir. 2010)).
207. *Brosseau*, 543 U.S. at 198–99.
208. Shroff v. Spellman, 604 F.3d 1179, 1189 (10th Cir. 2010) (citing Hope v. Pelzer, 536 U.S. 730, 740–41 (2002)).
209. *Brosseau*, 543 U.S. at 199.
210. *See id*.

cases of persuasive authority.'"[211] Other Supreme Court cases decided after *Aldaba* also support using a "robust consensus of cases of persuasive authority" in the courts of appeals to "clearly establish the federal right" alleged.[212] On remand, the Tenth Circuit will have to reexamine *Aldaba*, and its overarching methods for examining qualified immunity, in order to rectify its reliance on unclear law that did not put officers on notice of a possible Fourth Amendment violation under the circumstances at hand.

B. Aldaba Distorted Precedent, Effectively Destroying the Purpose of Qualified Immunity

The Tenth Circuit effectively destroyed the purpose of qualified immunity by denying it to the officers in *Aldaba*. Precedent dictates that a court should deny qualified immunity only for objectively unreasonable levels of force, in light of the circumstances present. The Supreme Court in *Graham* stated, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[213] Qualified immunity examinations of reasonableness of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[214] Further, excessive force must be examined in light of what is reasonable at the moment. As the Court noted:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[215]

The Supreme Court emphasized that even in looking back at the circumstances at issue, officers must be allowed some leeway in their decisions to use certain levels of force, due to the stressful and "rapidly evolving" situations they must act in.[216]

The Tenth Circuit in *Aldaba* afforded the police officers no such consideration. The facts, as the dissent pointed out, depicted an aggres-

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211. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (citing Wilson v. Layne, 526 U.S. 603, 617 (1999)).
212. Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1778 (2015)); *City & Cty. of San Francisco*, 135 S. Ct. at 1778.
213. Graham v. Connor, 490 U.S. 386, 396 (1989).
214. *Id.*
215. *Id.* at 396–97 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
216. *Id.*

sive, noncompliant individual who was not in his right mind.[217] The circumstances of *Aldaba* are quite similar to those of *Giannetti*, where the Tenth Circuit found force was reasonable in response to a combative woman who, despite reasonable force, died just after the encounter.[218] Both cases involved individuals who were mentally disturbed, and both cases involved individuals who did not follow police commands, were aggressive, and required the force of more than one officer in order to subdue them. Yet, these cases have opposite holdings and taken together muddle Tenth Circuit qualified immunity standards.

Aldaba ignored the facts of the situation, even though the Supreme Court has stated that the facts are determinative in qualified immunity and excessive force examinations. Additionally, *Aldaba* expected the officers to have time to investigate to an unreasonable degree the physical and mental state of an individual who, upon their arrival, was dripping blood and headed to the lobby of a hospital where there were undoubtedly other patients, patrons, and staff attempting to go about their business. The majority then expected the officers to deal with this individual despite this individual's resistance to verbal commands and warnings. If the medical staff could have handled the situation so easily, they would not have needed the police officers in the first place.

Other circuits would likely have ruled otherwise in this situation. For instance, the Eleventh Circuit encountered a situation similar to *Aldaba* in *Bussey-Morice v. Gomez*, involving the death of Preston Bussey III. In *Bussey-Morice*, Bussey presented at a hospital with bleeding arms, complaining of a leech that needed to be removed, and based on Bussey's aggressive manner and the nature of his wounds, hospital staff believed that he was having an acute psychotic attack.[219] Bussey would not let anyone touch him, the nurses felt threatened by him, and he eventually became more aggressive, threatening that he would throw blood on hospital security and attempting to leave the hospital.[220] Hospital staff called police officers to assist in the situation.[221] Despite attempts to calm Bussey down by talking to him and giving him commands, the officers had no luck in subduing him.[222] The officers tased Bussey after repeated noncompliant, aggressive responses to the officers' attempts to calm him.[223] The initial tasing had no effect, and the officers ultimately tased Bussey three times in addition to physically struggling with him.[224] After the officers were finally able to handcuff Bussey and the hospital staff

217. Aldaba v. Pickens, 777 F.3d 1148, 1163 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015) (Phillips, J., dissenting).
218. Giannetti v. City of Stillwater, 216 F. App'x 756, 757 (10th Cir. 2007).
219. Bussey-Morice v. Gomez, 587 F. App'x 621, 622 (11th Cir. 2014) (per curiam).
220. *Id.* at 622–23.
221. *Id.* at 623.
222. *Id.* at 623–24.
223. *Id.*
224. *Id.* at 624.

were able to administer medications to calm him down, Bussey died.[225] A medical expert testified that the taser, in combination with cocaine-induced delirium, had caused Bussey's death.[226] The Eleventh Circuit held that qualified immunity protected the police officers from the excessive use of force claim because clearly established law did not preclude repeated uses of a taser based on these circumstances.[227]

Additionally, the Eleventh Circuit addressed mental health in a qualified immunity examination in *Long v. Slaton*. There, the Eleventh Circuit held that an officer did not violate the Fourth Amendment by fatally shooting a mentally unstable individual attempting to flee in the officer's car, even though the individual had not operated the car dangerously.[228] The court explained "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect," and the officer had reason to believe the individual was dangerous, based in part on his unstable state of mind and his ignoring officer commands to stop.[229] The court also rejected the claim that the officer should have first attempted less lethal methods before fatally shooting the individual.[230] The court stated that the unpredictability of the individual's behavior and his fleeing indicated "the police need not have taken the chance and hoped for the best."[231]

The facts of *Bussey-Morice* are extremely similar to those in *Aldaba*. In both cases, an individual presented at a hospital and became aggressive such that hospital staff felt they were unable to control the situation adequately. Police officers responded, and a physical struggle and multiple uses of a taser resulted from the individual's noncompliance, aggression, and actions influenced by mental instability. Yet, the rulings in *Bussey-Morice* and *Aldaba* are the opposite—in the Eleventh Circuit, qualified immunity was granted, and in the Tenth Circuit, it was not. Given that the Supreme Court has held that qualified immunity is based on "giv[ing] ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law,"[232] it is difficult to reconcile why the Tenth Circuit denied qualified immunity in *Aldaba*. Further, while the situation in *Long* was more extreme than *Aldaba*, in that *Long* involved lethal force and a mentally unstable individual fleeing in a vehicle, the court's focus on the instability of the individ-

225. *Id.* at 624–25.
226. *Id.* at 625 (indicating disagreement among experts but stating "Bussey–Morice's expert . . . opined that the multiple Taser applications caused Bussey's death.").
227. *Id.* at 630.
228. Long v. Slaton, 508 F.3d 576, 581–83 (11th Cir. 2007).
229. *Id.* at 581.
230. *Id.* at 583.
231. *Id.*
232. Aldaba v. Pickens, 777 F.3d 1148, 1162 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)) (internal quotation mark omitted).

ual in light of the circumstances weighed in favor of force rather than against it. *Aldaba* did just the opposite and declared that mental instability should weigh against use of force. This circuit inconsistency creates ambiguous standards, making it difficult to identify clearly what factors will or will not support police use of force.

The Sixth Circuit has also dealt with similar situations and granted qualified immunity.[233] In *Caie v. West Bloomfield Township*, police officers responded to a request for a welfare check for Jason Caie, a reportedly depressed, suicidal, and intoxicated individual.[234] Caie's friends called law enforcement for assistance after unsuccessful attempts to convince Caie, who was behaving irrationally, to go to the hospital.[235] Police officers found Caie standing in lake water, and they requested that he come out of the water multiple times; Caie was uncooperative and simply stated that he wanted to die.[236] Eventually, the officers persuaded him to come to the shore, though he continued to behave erratically.[237] On shore, Caie was noncompliant again.[238] Officers eventually took him to the ground while he was waving his arms violently.[239] After being unable to handcuff Caie and after warning Caie he would be tased if he did not cooperate, the officers tased Caie while he was lying on the ground with his arms under his body.[240] The officers were then able to handcuff him and take him to the hospital.[241] The Sixth Circuit held that the use of the taser did not violate Caie's constitutional rights.[242] The court found that Caie had exhibited enough resistance to justify the use of force.[243]

In the case of *Caie*, the individual was outside, as opposed to in a hospital like Mr. Leija in *Aldaba*, and *Caie* does not report other individuals present. Thus, Caie was only a threat to his own well-being, and while he was uncooperative and waived his arms violently, he was not otherwise aggressive or dangerous toward the officers. However, the situation still warranted qualified immunity. Compared with *Aldaba*, Mr. Leija was more aggressive and a greater risk to the police officers and others, given the hospital setting with others present and given Mr. Leija's dripping blood.[244] It is difficult to reconcile this discrepancy between

233. *See, e.g.*, Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 507 (6th Cir. 2012); Caie v. W. Bloomfield Twp., 485 F. App'x 92, 93 (6th Cir. 2012).
234. *Caie*, 485 F. App'x at 93.
235. *Id.* at 94.
236. *Id.*
237. *Id.* at 94–95.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 97
243. *Id.* at 96–97.
244. Multiple jurisdictions recognize blood and other bodily fluids as weapons or have criminalized the throwing of or forcing police officers or other persons to have contact with blood or bodily fluids. *See, e.g.*, N.J. Stat. § 2C:12-13 (2015); S.D. Codified Laws § 22-18-26.1 (2015); Neb. Rev. Stat. § 28-934 (2015); Mont. Code Ann. § 45-5-214 (2015).

the Sixth Circuit's holding in *Caie* and the Tenth Circuit's holding in *Aldaba*.

C. Aldaba Inappropriately Created a New Standard; An Alternative Examination

The Tenth Circuit's consideration of the mental condition of an individual involved in a police confrontation went too far and it created a new standard of examining excessive force. The majority in *Aldaba* effectively suggested that, when considering excessive force claims in relation to qualified immunity, a court should primarily consider the mental stability of an individual and secondarily consider the actions or events that take place. The majority further implied that officers should always reduce the amount of force they use when reacting to mentally disturbed individuals.

To explain, the majority referenced the Ninth Circuit's holding in *Deorle*, stating that even when a disturbed individual is "'acting out' and inviting officers to use *deadly force* to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted not with a person who has committed a serious crime against others, but with a mentally ill individual"[245] who needs protecting, rather than reprimanding. The Ninth Circuit specifically referred to deadly force. In general, many consider the taser a less-than-lethal option, not deadly force.[246] The majority in *Aldaba* did not address this distinction yet held that the use of the taser was excessive. Either the majority ignored the difference between lethal and less-than-lethal force, a distinction not to be taken lightly given that one is likely to end in death and the other is not, or the majority implied that the use of a taser is deadly force, an allegation not supported by scientific data.[247] Yet again, the majority's holding is hard to resolve, given its ambiguities and lack of explanation. Similarly, the majority referenced the Ninth Circuit again when stating that directly causing an individual "*grievous injury*" does not serve the governmental interest in protecting the mentally disturbed from self-harm.[248] In applying this to the situation in *Aldaba*, the majority implied that tasers cause grievous harm but only in regards to mentally disturbed individuals—a contention that has been raised elsewhere but not proven or widely accepted. Taken together, these references to Ninth Circuit precedent suggest that the majority believed that the existence or lack of mental disturbance should be the primary focus in an excessive force claim.

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245. Aldaba v. Pickens, 777 F.3d 1148, 1156 (10th Cir.), cert. granted, judgment vacated, 136 S. Ct. 479 (2015) (quoting Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001)) (emphasis added).

246. Nevins, *supra* note 42, at 240; Woolfstead, *supra* note 49, at 304.

247. Nevins, *supra* note 42, at 240.

248. *Aldaba*, 777 F.3d at 1156 (quoting Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir.2003)) (emphasis added).

This implication poses many problems. First, as the dissent pointed out, the majority failed to establish any viable alternative actions that the officers in *Aldaba* could have taken. The officers attempted to calm Mr. Leija down and gave him warnings before using the taser or physical force, but their attempts failed. Additionally, the majority stated that when an "individual poses a more severe and immediate threat to himself, a higher level of force may be reasonable in order to seize him for protective custody purposes."[249] Medical personnel informed one of the officers upon arrival that "Mr. Leija was ill and could die if he left the hospital."[250] What "more severe and immediate threat"[251] could Mr. Leija have posed to himself other than death? Given the severity of harm risked, using a taser—a less-than-lethal device—rather than allowing Mr. Leija to leave and potentially die, is the preferred action. The officers feared for their own safety and the risk of exposure to Mr. Leija's blood if they attempted to use physical force alone.[252] Thus, the risk of Mr. Leija's death if he left, combined with the officers' risk of harm from Mr. Leija's blood, justified taser use.

It is also important to note that studies have shown that certain mental illnesses come with a higher propensity for violence.[253] Most law enforcement officers are not experts in mental health. It is unreasonable for police officers to be expected to recognize and evaluate the many different types of mental disturbances that might indicate an individual is more or less dangerous and might require more or less force given his or her mental state, especially in a matter of seconds when officers arrive on scene. Additionally, in hospital situations, health care professionals, and mental health care professionals in particular, are at a statistically higher risk of violence and harm than professionals in other settings.[254] The hospital situation itself may suggest the need for higher levels of force by police. In order to adapt to the high-risk setting in a hospital, police officers need less-than-lethal, yet greater-than-verbal, ways to deal with aggressive and possibly mentally disturbed hospital patrons. *Aldaba* failed to take into account the high stress setting of hospitals and the greater likelihood that police responding to hospital calls will be required to deal with mentally disturbed individuals prone to violence.

Additionally, *Aldaba* created an unreasonable standard that the mental stability of an individual is more important than the health and

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249. *Id.* at 1155.
250. *Id.* at 1152.
251. *Id.* at 1155.
252. *Id.* at 1167.
253. *See* Tanvir Singh, *Mental Illness- Does It Make You More Violent?*, PSYCHOLOGY ONLINE PRIORY LODGE EDUCATION LIMITED (March 2007), http://www.priory.com/psych/violence.htm.
254. Robert I. Simon, *Patient Violence Against Health Care Professionals*, PSYCHIATRIC TIMES (March 03, 2011), http://www.psychiatrictimes.com/psychiatric-emergencies/patient-violence-against-health-care-professionals#sthash.mWfyclwC.dpuf.

safety of the police officers and the public. The Tenth Circuit's implication that police should use lower levels of force when dealing with mentally disturbed individuals threatens officer safety and law enforcement's ability to effectively protect the disturbed individual and the public put in harm's way.

Further, if police officers do not feel courts will support them in using force to deal with aggressive, mentally disturbed individuals, they may be less willing and less likely to react to situations such as these when hospitals request police assistance. It is generally held that police officers have no duty to aid individuals in need,[255] and the ruling of *Aldaba* may discourage police officers from responding to requests to help those at risk of self-harm, for fear of excessive force claims, such as in *Aldaba*, where qualified immunity may fail them. The Supreme Court has recognized a well-established tradition of police discretion, even in situations involving apparently mandatory statutes.[256] Circuit courts have followed; in *Warren v. D.C.*, the District of Columbia Court of Appeals plainly stated that there is a:

> "fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen." The duty to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists.[257]

Unless the circumstances invoke a doctrine that creates a duty for a police officer to respond to an individual's needs, such as the special-relationship doctrine, a police officer maintains full discretion as to whether or not to act to protect or provide aid to a person for whatever reason, including to prevent potential self-harm.[258] A special relationship

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255. *See, e.g.*, Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 748–49 (2005) (holding respondent did not have personal right to police enforcement of restraining order); Adams v. City of Fremont, 68 Cal. App. 4th 243, 248 (1998), *as modified on denial of reh'g* (Jan. 4, 1999) (holding "[P]olice officers responding to a crisis involving a person threatening suicide with a loaded firearm have no legal duty under tort law that would expose them to liability if their conduct fails to prevent the threatened suicide from being carried out."); McNack v. State, 398 Md. 378, 397 (2007) (stating the duty owed by law enforcement officers by virtue of their position is a duty to protect the public and does not create a special relationship with an individual); Warren v. D.C., 444 A.2d 1, 3 (D.C. 1981) (stating there is fundamental principle that government agents are under no general duty to provide public services such as police protection to individual citizens); L. Cary Unkelbach, *No Duty to Protect: Two Exceptions*, 71 THE POLICE CHIEF, No. 7, July 2004.

256. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 748–49 (2005).

257. *Warren*, 444 A.2d at 3 (citation omitted).

258. *See Town of Castle Rock, Colo.*, 545 U.S. at 748–49 (holding respondent did not have a personal right or property interest in police enforcement of restraining order against her husband); *Adams*, 68 Cal. App. 4th at 248 (holding "[P]olice officers responding to a crisis involving a person threatening suicide with a loaded firearm have no legal duty under tort law that would expose them to liability if their conduct fails to prevent the threatened suicide from being carried out."); *McNack*, 398 Md. at 397 (stating the duty owed by law enforcement officers by virtue of their position is a duty to protect the public and does not create a special relationship with an individual); *Warren*, 444 A.2d at 3 (stating there is fundamental principle that government agents are under no general duty to provide public services such as police protection to individual citizens); Unkelbach, *supra* note 255.

can exist in a few narrow circumstances, such as where the police created or increased a peril by affirmative acts, where the police voluntarily undertook to help an individual, or where the police took affirmative steps to aid an individual and consequently lulled the individual into a false sense of security.[259] However, "[c]ourts have refused to find a special relationship or impose liability based on the negligence by police personnel in responding to requests for assistance . . . or in failing to provide sufficient protection."[260] Thus, a police officer, in his or her discretionary power, can simply choose not to act in response to a request for police assistance. The harsh ruling in *Aldaba* may encourage officers in similar situations to not respond at all. Contrary to public belief that police officers are obligated to assist individuals, police officers may decide that providing aid in situations like *Aldaba* is simply too risky, given the stringent and ambiguous ruling of the Tenth Circuit, which effectively stated that police officers must be able to weigh mental health in use-of-force considerations to an unreasonable degree that risks police safety and ignores public safety.

Police officers have been accused of responding in this way. The recent death of Freddie Gray while in police custody in Baltimore, Maryland, and the subsequent charging of police officers involved, has led to multiple reports of reduced police presence generally and reduced police responses to calls in Baltimore.[261] Commentary responding to accusations of reduced police involvement explained that officers did not feel supported in their authority to act, and consequently, they were afraid to do their jobs and anxious about the extent to which situations must escalate to in order for them to feel confident in their authority to act.[262] The denial of qualified immunity in *Aldaba* may similarly discourage police officers and decrease their confidence in their authority to react in situations dealing with mentally disturbed individuals. Rather than risk an excessive force claim, law enforcement officers may simply choose to ignore such calls. The hypocritical lack of support for police discretionary authority to react to dangerous situations, yet the expectation that they should do so in order to protect mentally disturbed individuals from self-harm, leaves police at a standstill. Law enforcement officers are caught in a proverbial corner with two equally poor options that will in-

259. M.B. v. City of San Diego, 233 Cal. App. 3d 699, 704–05 (Cal. Ct. App. 1991); *see also* Unkelbach, *supra* note 255.

260. *M.B.*, 233 Cal. App. 3d at 705.

261. *See, e.g.*, Brooke Baldwin & Dana Ford, *Baltimore Police Officers Break Silence on Riots, Murder spike and Freddie Gray*, CNN (Jun. 10, 2015), http://www.cnn.com/2015/06/10/us/baltimore-police-officers-interview/; Jennifer Ludden, *In Baltimore, Violent Crime Is Up, And Residents Say Police Presence Is Down*, NPR (Jun. 4, 2015), http://www.npr.org/2015/06/04/411917414/since-freddie-gray-s-death-violent-crime-is-up-in-west-baltimore; Mary Rose Madden, *On The Watch: How Will Baltimore Police Officers Respond To The Call For Help?*, WYPR (Jul. 20, 2015), http://news.wypr.org/post/watch-how-will-baltimore-police-officers-respond-call-help#stream/0.

262. *Id.*

evitably lead to a negative outcome—do they respond and risk an excessive force claim, or do they decide, in their legally supported discretion, to ignore the request for help and possibly incite public ridicule?

A safer alternative to the implied standard of force in *Aldaba* is to take into consideration the mental health and stability of an individual but only as a secondary matter in determining how to react to the individual's potentially aggressive behavior. First and foremost, the actions of the individual should dictate the reasonable level of force to use in subduing that individual. Courts should consider mental stability as a factor in use-of-force considerations only to the extent that doing so can be done without creating a greater risk to the police involved or to the surrounding public. Officers should instead focus on safety and neutralizing potentially dangerous situations. In intense situations where it is impractical for an officer to use less force, mental disturbance is simply irrelevant. Where an individual's actions dictate using force, force is warranted regardless of an individual's mental state. The presence of a mental disturbance should not command officers to use less force than they would on an individual with average mental capacity. If the circumstances involve a mentally disturbed individual that is predictable enough to warrant attempts to deescalate the situation without force, then officers should rightfully take mental health into account. However, an aggressive individual's mental disturbance does not warrant placing law enforcement officers, hospital staff, or the general public at greater risk. It is only reasonable to reduce force in light of mental illness when officers can do so safely. Courts should similarly follow such guidelines in excessive force examinations.

IV. CONCLUSION

While the death of any individual, mentally disturbed or sound, involved in an encounter with law enforcement officers is tragic, qualified immunity is designed to protect police officers and other officials when events go awry. Without qualified immunity, officials are forced to act in fear of suit with every decision they make. It is for this reason that the qualified immunity defense was developed. Under the Tenth Circuit's decision in *Aldaba*, police officers must fear every choice they make when it involves a mentally disturbed individual. Rather than allowing officers to evaluate the situation based on the events taking place—the level of aggression exhibited by an individual, the level of risk posed to officers or to others, and the level of interest in subduing the individual—officers are forced to investigate the mental stability of aggressors they have been called to deal with when no one else can or will subdue them. The situations that officers face are often dangerous, and every moment that goes by is an opportunity for the situation to escalate or deescalate. To ask police officers, many of whom are not experts in mental health, to evaluate the mental stability of a potentially violent individual and to emphasize this evaluation in weighing the levels of force

available in any given situation is simply absurd. Police officers already risk enough in their day-to-day jobs. The use-of-force standard that *Aldaba* implied effectively destroys the purpose of qualified immunity in unpredictable, often dangerous situations involving mentally unstable individuals. If the Tenth Circuit continues with the trends it set in *Aldaba*, police officers may no longer be willing to respond to situations involving aggressive, mentally disturbed individuals for fear of suit and denial of qualified immunity. The court failed to acknowledge the unreasonable burden that it places on law enforcement officials and their ability to act quickly, effectively, and safely in their jobs. The Tenth Circuit should reexamine the emphasis it places on weighing mental instability as a factor in use-of-force determinations.

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