



## A Sizeable Shield

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The United States Supreme Court has rigorously enforced qualified immunity standards, providing the broadest possible protection to governmental employees.

# User's Guide to Qualified Immunity

Qualified immunity is a valuable tool to protect governmental employees not only from the threat of personal liability, but also from the trouble and expense of defending a lawsuit entirely. Qualified immunity insulates

governmental officials from liability for civil actions arising from discretionary conduct taken under the color of law as long as their conduct does not violate clearly established rights of which a reasonable person in their position would have known. The U.S. Supreme Court has declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Further, "officials are immune unless the law clearly proscribed the actions they took." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Qualified immunity is a defense available to state and local officials and employees under 42 U.S.C. §1983 and to federal officials under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

### Initial Considerations

One of the first questions that an attorney should ask when confronted with a com-

plaint against a governmental employee is whether a plaintiff has asserted a liability claim against the employee personally, at all. Governmental employees may be sued in two capacities: an official capacity or an individual capacity, sometimes called personal capacity. Official capacity claims do not impose personal liability on employees. Instead, an official capacity claim is treated as a claim against the governmental entity that the individual represents. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978) (stating that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent."). As explained by the Supreme Court in *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985):

As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit



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against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. (internal citation omitted).

Qualified immunity is only a defense to actions seeking to hold individual defendants personally liable for their actions taken under the color of law. It does not apply to official capacity actions, which require a showing that the individual acted in accordance with a policy or custom of the governmental entity, and the policy was the "driving force" behind the alleged constitutional or statutory violation. *Monell*, 436 U.S. at 694; *Oklahoma City v. Tuttle*, 471 U.S. 808, 817-818 (1985). Sovereign immunity may also bar a plaintiff's official capacity claims.

Conversely, the policies and customs of a governmental entity are irrelevant when the personal liability of a governmental employee is at issue. Whether an individual governmental employee followed or violated policies does not matter: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). For this reason, counsel for a defendant sued in his or her individual capacity should seek to bifurcate individual liability claims from the claims against the governmental entity, particularly when the individual's conduct may have violated government protocols, so as to prevent their admission at trial against the individual employee.

The distinction between official and individual capacity, in addition to affecting the nature of the potential claims, also affects the ramifications of a verdict or a judgment. A plaintiff who obtains a verdict against a governmental employee in his or her personal capacity cannot then seek to collect the judgment from the related governmental entity. The Supreme Court has ruled that

a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the

governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty.

*Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985).

A judgment against a governmental employee also cannot constitute res judicata or support collateral estoppel with respect to claims against a municipal or other government entity and vice versa. *Warnock v. Pecos County*, 116 F.3d 776 (5th Cir.1997); *Mitchell v. Chapman*, 343 F.3d 811, 823 (6th Cir. 2003); *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.), cert. denied, 488 U.S. 856 (1988); *Headley v. Bacon*, 828 F.2d 1272, 1277-79 (8th Cir.1987). Defense counsel should remain cognizant of the effects of these different capacities and carefully review pleadings to determine, precisely, the claims that plaintiffs have asserted and the type of relief sought.

While most experienced plaintiffs' attorneys will specifically indicate in a complaint whether the plaintiff intends to assert official or individual capacity claims or both, there are times when a complaint does not make this clear. When faced with a vague complaint, most jurisdictions apply a "course of proceedings" test to determine whether a governmental official is being sued in his or her official or individual capacity with two exceptions. In the Ninth Circuit, the courts presume that a plaintiff has sued the defendant in his or her individual capacity, and in the Eighth Circuit, the courts assume in the face of a silent complaint that a plaintiff only intends to assert an official capacity claim. See generally *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir. 2001) (listing decisions from various jurisdictions); *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995) (same).

The "course of proceedings test" questions whether the complaint allegations, either alone or sometimes combined with other documents filed in a case, provide the governmental officer or employee de-

fendant with notice that he or she is being sued personally. One factor that courts view as relevant to whether or not a defendant received notice is how a complaint identifies an individual defendant. When a complaint identifies a defendant by his or her title, such as "Sergeant Jones," rather than his or her personal name, it signals to a court that a plaintiff has alleged an

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official capacity claim. Similarly, the use of "the officers" rather than "the individual defendants" suggests that a plaintiff has not asserted a claim for personal liability. Courts also view allegations that an individual or individuals acted in line with a policy or custom as a hallmark of an official capacity claim, while a complaint that alleges that one or more individual defendant acted "for themselves" are viewed as indicative of a personal capacity claim. The type of damages that a plaintiff seeks also is instructive. A plaintiff cannot assert punitive damages against states or municipalities and such damages cannot be recovered with official capacity claims. Compensatory damages are also barred against sovereign entities, but not against their employees.

Unfortunately for defense counsel, whether or not an individual defendant has pleaded qualified immunity as a defense can also be a relevant factor for a court in determining whether the individual defendant received notice of a personal capacity claim. So a defendant has a "catch-22" quandary—waiving qualified immunity by failing to plead it as a defense in the event that a court finds that the complaint contains a personal capacity claim, or pleading qualified immunity and ensuring that



a personal capacity claim exists, even if the plaintiff previously did not intend one. Perhaps the best practice when presented with an ambiguous complaint is to plead both municipal and individual defenses, thereby minimizing the inference of notice a court can draw from the asserted defenses. See *Biggs*, 66 F.3d at 61 (“Examining the course of proceedings, the defendants asserted, among other defenses, that they are entitled to qualified immunity.... On the other hand, the defendants also raised the issue of Eleventh Amendment immunity, so this factor is accorded less weight than otherwise would be the case.”).

Once defense counsel has determined that a plaintiff has alleged an individual liability claim, the defendant must plead qualified immunity as an affirmative defense. The defendant has the burden of pleading that qualified immunity exists. *Gomez v. Toledo*, 446 U.S. 635, 639–41 (1980). However, “[o]nce a §1983 defendant pleads qualified immunity and shows that he is a governmental official whose position involves the exercise of discretion, the plaintiff bears the burden of rebutting this defense by establishing that the official’s wrongful conduct violated clearly established law.” *Herrera v. Med. Ctr. Hosp.*, 241 F. Supp. 2d 601, 615 (E.D. La. 2002). See e.g., *Pierce v. Smith*, 117 F.3d 866, 871–72 (5th Cir. 1997); *Camarillo v. McCarthy*, 998 F.2d 638, 640 (9th Cir. 1993); *Spivey v. Elliott*, 29 F.3d 1522, 1527 (11th Cir. 1994), *on reconsideration*, 41 F.3d 1497 (11th Cir. 1995).

### Timing of Qualified Immunity

Qualified immunity is intended to shield a defendant from a lawsuit altogether. In creating the contours of the qualified immunity defense, the U.S. Supreme Court recognized the expense and the disruptive impact of lawsuits on governmental employees, citing “the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Indeed, the Court has acknowledged that “the driving force behind [the] substantial reformation of qualified immunity principles” was to eliminate “insubstantial claims” before discovery had taken place “and on sum-

mary judgment if possible.” *Anderson*, 483 U.S. at 640 n. 2. The Court has also noted that entitlement to qualified immunity “is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Accordingly, defense counsel should file a motion for a dismissal or for summary judgment as early as possible in a case as the Supreme Court has repeatedly instructed. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). This is particularly true when dealing with less than stellar witnesses on the defense side, an opposing counsel with a history of finding the right experts to testify in a case, or a very sympathetic plaintiff. Allowing discovery in such cases will only give plaintiff’s counsel more to work with and more facts that he or she can characterize as “material.” An early motion based on qualified immunity prevents a plaintiff from building momentum that might defeat a later-filed motion. Although a court may allow some discovery to rule on the motion, the court is more likely to circumscribe such discovery, making it less detrimental to a defendant. And some courts may not allow discovery at all. See, e.g., *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991, 994 (5th Cir. 1995) (“Discovery...must not proceed until the district court *first* finds that the plaintiff’s pleadings assert facts which, if true, would overcome the defense of qualified immunity) (emphasis in original); *Skousen v. Brighton High Sch.*, 305 F.3d 520 (6th Cir. 2002) (finding the failure to rule on a qualified immunity motion before discovery was a legal error).

### Determining Qualified Immunity

As stated earlier, it is plaintiff’s burden to show that the individual defendant violated clearly established rights of which a reasonable person in defendant’s position would have known. Whether an individual defendant is entitled to qualified immunity is a question of law to be resolved by the Court. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). There are two questions to ask that determine if qualified immunity applies: has the plaintiff alleged the deprivation of a constitutional or statutory right, and was that right clearly established at the time of the alleged events. In the words of the Supreme Court, “If no constitutional right

would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.” *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Correspondingly, if the right at issue was not clearly established when the alleged event occurred, qualified immunity would apply even if the right was, in fact, violated. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–79 (2009).

At one time courts were required to decide whether a constitutional right was violated before addressing whether that right was clearly established. Now, in accordance with *Pearson v. Callahan*, 555 U.S. 223 (2009), courts have the discretion to decide which of the two issues to address first.

The relevant question in the constitutional violation inquiry is fairly straightforward: when “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant’s] conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The “clearly established” inquiry, on the other hand, merits further discussion.

When considered in the abstract, defendants are hard pressed to argue that a particular constitutional right was not clearly established. As the Court explained in *Anderson* using due process as an example:

[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation.

483 U.S. at 639. Fortunately for defense counsel, the analysis does not operate at this level of generality. *Saucier*, 533 U.S. at 201 (holding that the “clearly established” analysis “must be undertaken in light of the specific context of the case, not as a broad general proposition.”). Realizing that such a perspective would eviscerate immunity altogether, the Court has instead held that

“[c]learly established” for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qual-

ified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent."

*Wilson*, 526 U.S. at 614–15 (internal quotations omitted).

Furthermore, to the extent that a governmental employee operates within a single jurisdiction, the status of the law in that jurisdiction should govern. Plaintiff should be challenged whenever he or she presents another jurisdiction's law to support a claim that the law was clearly established and that the individual defendant should have known about it.

Keep in mind that qualified immunity is an objective inquiry. Therefore, "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). So defense counsel should urge a court to disregard any attempt by a plaintiff's attorney to inject the governmental employee's motivations into the analysis when responding to a qualified immunity motion.

### Recent Supreme Court Cases

The United States Supreme Court has rigorously enforced qualified immunity standards, providing the broadest possible protection to governmental employees. In a series of decisions in 2012, the Court signaled that it intended to apply qualified immunity vigorously and to provide broad protection against individual liability to governmental officials and employees.

#### ***Filarsky v. Delia***

The Court began with *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), involving a firefighter, Nicholas Delia, who alleged Fourth and Fourteenth Amendment rights violations. Mr. Delia had taken sick leave after he had responded to an emergency involving a toxic spill. As his sick leave extended into weeks, his employer began to suspect malingerering and hired a private investigator who observed Mr. Delia purchasing building supplies at a home improvement store. This led to an internal investigation of Mr. Delia's activities to see whether he

was truly ill or was just taking time off to complete a few projects around the house.

As part of the investigation, the city hired Steve Filarsky, a prominent employment lawyer, to conduct an interview with Mr. Delia. During the interview, Mr. Delia acknowledged that he had purchased the materials but denied having installed them, claiming that they were still sitting in his house. Mr. Filarsky asked to be allowed to go to Mr. Delia's house to see the materials but was refused. He then asked that the materials be brought out into the yard for him to view, and he was again rebuffed. Finally, Mr. Filarsky ordered Mr. Delia to produce the materials. Mr. Delia did so and then sued the city, Mr. Filarsky, and others, claiming that they had violated his constitutional rights.

The district court found that all of the defendants were entitled to qualified immunity because Mr. Delia had failed to establish the violation of a constitutional right. The Ninth Circuit Court of Appeals reversed the decision regarding qualified immunity for Mr. Filarsky, holding that as he was a private attorney retained by the city rather than a public employee, he was not entitled to qualified immunity protection.

The United States Supreme Court reversed, reinstating summary judgment in favor of Mr. Filarsky on the basis of qualified immunity. The Court noted in the decision that §1983 was enacted in 1871 when private citizens frequently assumed governmental roles; for instance, Abraham Lincoln accepted several appointments to conduct prosecutions while engaged in private practice, and private attorneys were also called upon to assist attorneys general in noteworthy prosecutions. The common law, therefore, did not distinguish between public employees and private citizens with regard to providing qualified immunity from suit. The Supreme Court found no reason to deviate from the common law, finding that government needed to be able to attract and to use the most talented individuals, who might think twice about serving if faced with the threat of litigation without qualified immunity protection.

The *Filarsky* decision opens the door to a safe haven from §1983 lawsuits for those individuals who become connected to the government through part-time work or as

a result of discrete projects. While individuals who pursue purely personal ends or who have only a limited connection to a government—such as those working for a privately run prison—remain unable to assert a qualified immunity defense, those individuals who governments have hired to carry out government work now have at least an argument for immunity. This

  
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ruling will especially affect small municipalities, which may lack the resources to maintain full-time, or even part-time, employees for each department. Such municipalities can now draw upon a wider range of talent without the threat of liability hindering the enthusiasm of their prospective hires. Furthermore, this case shelters outside counsel retained but not employed by a city, township, or village to act as a city, township, or village attorney.

#### ***Ryburn v. Huff***

After broadening the range of those capable of asserting the qualified immunity defense in *Filarsky*, 132 S. Ct. 1657 (2012), the Court reaffirmed the defense's wide scope. In *Ryburn v. Huff*, 132 S. Ct. 987 (2012), a case concerning an alleged illegal entry into a home, four officers from the Burbank Police Department in California responded to an emergency call from a school about a potential threat. The principal informed the officers about a rumor that a student, Vincent Huff, had written a letter indicating that he was going to "shoot up" the school. This rumor had cir-



culated to the point that several parents had decided not to send their children to school.

As the officers began investigating the threat, they learned that the student was frequently bullied in school and had recently been absent for several days. One of his classmates stated that he thought Vincent Huff was capable of carrying out

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such a threat. Based upon this information, the officers decided to contact and interview Vincent Huff personally. The officers had been trained for school violence situations and recognized that the bullying and absenteeism were risk factors prevalent among those who ultimately became school shooters.

The officers went to Vincent Huff's house, but no one answered either the door or the home phone. The officers then tried to contact his mother on her cell phone while they were still at the residence. Mrs. Huff answered and informed the officers that both she and her son were inside the house. When the officers said they were outside and wanted to speak with her further, she hung up on them.

A few minutes later she opened the door and began talking with them. She did not ask why they were there, dismissed their concerns about the threatening letter, and refused to let the officers enter the house.

The officers found her uncooperative conduct extremely unusual for a parent during an investigation of that type.

The situation culminated when Mrs. Huff was asked if any guns were in the house, at which point she immediately turned around and ran back inside. Two of the officers, concerned for their safety, ran into the house behind her. Two other officers some distance away also entered the home, believing that permission had been granted to enter. After speaking with Mrs. Huff and her son for five or ten minutes, the officers concluded that the rumors were false and left, intending to report to the school.

The Huffs filed a §1983 claim based upon the entry to their home without a warrant in violation of the Fourth Amendment. The district court concluded that all of the officers were entitled to qualified immunity because given the information known to them at the time, a reasonable officer could have concluded that they were in danger and that weapons were present in the house. The Ninth Circuit reversed the holding as it applied to the first two officers to enter the house. The appellate court held that Mrs. Huff had every right to end the conversation and had done nothing unlawful. As such, the two officers' apprehension of danger was objectively unreasonable.

In a *per curiam* opinion, the United States Supreme Court reversed and reinstated the trial court's grant of qualified immunity to the two officers who cited safety concerns as their reason for entering the house. In doing so the Court focused on Vincent Huff's risk factors and his mother's odd behavior—her failure to answer the door or the phone, her lack of concern about their visit or the rumor of a threat, her refusal to invite them in and, most notably, her hasty retreat when asked if any guns were in the house. The Court emphasized that although each of these actions was lawful and even nonthreatening when viewed in isolation, in the aggregate and in a rapidly unfolding situation they "paint[ed] an alarming picture." *Id.* at 991. The Court then held that the two officers' conclusions about the danger confronting them were "eminently reasonable" and entered a judgment in their favor.

Attorneys can glean several practice pointers from the analysis in *Ryburn*. When presenting a qualified immunity defense, it

is essential for counsel to paint the "big picture for the Court." Although one dominant event may have caused your client to act, it may enhance a defense to lay a foundation for the significance of that event using the events leading up to that moment in time. This includes presenting all of the pertinent facts known to the governmental employee that caused that employee to act. A complete picture may dictate a different interpretation and have a greater impact than events taken individually.

Second, you should not assume that lawful activity by a plaintiff will necessarily defeat a qualified immunity defense. Lawful activity can be a basis for suspicion and action by a governmental employee. As noted by the Supreme Court, "there are many circumstances in which lawful conduct may portend imminent violence." *Id.*

*Ryburn* also highlights the importance of presenting the sequence of events that establishes for the court as vividly as possible the urgent atmosphere that existed when your client made decisions. You can accomplish this by using shorter, active verb-tense sentences, eliminating nonessential details, and adding time indicators such as "two seconds later." The *Ryburn* decision repeatedly pointed out the leisure that the appellate court had and its distance from the situation when it analyzed Mrs. Huff's conduct, contrasting it with the rapid events faced by the officers making split-second decisions at the scene. It is essential when seeking qualified immunity to describe events in a manner that will put a judge in your client's shoes and paint a picture of the scene that the employee faced when he or she made the crucial decision.

#### ***Messerschmidt v. Millender***

*Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012), involved allegations of an overly broad search warrant. The plaintiff's girlfriend, Shelly Kelly, decided to break up with him and move out. Fearing retribution because of previous assaults, she summoned police assistance to supervise her leaving. Officers responded but were called away on an emergency. The plaintiff appeared as soon as the officers left, yelled at his ex-girlfriend, and attempted to throw her off of a balcony. Ms. Kelly managed to escape and ran for her car. The plaintiff followed, pointing a sawed-off shotgun

through the car window and threatening to kill her. Ms. Kelly drove away, and the plaintiff fired five shots at her car.

Ms. Kelly reported the assault to the police, informing them in the process that the plaintiff was an active member of a gang. Subsequent research by the officers confirmed the plaintiff's gang status. Messerschmidt, the officer in charge of the investigation, prepared an arrest warrant for the plaintiff and a search warrant for his home. The search warrant sought as its object all guns and firearms and evidence showing gang membership affiliation. The supporting affidavits detailed the officer's extensive experience, including his experience with gangs and gangrelated crimes. The facts of Ms. Kelly's assault were also included in the affidavits.

Messerschmidt's supervisors, the district attorney, and the magistrate approved the affidavits. When the warrant was executed, the search revealed the shotgun, some ammunition, and a social services letter addressed to the plaintiff. The plaintiff later filed a lawsuit asserting that the search warrant was invalid.

The district court concluded that the warrant was overbroad because it sought more firearms than the specific one that the plaintiff fired toward Ms. Kelly and because there was no evidence that his assault of her was gang related. The Ninth Circuit initially reversed but later affirmed the district court decision in a decision en banc.

The Supreme Court reversed and held that qualified immunity barred the plaintiff's lawsuit against the individual defendants, noting that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments[.]" In rendering the opinion, the Court placed some emphasis on the fact that a neutral magistrate had concluded that probable cause existed. The opinion stated:

[T]he fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause.... [I]t cannot be said that no officer of reasonable competence would have requested the warrant. Indeed, a

contrary conclusion would mean not only that [the investigating officers] were plainly incompetent, but that their supervisor, the deputy district attorney, and the magistrate were as well.

*Id.* at 1249. This case again emphasizes the deference afforded to governmental officials under the qualified immunity standard. In addition, *Messerschmidt* provides important ammunition to governmental agents seeking to insulate themselves from liability. Governmental employees should understand that they should review and discuss decisions that encompass constitutional questions with supervisors or suitable neutral third parties to the extent appropriate to resolve misgivings or questions before they take particular actions.

### ***Reichle v. Howards***

Finally, *Reichle v. Howards*, 132 S. Ct. 2088 (2012) arose from then Vice President Dick Cheney's trip to a mall. The plaintiff was overheard by the Secret Service talking on his cell phone, claiming that he "was going to ask the Vice President how many kids he's killed today." *Id.* at 2089. The plaintiff later approached Vice President Cheney and told him that his Iraq policies were disgusting. When the vice president turned away, the plaintiff touched his shoulder. He was then stopped and questioned by the Secret Service. The plaintiff intimated that he was being stopped for his opinions and denied having touched Vice President Cheney. The plaintiff was arrested for harassment, but the charge was ultimately dismissed.

The plaintiff sued the two Secret Service agents, alleging retaliatory arrest based on the First Amendment and an unconstitutional search based on the Fourth Amendment. The district court denied the motion for summary judgment on qualified immunity grounds. The appellate court reversed the district court's ruling, holding that qualified immunity applied to the Fourth Amendment claim but continued to deny qualified immunity for the First Amendment claim.

The Supreme Court granted certiorari to address whether a retaliatory arrest claim could lie even though the arrest was supported by probable cause and whether that right was clearly established. However, in the opinion, the Court dodged the

"more difficult question" and elected only to answer the second question, granting qualified immunity to the Secret Service agents on the grounds that the law was not clearly established.

While this decision is interesting because it signals that a First Amendment claim of retaliatory arrest despite probable cause may be a viable possibility, the decision reaffirms the narrowness of the inquiry and the degree to which a law must be "clearly established" for plaintiffs to avoid the qualified immunity defense, which makes it quite valuable. The Court stated:

To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate.

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Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right.

*Id.* at 2094.

What *Reichle* makes evident is the importance of properly framing the constitutional right at issue. A plaintiff's counsel generally will attempt to paint the constitutional question as broadly as possible. Making the constitutional question as specific as possible is in your best interest, homing in on the particular circumstances presented.

These Supreme Court cases emphasize the size of the shield intended for governmental employees who are defending against personal capacity suits. Some circuit and district courts do not maintain such a favorable approach, while others seem to be downright hostile to the idea of qualified immunity. The above cases may assist to curb those courts and, at the very least, provide a roadmap for the defense practitioner to properly structure their individual capacity cases for dismissal. Under the mandates of the Supreme Court, qualified immunity remains a powerful tool to protect governmental employees from personal liability.

