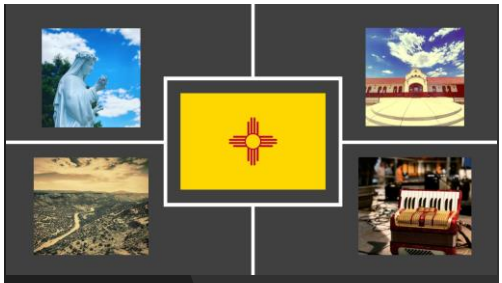
Qualified Immunity- Its History and Its Future

John Wilkerson
General Counsel
Arkansas Municipal League

1

The QI Standard

2



Mullenix v. Luna, 577 U.S. 7 (2015)

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *citing Pearson v. Callahan*, 555 U.S. 223, (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, (1982)).

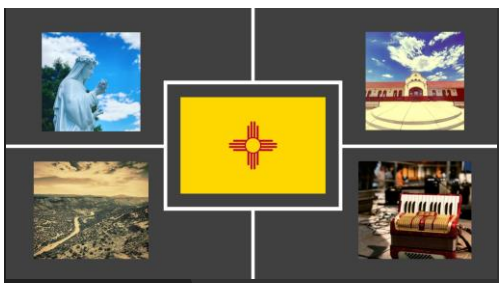
A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *quoting Reichle v. Howards*, 132 S.Ct. 2088 (2012).

"We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *quoting Ashcroft v. al–Kidd*, 563 U.S. 731, (2011).

Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *quoting Malley v. Briggs*, 475 U.S. 335, (1986).

"We have repeatedly told courts ... not to define clearly established law at a high level of generality." This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *quoting Brosseau v. Haugen*, 543 U.S. 194 (2004).

3



Kisela v. Hughes, 138 S.Ct. 1148 (2018) & *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014).

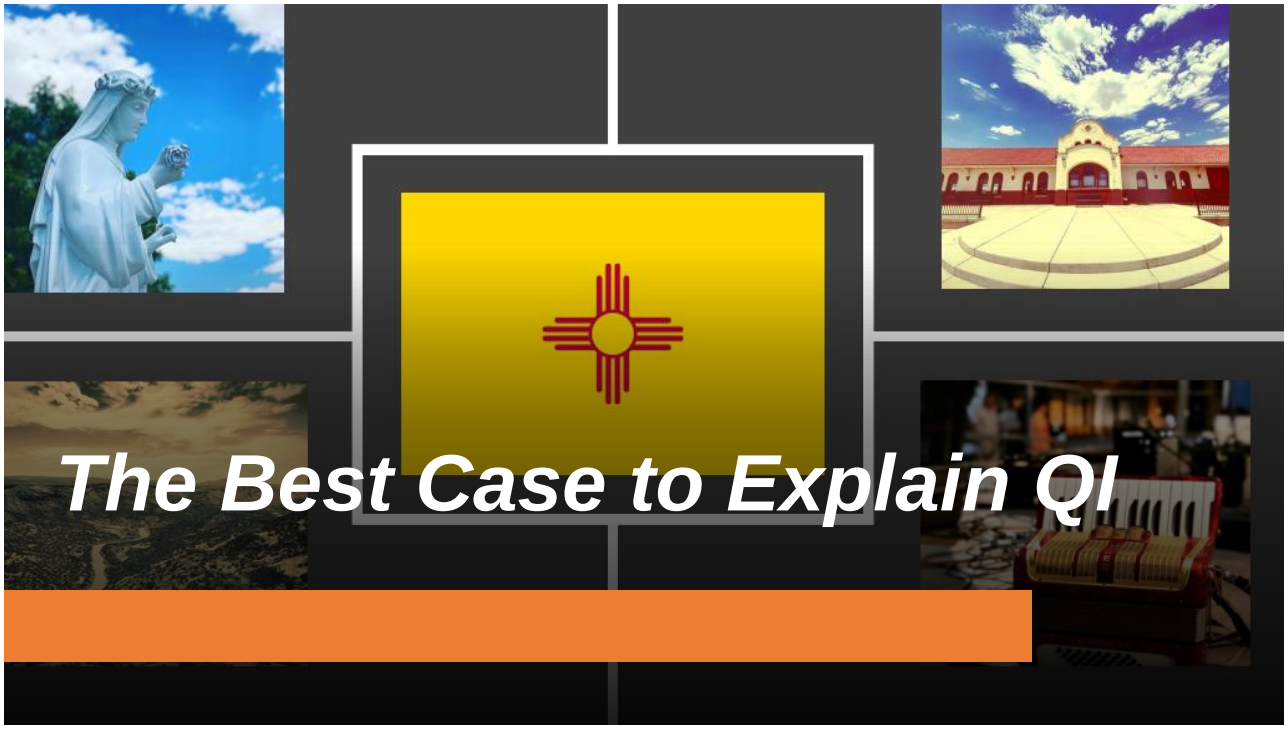
"Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness."

Kisela v. Hughes

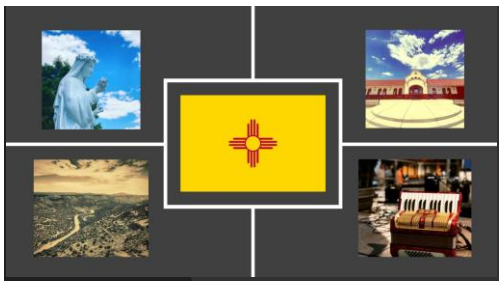
"An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."

Plumhoff v. Rickard

4



5



Tennessee v. Garner
471 U.S. 1

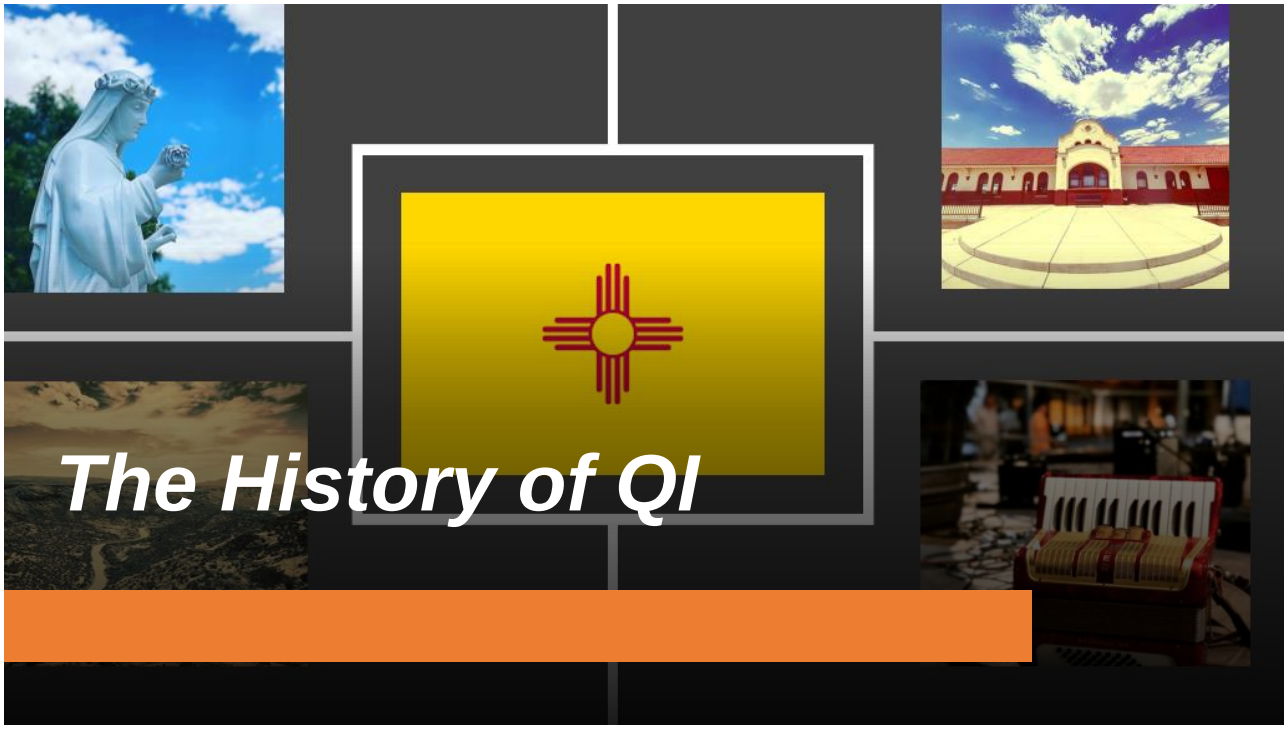
"Fleeing Felon Rule"

6

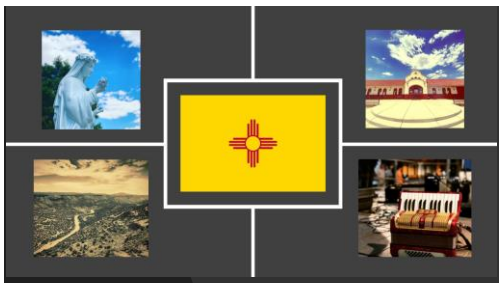
The best case to explain Q.I.

- 10:45 pm, October 3, 1974
- "prowler inside call"
- Witness says people are neighbor's house
- One officer goes to back of house
- Suspect flees from house towards 6 foot fence
- No weapon seen
- Suspect starts up fence
- Officer shoots and kills suspect

- Fleeing felon rule: "common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death."



7



Pierson v. Ray
386 U.S. 547 (1967)

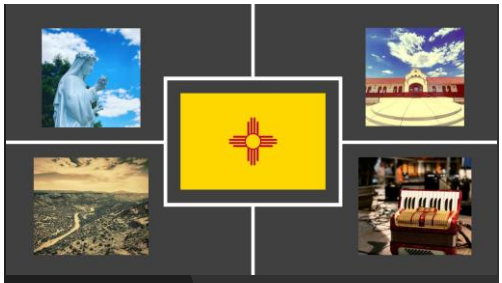
"Clearly Established"

8

- "We hold that the **defense of good faith** and probable cause, which the court of appeals found **available to the officers in the common-law** action for false arrest and imprisonment is **also available to them in the action under §1983.**"
- "A policeman's lot is not so unhappy that he must choose between being charged w/ dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."

THE DISSENT (Foreshadowing)

- "I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit under section 1983."

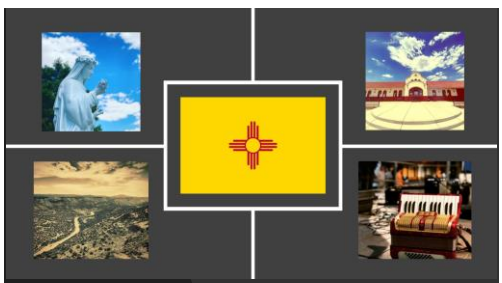


Harlow v. Fitzgerald
457 U.S. 800 (1982)

No More 'Good Faith'

- Common Law Purpose: Shields officers from "undue interference" while performing their duties. The constant threat of being sued will "**dampen the ardor** of all but the most resolute, or the most irresponsible [public officials" quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949).
- "The **subjective element** of the **good-faith defense frequently has proved incompatible** with our admonition…that insubstantial claims should not proceed to trial…Until [the] threshold immunity question is resolved, **discovery should not be allowed**."
- "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct **does not violate clearly established statutory or constitutional rights** of which **a reasonable person** would have known."

9



Buckley v. Fitzsimmons
509 U.S. 259(1993)

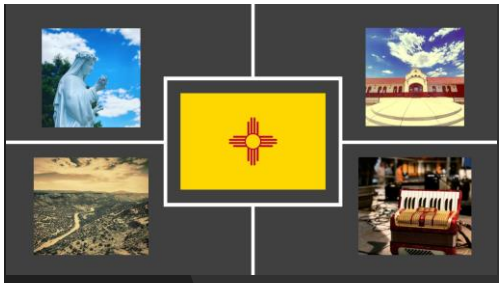
"Well established" immunities considered by Congress in 1871.

- "**In most cases**, qualified immunity is sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."
- "In *Tenney v. Brandhove,* 341 U.S. 367 (1951), however, we held that **Congress did not intend § 1983 to abrogate immunities** "well grounded in history and reason."
- "**Certain immunities were so well established in 1871**, when § 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them.

NOTE:

- "We **do not have a license** to establish immunities from § 1983 actions in the interests of **what we judge to be sound public policy**."

10

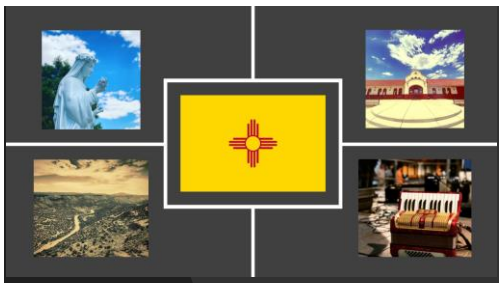


Mitchell v. Forsyth
472 U.S. 511 (1985)

Interlocutory Appeals

- QI is an entitlement in the form of **immunity from suit** rather than a mere defense to liability **it is effectively lost if a case is erroneously permitted to go to trial."**

11

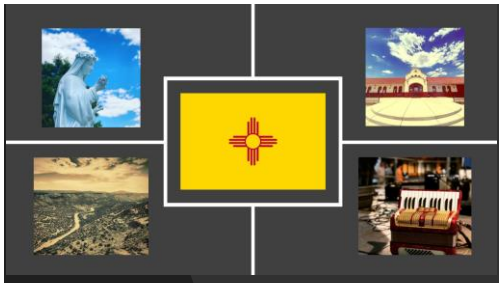


Saucier v. Katz
533 U.S. 194 (2001)

The Prongs: first one first

- "The **first** [threshold question] must be **whether a constitutional right would have been violated** on the facts alleged; **second**, assuming the violation is established, the question **whether the right was clearly established** must be considered."

12

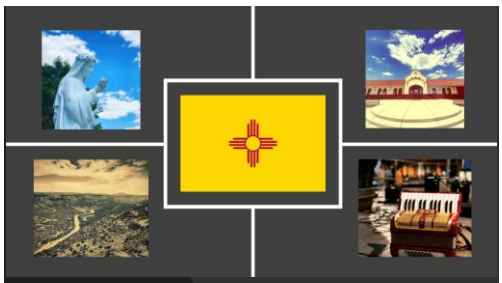


Hope v. Pelzer
536 U.S. 730 (2002)

"Obvious cruelty"

13

- For a constitutional right to be clearly established, its contours "**must be sufficiently clear** . . . [t]his is **not to say** that an official action is protected by qualified immunity unless the **very action in question has previously been held unlawful**, but it is to say that in the **light of pre-existing law the unlawfulness must be apparent**."
- "The **obvious cruelty** inherent in this practice should have provided respondents with **some notice** that their alleged conduct violated Hope's constitutional protection against **cruel and unusual punishment**. Hope was treated **in a way antithetical to human dignity."**

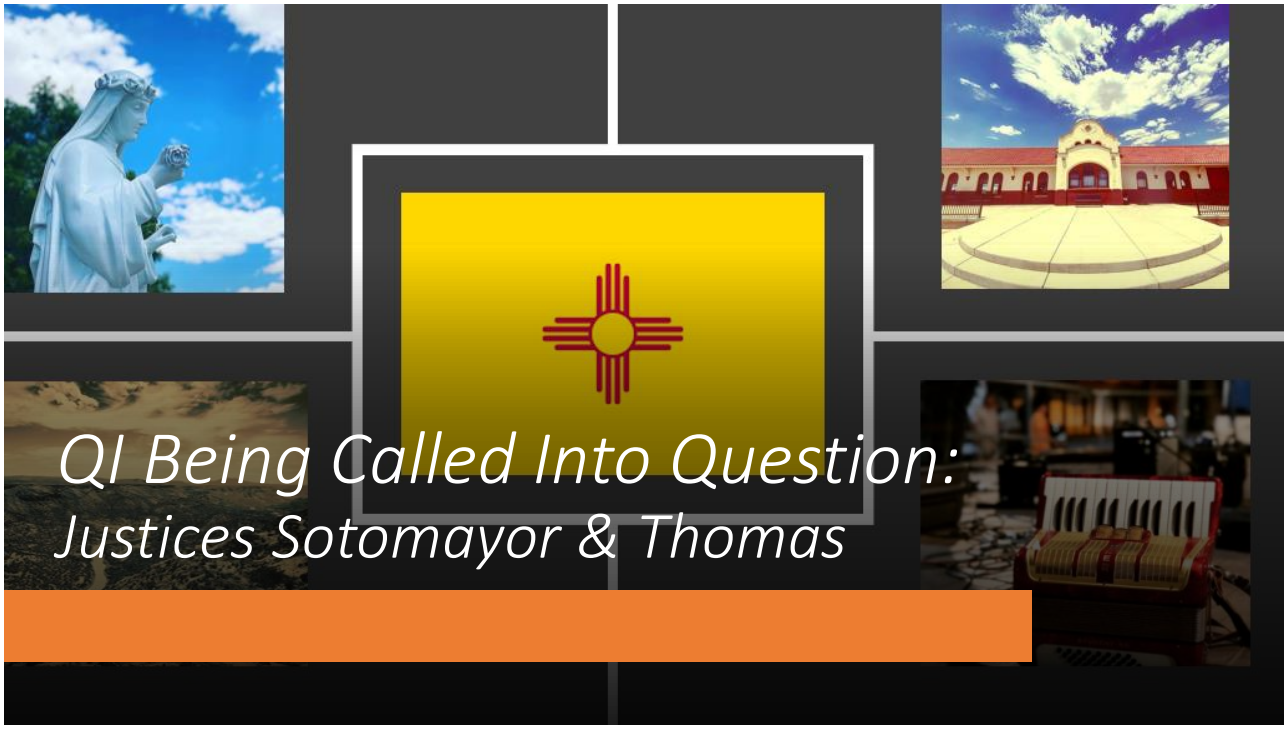


Pearson v. Callahan
555 U.S. 223 (2009)

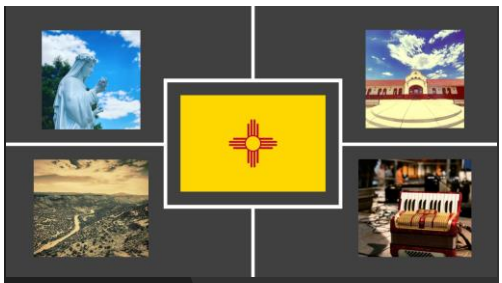
Goodbye, *Saucier*

14

- "Qualified immunity balances **two important interests**—the **need to hold public officials accountable** when they exercise power irresponsibly and the need to **shield officials from harassment**, distraction, and liability when they **perform their duties reasonably.**"
- "[*Saucier* framework] sometimes results in **a substantial expenditure of scarce judicial resources** on difficult questions that have **no effect on the outcome of the case**. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right."
- The two-step inquiry "is an uncomfortable exercise where ... the answer [to] whether there was a violation **may depend on a kaleidoscope of facts not yet fully developed**"



15

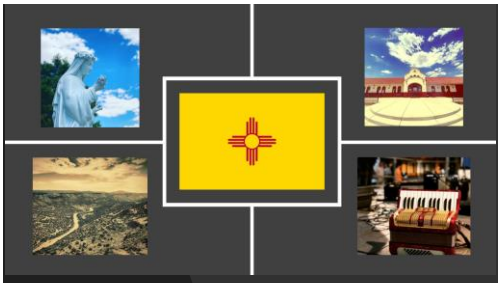


Ziglar v. Abbasi
137 S. Ct. 1843 (2017)

Justice Thomas' Dissent & "freewheeling policy choice[s]"

16

- **<u>Some evidence supports</u>** the conclusion that common law immunity as it existed in **<u>1871 looked quite different</u>** from our current doctrine.
- "Our qualified immunity precedents…represent precisely the sort of '<u>freewheeling policy choice[s]</u>' that we have previously disclaimed the power to make." (*Buckley, supra)*
- Is the "clearly established" standard a question for Congress and not the courts?

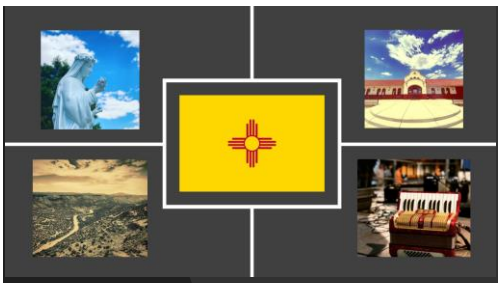


Mullenix v. Luna, 577 U.S. 7 (2015);

Justice Sotomayor's Dissent

17

- Is there a governmental interest in shooting rather than waiting?
- Did the court, and Mullenix, ignore that "**there must be a governmental interest not just in seizing a suspect, but in the level of force used to effectuate that seizure**."
- "How's that for proactive?"
- Does the Court sanction a 'shoot first, think later' approach to policing?



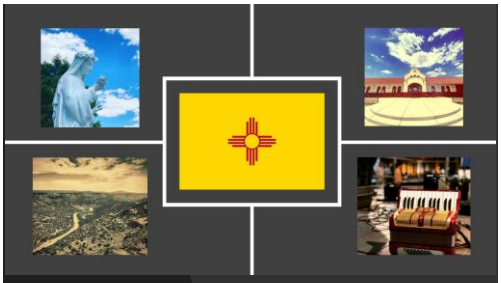
Kisela v. Hughes
138 S.Ct. 1148 (2018)

Justice Sotomayor's Dissent (Justice Ginsburg joins): A wall of caselaw ignored.

18

- "Hughes committed no crime and was not suspected of committing a crime. . . a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. . . Hughes did not resist or evade arrest. . . the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force."
- "'A wall of caselaw' existing at the time that Kisela shot the victim, which was ignored by the court…those cases are not identical to this one.'"

19

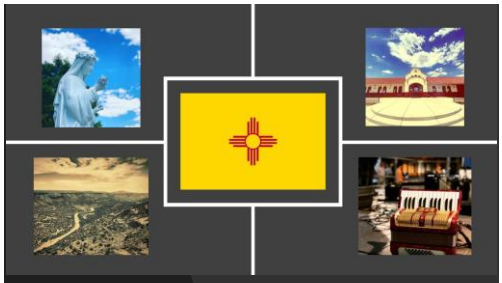


Yale Article:

The Perception

20

- As Noah Feldman has observed "the Supreme Court wants fewer lawsuits against police to go forward." And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

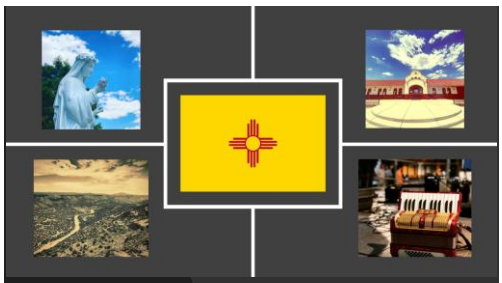


Yale Study:

The Commentary

- Shaping the contours of qualified immunity's protections.
- The threat of a qualified immunity's effects on litigation.

21



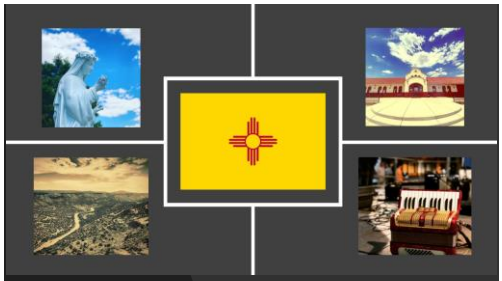
Yale Study:

The Findings

TABLE 6.
SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	15 (21.7%)	33 (29.7%)	27 (38.0%)	30 (33.0%)	34 (34.7%)	**139 (31.6%)**
QI granted in part	7 (10.1%)	7 (6.3%)	6 (8.5%)	5 (5.5%)	1 (1.0%)	**26 (5.9%)**
QI granted in full	16 (23.2%)	18 (16.2%)	3 (4.2%)	11 (12.1%)	5 (5.1%)	**53 (12.0%)**
QI in the alternative/fails 1st step	5 (7.2%)	12 (10.8%)	11 (15.5%)	9 (9.9%)	13 (13.3%)	**50 (11.4%)**
Grant (not on QI)	7 (10.1%)	13 (11.7%)	12 (16.9%)	13 (14.3%)	17 (17.3%)	**62 (14.1%)**
Grant (reasoning unclear)	2 (2.9%)	2 (1.8%)	0	0	5 (5.1%)	**9 (2.0%)**
GiP (not on QI or QI in alt.)	4 (5.8%)	6 (5.4%)	2 (2.8%)	8 (8.8%)	6 (6.1%)	**26 (5.9%)**
Not decided	13 (18.8%)	20 (18.0%)	10 (14.1%)	15 (16.5%)	17 (17.3%)	**75 (17.0%)**
Total motions	**69**	**111**	**71**	**91**	**98**	**440**

22



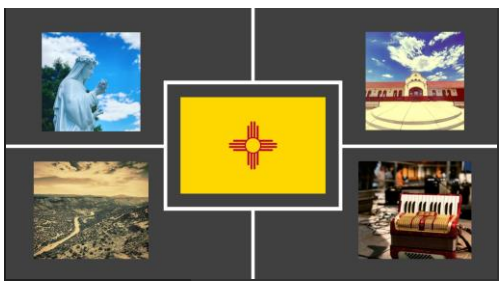
Yale Study:

The Findings

23

TABLE 12.
CASE DISPOSITIONS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Settlement/R.68 Judgment	41	59	69	103	218	490
Voluntary/stipulated dismissal	30	37	34	45	36	182
Sua sponte dismissal before defendant responds	11	50	27	11	27	126
Dismissed as sanction	1	1	0	0	3	5
Dismissed for failure to prosecute	1	7	7	24	3	42
Remanded to state court	0	8	0	3	5	16
Motion to dismiss granted (not based on QI)	11	21	12	16	26	86
Summary judgment granted (not based on QI)	17	13	16	21	33	100
Directed verdict for D (not based on QI)	0	0	0	1	2	3
MTD granted based on QI	**3**	**3**	**0**	**0**	**1**	**7 (0.6%)**
SJ granted based on QI	**9**	**10**	**3**	**3**	**2**	**27 (2.3%)**
QI granted at or after trial	**0**	**0**	**0**	**0**	**0**	**0**
QI granted on appeal	**0**	**2**	**1**	**0**	**1**	**4 (0.3%)**
Case open, stayed, or on appeal	0	0	2	5	5	12
Trial – plaintiff verdict	0	0	1	2	4	7
Trial – defense verdict	7	11	0	12	37	67
Split verdict	0	1	0	0	2	3
Other	0	2	0	2	2	6
Total cases	**131**	**225**	**172**	**248**	**407**	**1,183**

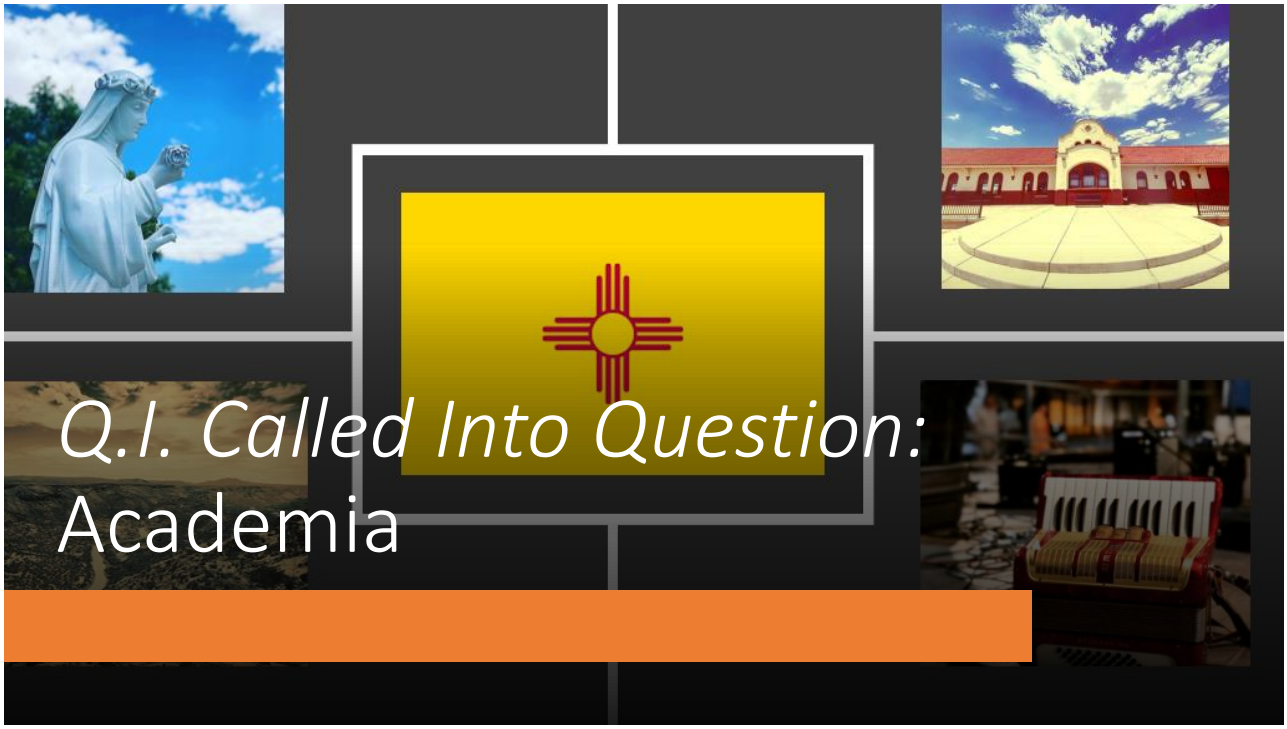


Yale Study:

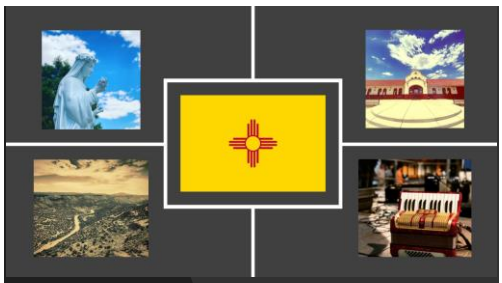
Ultimate Finding

- Not really used to prevent discovery
- Wants "good faith" back
  - ('How's that for proactive?')

24



25



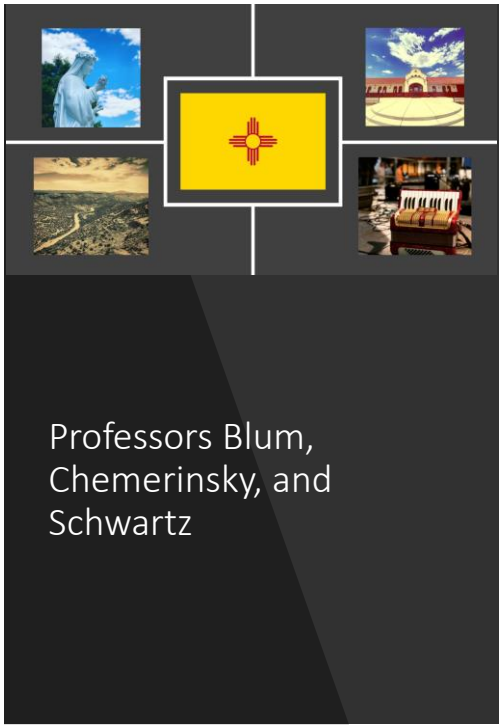
Professors Blum, Chemerinsky, and Schwartz

26

Take issue with Pearson

"The extent of *Pearson's* negative effect on the development and clarification of constitutional rights is also apparent in lower court decisions, which demonstrate the courts' willingness to ignore the merits question, leaving the constitutional issue for another day."

https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1685&context=lawreview

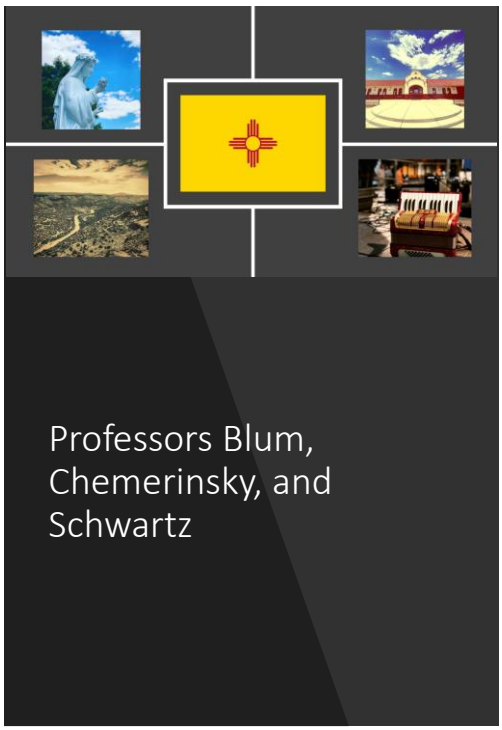


27

Critical of the Post-*Pierson* Shift

"The *Harlow* standard for thirty years focused on **whether** it was clearly established law that "a" **reasonable officer should know**; now it must be law that "every" reasonable officer should know. Now, after *Ashcroft v. Al-Kidd*, **it must be a right that is beyond dispute (*debate)**.

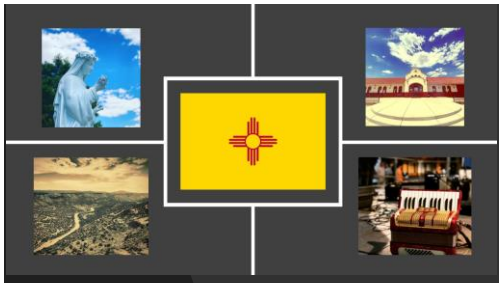
Therefore, courts are able to grant qualified immunity and dismiss Section 1983 claims by **requiring an exact case on point** from a high level court and the recently implemented heightened standard for proving a clearly established law."



28

The Ignoring of *Hope*

*"**Hope,** **while not overruled, is largely ignored*** or distinguished by both the Supreme Court and lower courts."



Notre Dame Law Review

http://ndlawreview.org/publications/archives/volume-93/volume-93-issue-5/

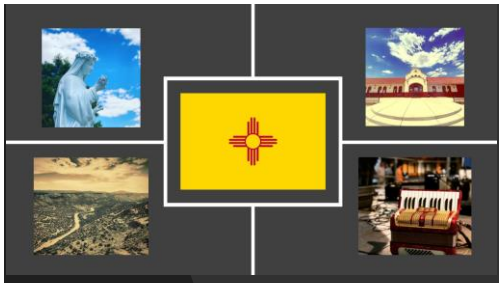
- "[S]cholars such as Dean Erwin Chemerinsky have argued that **qualified immunity is to blame, in part, for the absence of proper accountability in this area**."

FORMALISM, FERGUSON, AND THE FUTURE OF QUALIFIED IMMUNITY, Fred O. Smith, Jr., 2094 Notre Dame Law Review vol. 93:5

29

Future of Qualified Immunity

30

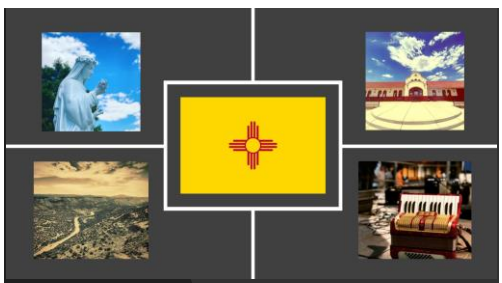


Thoughts on the Future

- "**<u>Social movements are demanding more accountability</u>**, especially with respect to constitutional violations at the intersection of criminal justice and race. tasing, two tasings, or three tasings."

FORMALISM, FERGUSON, AND THE FUTURE OF QUALIFIED IMMUNITY, Fred O. Smith, Jr., 2094 Notre Dame Law Review vol. 93:5

31

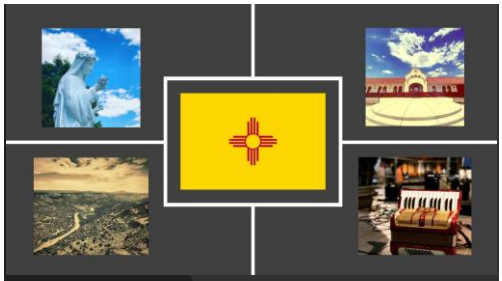


Legislation – Federal

The Ending Qualified Immunity Act, Congresswoman Pressley

- In response to **heinous and unjust acts of police misconduct**, including the murders of George Floyd and **Breonna Taylor** this legislation would end the doctrine of qualified immunity.
- The legislation codifies that the **qualified immunity doctrine is not grounds for defense for officers that violate the law**.
- Specifically, this bill would amend Section 1983 to explicitly state that the **qualified immunity** doctrine invented by the Supreme Court **does NOT provide police officers that brutalize or otherwise violate civil rights with defense or immunity from civil liability** for their actions.
- **Clarify Congress' original intent for Section 1983** and note the history and necessity of this protection.

32



Legislation – State

33

"GEORGE FLOYD ACT OF 2020"

The immunity afforded the entities listed under subsection (a) of 32 this section does not apply:

(2) If an act was committed by a law enforcement agency or a law enforcement officer employed by, volunteering with, or contracted with an entity listed under subsection (a) of this section and the law enforcement agency or law enforcement officer:

(A) Either:

(i) Negligently or recklessly acted or failed to act in a manner that is unreasonable or in bad faith for a law enforcement officer considering the attendant facts surrounding the act or failure to act; or

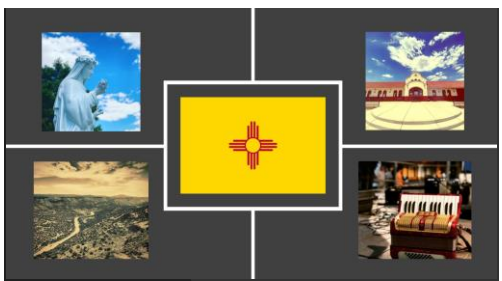
(ii) Either:

(a) Failed to adhere to established law enforcement standards;

(b) Ignored clear orders by a lawful authority; or

(c) Acted in a manner inconsistent with clearly established law or training protocol; and

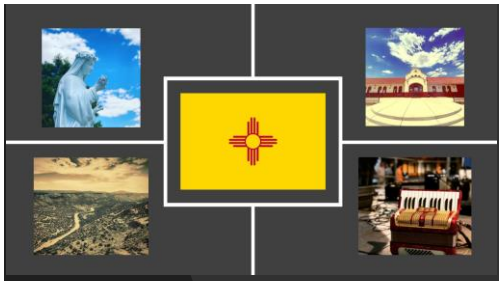
(B) Infringed upon another person's rights under the United States Constitution, Arkansas Constitution, or clearly established federal or state law.



Jackson v. Jacksonville

34

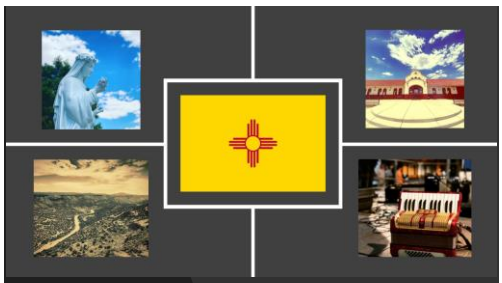
One tasing, Two tasings, Three tasings



Raines v. Conway

35

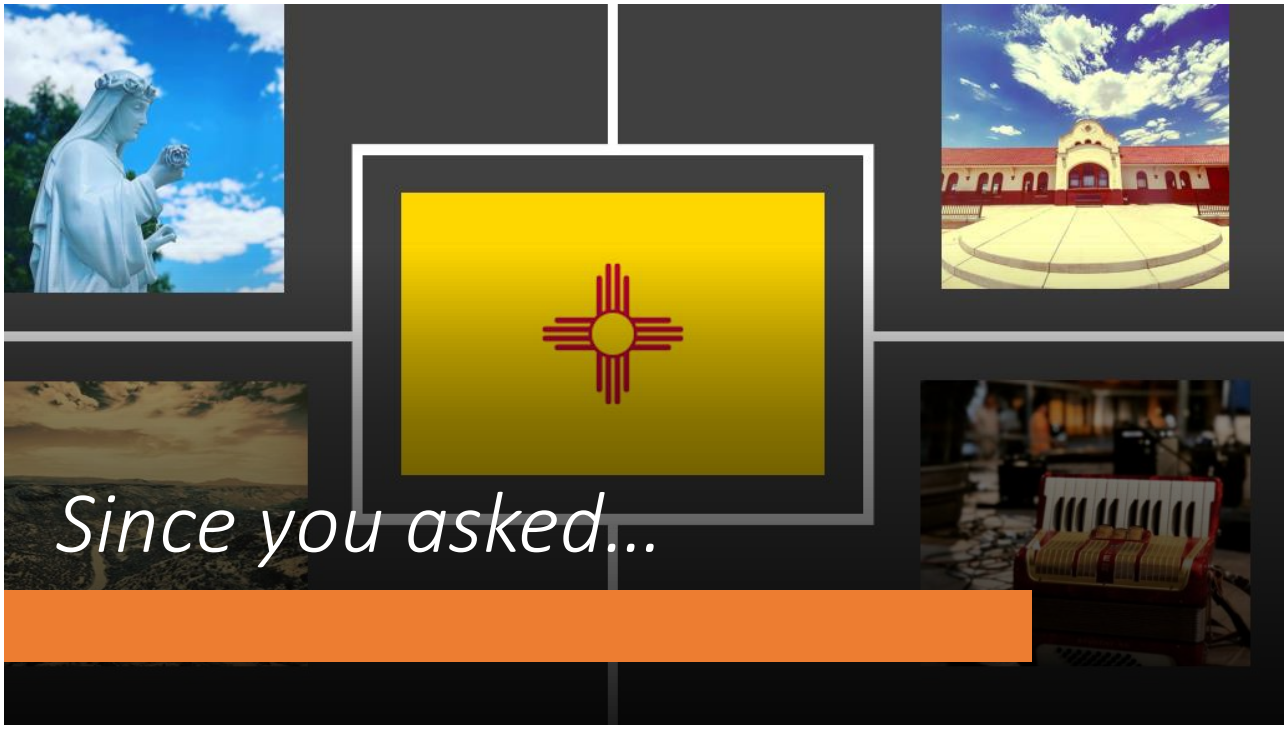
- *Estate of Morgan v. Cook* and the Knife



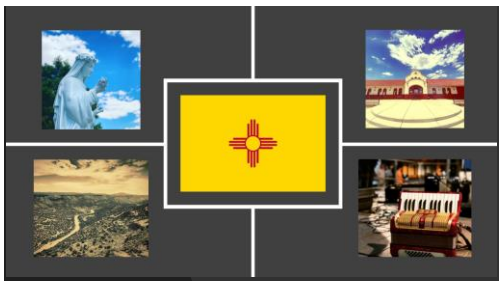
Dillard v. O'Kelly, 961 F. 3d 1048 (8th Cir., 2020)

36

- Qualified Immunity and the Right to Privacy
- Procedural History
  - District Court: Defendants SPD and WCSO filed Motions to Dismiss Plaintiff's §1983 claims under the doctrine of Qualified Immunity, and the State claims under ACA §21-9-301's Official Immunity law. The District court denied Defendant's motion and Defendant's appealed to the Eight Circuit.
  - Eighth Cir. Panel—Affirmed the District Court's Ruling.
  - Eighth Circuit *en banc:* Held that the "asserted due process right to informational privacy was not clearly established" because the Supreme Court has thus far declined to say definitively that there is a constitutional right to informational privacy under Substantive Due Process. Based on this finding, the Eighth Circuit reversed and held that SPD and WCSO were entitled to Qualified immunity, but otherwise affirmed the lower courts' decision.



37



What's the purpose of QI?

38

The Gray Areas

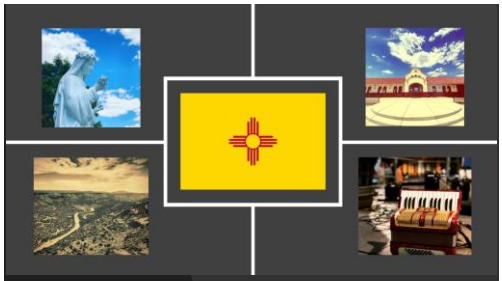
> "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Saucier*.
>
> "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. Officers sued in a § 1983 civil action have the same fair notice right as do defendants charged under 18 U.S.C. § 242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of constitutional rights." *Hope, supra.*

Provide Assurance to Officers

> "There is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow, supra.*

Avoid Rigors of Trial

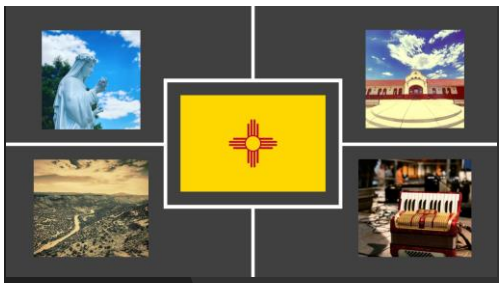
> Interlocutory Appeal.



Is it as bad as some say?

39

3.9%



How can it be improved?

40

First, the purpose of QI:

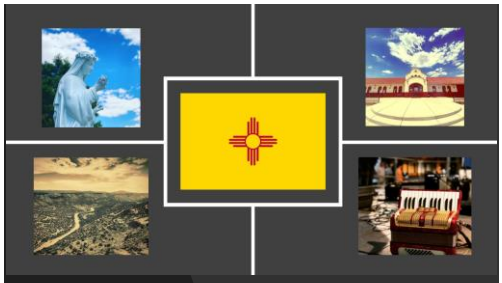
> *Not to avoid discovery; but, to avoid trial – thus the need for interlocutory appeals*
>
> *Plus, the gray areas*

We don't use QI that much. Only for Interlocutory Appeals

Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." 533 U.S., at 205, 121 S.Ct. 2151.

"There is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow, supra.*

Officers sued in a civil action for damages…have the same right to fair notice as do defendants charged w/ the criminal offence defined in 18 USC §242 which makes it a crime for a state official to act "willfully" and under color of law to deprive a person of rights protected by the constitution.



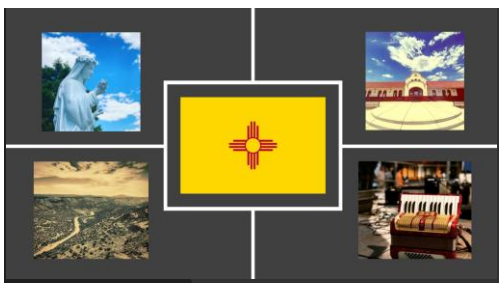
What about the jury?

Like in *Mullenix,* the dissent in *Kisela* picks the facts upon which to focus – as does the majority.

Is Q.I. better left for determination after a jury has determined the facts.

Of course, officers lose the immunity from trial aspect, but perhaps better case law can be produced.

41



Since you asked…

Bring back to *Saucier*…answer the merits question.

But…

"When a court of appeals addresses the merits question and declares a constitutional right has been violated, but the defendant prevails on the qualified immunity prong of the analysis, an interesting problem is presented. May the defendant, the prevailing party in the court below, seek review in the Supreme Court of the merits question that was decided in the plaintiff's favor?

While the defendant officials whose conduct has been deemed unconstitutional are shielded from liability in the case decided, future conduct under similar circumstances will be governed by the newly declared constitutional standard and qualified immunity will not be afforded."

Blum, Chemerinsky, & Schwartz

"[T]he development of constitutional law is by no means entirely dependent of cases in which the defendant may see [QI]. Most of the constitutional issues that are presented in §1983 damages actions…also arise in cases which that defense is not available, such as criminal cases and §1983 cases against a municipality, as well as§1983 cases against individuals where injunctive relief is sought instead of or in addition to damages."

2) *Hope* has to be a part of the equation

42