**9.34** **Qualified Immunity**

**Comment**

 The Committee has not formulated any instructions concerning qualified immunity because most issues of qualified immunity are resolved before trial, or the ultimate question of qualified immunity is reserved for the judge to be decided after trial based on the jury’s resolution of the disputed facts.

 Under the doctrine of qualified immunity, “courts may not award damages against a

government official in his personal capacity unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct.” *Lane v. Franks*, 573 U.S. 228, 243 (2014). The qualified immunity analysis consists of two prongs: (1) whether the facts the plaintiff alleges make out a violation of a constitutional right; and (2) whether that right was clearly established at the time the defendant acted. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc); *Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020). A court may “exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (noting that analyzing first then second prong, while not mandatory, “is often beneficial [,] . . . promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable”); *see also Jessop v. City of Fresno*, 936 F.3d 937, 940 (9th Cir. 2019). *But see District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (“We continue to stress that lower courts ‘should think hard, and then think hard again,’ before addressing both qualified immunity and the merits of an underlying constitutional claim”); *O’Doan v. Sanford*, 991 F.3d 1027, 1036 (9th Cir. 2021) (“Although qualified immunity involves a two-step analysis, we may exercise our discretion to resolve a case only on the second ground when no clearly established law shows that the officers’ conduct was unconstitutional.” (citations omitted)); *Evans v. Skolnik*, 997 F.3d 1060, 1066 (9th Cir. 2021) (applying *Pearson*, 555 U.S. at 236).

 Whether a right is clearly established turns on whether it is “sufficiently definite that any reasonable official in the defendant’s shoes would have understood he was violating it.” *Nicholson v. City of Los Angeles*, 935 F.3d 685, 695 (9th Cir. 2019) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). Regarding the second prong, the Ninth Circuit has explained: “We begin our inquiry into whether this constitutional violation was clearly established by defining the law at issue in a concrete, particularized manner.” *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017). The Ninth Circuit also confirmed that it is the plaintiff who bears the burden of showing that the rights allegedly violated were clearly established. *Id*. at 1118. Moreover, in order to show that a right was clearly established, the

plaintiff must demonstrate that, at the time of the alleged violation, the state of the law gave fair

warning that the relevant conduct was unconstitutional. *See Ballentine v. Tucker*, 28 F.4th 54, 64

(9th Cir. 2022).

 Qualified immunity is a question of law, not a question of fact.  *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9thCir. 2008). “Immunity ordinarily should be decided by the court long before trial.”  *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Only when “historical facts material to the qualified immunity determination are in dispute” should the district court submit the factual dispute to a jury.  *Torres*, 548 F.3d at 1211; *see also Newmaker v. City of*

*Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (“Summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer’s credibility that is genuinely in doubt.”). If the only material dispute concerns what inferences properly may be drawn from the historical facts, a district court should decide the issue of qualified immunity.  *Conner*, 672 F.3d at 1131 n.2 (“[W]hile determining the facts is the jury’s job (where the facts are in dispute), determining what objectively reasonable inferences may be drawn from such facts may be determined by the court as a matter of logic and law.”). Only the judge can decide whether a particular constitutional right was “clearly established” once any factual issues are resolved by a fact finder. *See Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017).

 An institutional defendant, such as a school district or municipality, is not entitled to qualified immunity. *See Owen v. Independence*, 445 U.S. 622, 638 (1980) (holding that “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983”).

 “The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury . . .. In the Ninth Circuit, we begin our inquiry by looking to binding precedent . . .. If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand, when ‘there are relatively few cases on point, and none of them are binding,’ we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results . . .. Thus, in the absence of binding precedent, we ‘look to whatever decisional law is available to ascertain whether the law is clearly established’ for qualified immunity purposes, including decisions of state courts, other circuits, and district courts.” *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004); *see also Jessop*, 936 F.3d at 939, 942 (stating there is “no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant,” where Ninth Circuit had not decided issue and other circuits are divided; although officers “ought to have recognized that” stealing seized property “was morally wrong, they did not have clear notice that it violated the Fourth Amendment”).

 Generally, a plaintiff need not find “a case directly on point,” but existing precedent must have placed the statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) (emphasizing “the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality’” (quoting *al-Kidd*, 563 U.S. at 742)); *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016). For example, in *Seidner v. de Vries*, the Ninth Circuit held that because “[t]here are material differences between motorized and non-motorized vehicles,” a case holding using a roadblock to stop a motorcyclist was excessive force under specified circumstances did not clearly establish that using a roadblock to stop a bicyclist was excessive force. 39 F.4th at 602 (9th Cir. 2022).

However, “there can be the rare ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (citing *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam)). *See also Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (finding border patrol agent’s fatal shooting of teenager on other side of border for no apparent reason to be one such rare but obvious circumstance); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (finding police officers’ “shepherding” of presidential candidate’s supporters into crowd of violent counter-protesters to be one such rare but obvious circumstance); *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017) (identifying intentional use of perjured or fabricated evidence in child dependency hearing to be one such rare but obvious circumstance). “[A] right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances.” *Ballentine*, 28 F.4th at 66 (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013) (abrogated on other grounds by *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)). *But see Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8 (2021) (“Although this Court’s caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.” (internal quotation marks and citations omitted)).

In *Rice v. Morehouse*, the Ninth Circuit reiterated that, for purposes of clearly established law, “we clearly established one’s ‘right to be free from the application of non-trivial force for engaging in mere passive resistance.’” 989 F.3d 1112, 1125 (9th Cir. 2021) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)) (citing *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) (explaining that cases dating back to 2001 established that “a failure to fully or immediately comply with an officer’s orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force”)).

It is clearly established that the First Amendment protects a person’s right to record or attempt to record police when the person is in a place where the person is permitted to be, is unarmed, and is not a suspect. *See Bernal v. Sacramento Cnty. Sheriff’s Dep’t*, 73 F.4th 678, 698-99 (9th Cir. 2023) (holding that qualified immunity did not shield law enforcement officers who forcibly restrained the unarmed, non-suspect plaintiff after he yelled at and filmed the officers in his front yard).

 A defendant is entitled to qualified immunity as a matter of law only if, taking the facts in the light most favorable to the nonmoving party, he or she did not violate any clearly established constitutional right.  *Torres*, 548 F.3d at 1210.If reasonable jurors could believe that the defendant violated the plaintiff’s constitutional right, and the right at issue was clearly established, the case should proceed to trial.  *Id.*: *see also LaLonde v. County of Riverside*, 204 F.3d 947, 953 (9th Cir. 2000) (“If … there is a material dispute as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial, before a jury if requested.”). “Though we may excuse the reasonable officer for … a mistake, it sometimes proves necessary for a jury to determine first whether the mistake, was, in fact, reasonable.” *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (citations omitted); *see also Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (explaining that if determining reasonableness of officer’s action depends on disputed issues of fact—*i.e*., which version of facts is accepted by jury—this is question of fact best resolved by jury). When a case proceeds to trial, qualified immunity is no longer an “immunity from suit”; rather, it effectively becomes a defense.  *Torres*, 548 F.3d at 1211 n. 9. For a discussion of the clearly established requirement in the context of a state prison exposing guards and inmates to a heightened danger from COVID‑19, *see Polanco v. Diaz*, 76 F.4th 918, 929-31 (9th Cir. 2023).

 When there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity. *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017); *see also Nehad v. Browder*, 929

F.3d 1125, 1140 (9th Cir. 2019). The issue should be preserved in a Rule 50(a) motion at the close of evidence and then revisited, if appropriate, after the verdict in a Rule 50(b) motion. *Tortu v. Las Vegas Metro. Police Dep’t*, 556 F.3d 1075, 1083 (9th Cir. 2009) (“When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant’s responsibility to preserve the legal issue for determination after the jury resolves the factual conflict.”); *see also A.D. v. Cal. High. Patrol*, 712 F.3d 446, 452 n.2 (9th Cir. 2013) (noting that defendant preserved his position on qualified immunity—renewed in Rule 50(b) motion after trial—by bringing Rule 50(a) motion for JMOL before case was submitted to jury). Consistent with this case law, there may be particular cases in which a special verdict on a discrete fact is warranted in order to resolve a qualified immunity claim. But a special verdict is not required in every qualified immunity case involving disputed issues of material fact for the purpose of evaluating a post-verdict qualified immunity defense. *See Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017).

 The district court may raise the issue of qualified immunity *sua sponte*. *Easley v. City of*

*Riverside*, 890 F.3d 851, 855 (9th Cir. 2018). In *Easley*, the defendant asserted qualified

immunity as a defense in his answer but took no further action on the defense. At the pre-trial

conference, the district court directed the parties to brief the issue, and entered summary

judgment in defendant’s favor. The Ninth Circuit affirmed. *Id*.

 Qualified immunity analysis is irrelevant to the issue of liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). *See Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1250 (9th Cir. 2016).

 “State action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available.” *Bracken v. Okura*, 869 F.3d 771, 776 (9th Cir. 2017). Thus, when an off-duty police officer, wearing his uniform, is working as a private security guard, qualified immunity does not apply, even if the off-duty work is with the consent of the police department and the off-duty officer may be found to have been acting under the color of state law. *Id*. at 777-78.

 For a discussion of when a law enforcement officer is entitled to rely on the judgment of a government agency for purposes of the second prong of the qualified immunity analysis, *see Sjurset v. Button*, 810 F.3d 609 (9th Cir. 2015). For a discussion of when a law enforcement officer may rely on a policy, ordinance, or permit scheme underlying the officer’s challenged actions that is not itself challenged, *see Saved Magazine v. Spokane Police Department*, 19 F.4th 1193 (9th Cir. 2021).

 “As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties.” *Juan Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992)). One exception to this general rule is the state-created danger doctrine. Under this exception, a government employee must have affirmatively placed the plaintiff in a position of danger, that is, the employee’s actions must have created or exposed an individual to a danger that he or she would not have otherwise faced. *Id*. To prove that the exception applies, “[t]he affirmative act must create an actual, particularized danger,” “the ultimate injury to the plaintiffs must be foreseeable,” and “the employees must have . . . acted with ‘deliberate indifference’ to a ‘known or obvious danger.’” *Id*. (citations omitted). For a further discussion of the state-created danger doctrine, *see also Bracken*, 869 F.3d at 778-79; *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

 In *Thompson v. Raheem*, 885 F. 3d 582, 586 (9th Cir. 2018), the Ninth Circuit clarified

that a qualified immunity defense to an excessive force claim is analyzed in three stages. In the first stage, the court assesses the severity of the intrusion by evaluating the type and amount of force inflicted. In the second stage, the court evaluates the government’s interest by assessing the severity of the crime; whether the suspect posed an immediate threat to the officers’ or public’s safety; and whether the suspect was resisting arrest or attempting to escape. In the third and final stage, the court balances the gravity of the intrusion against the government’s need for the intrusion.  *See also Williamson v. City of National City*, 23 F.4th 1146 (2022) (following same three-step analytical framework to analyze qualified immunity in excessive force claim).

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