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Public Protest and Government Immunities

Timothy Zick

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TIMOTHY ZICK*

ABSTRACT

This Article presents the findings of a quantitative and qualitative study of the application of qualified immunity and other governmental immunities in the context of public protest. Relying on three unique datasets of federal court decisions examining First Amendment and Fourth Amendment claims, the Article concludes that public protester plaintiffs face an array of obstacles when suing state, local, and federal officials for constitutional injuries. Quantitative findings show that protesters' claims are frequently dismissed under qualified immunity doctrines and that plaintiffs also face strict limits on municipal liability, new restrictions on First Amendment retaliation claims, and the possible extinction of monetary actions against federal officials. Qualitatively, the study shows protesters' rights are underdeveloped in several respects, including recognition of the right to record law enforcement and limits on law enforcement's use of force. The study lends additional support and new urgency to calls for qualified immunity reform or repeal, as well as reconsideration of other governmental immunities. It also concludes that much more than money damages for injured plaintiffs is at stake. Lack of adequate civil remedies may significantly chill future public protest organizing and participation.

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TABLE OF CONTENTS

INTRODUCTION

Between January 2020 and June 2021, there were more than thirty thousand public demonstrations in the United States.[1] In what were perhaps the largest public protests in American history, an estimated fifteen to twenty-six million protesters gathered in the nation's public streets after

1. *See Armed Assembly: Guns, Demonstrations, and Political Violence in America*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Aug. 23, 2021), https://everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america [https://perma.cc/25AY-SGR3].

George Floyd's murder.[2] Although the demonstrations were predominantly peaceful, state and local law enforcement used aggressive policing methods to restrict and suppress them.[3] Officers beat protesters with batons, rammed them with bicycles, used dangerous crowd containment strategies, arrested protesters without probable cause, used tear gas and other "less-lethal" force against peaceful assemblies, and unlawfully arrested legal observers including members of the press.[4] In several cities, including Portland and the District of Columbia, federal law enforcement and other agency personnel also engaged in aggressive and violent protest policing.[5] Former President Donald Trump told state governors to "dominate" the protesters and send them to jail.[6]

Many of these law enforcement actions violated protesters' First Amendment and Fourth Amendment rights. Protesters can sometimes obtain

2. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://web.archive.org/web/20200703122637/https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html].

3. *See* Talia Buford, Lucas Waldron, Moiz Syed & Al Shaw, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here's What We Found.*, PROPUBLICA (July 16, 2020), https://projects.propublica.org/protest-police-tactics [https://perma.cc/B72L-F66N] (finding officers punched, pushed, and kicked retreating protesters and used pepper spray, tear gas, and batons against non-combative demonstrators); Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html [https://perma.cc/6NCZ-WWEB] (drawing similar conclusions).

4. Mark Berman & Emily Wax-Thibodeaux, *Police Keep Using Force Against Peaceful Protesters, Prompting Sustained Criticism About Tactics and Training*, WASH. POST (June 4, 2020, 1:02 PM), https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd_story.html [https://perma.cc/9QZQ-7VL9]; *see* Ashley Southall, *N.Y. Attorney General Sues N.Y.P.D. Over Protests and Demands Monitor*, N.Y. TIMES (Jan. 14, 2021), https://www.nytimes.com/2021/01/14/nyregion/nypd-police-protest-lawsuit.html [https://perma.cc/2RJG-6FZD] (discussing misconduct allegations against NYPD officers); *see also* Katelyn Burns, *Police Targeted Journalists Covering the George Floyd Protests*, VOX (May 31, 2020, 1:10 PM), https://www.vox.com/identities/2020/5/31/21276013/police-targeted-journalists-covering-george-floyd-protests [https://perma.cc/V5G7-PDK6].

5. For a critical account of the federal government's response to the Black Lives Matter ("BLM") racial justice protests, see KAREN J. GREENBERG, SUBTLE TOOLS: THE DISMANTLING OF AMERICAN DEMOCRACY FROM THE WAR ON TERROR TO DONALD TRUMP 145–72 (2021). *See also* Katie Shepherd & Mark Berman, '*It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020, 8:24 PM), https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests [https://perma.cc/8H9N-MNJF]; Alex Ward, *The Unmarked Federal Agents Arresting People in Portland, Explained*, VOX (July 20, 2020, 6:30 PM), https://www.vox.com/2020/7/20/21328387/portland-protests-unmarked-arrest-trump-world [https://perma.cc/QMW9-7DYE]; Nicole Sganga, *Federal Agents Sent to Portland in 2020 Were "Unprepared" to Quell Unrest, Watchdog Finds*, CBS NEWS (Apr. 21, 2021, 1:04 PM), https://www.cbsnews.com/news/portland-protests-2020-federal-agents-unprepared [https://perma.cc/4N2Z-NAWS].

6. Matt Perez, *Trump Tells Governors to 'Dominate' Protesters, 'Put Them in Jail for 10 Years'*, FORBES (June 1, 2020, 1:56 PM), https://www.forbes.com/sites/mattperez/2020/06/01/trump-tells-governors-to-dominate-protesters-put-them-in-jail-for-10-years [https://perma.cc/Z3JD-QERX].

judicial injunctions preventing law enforcement from using such tactics in future protests.[7] Police departments sometimes, though far too infrequently, discipline officers for violating constitutional rights and other misconduct.[8] However, injunctive relief and departmental discipline do not compensate for the physical and emotional injuries protesters experience at the hands of aggressive and sometimes violent law enforcement officers. As Joanna Schwartz has observed, "for many people, filing a lawsuit [for damages] is the best available way to punish police when they violate the law and give police reason not to violate the law again."[9]

Both 42 U.S.C. § 1983 ("section 1983")[10]—a statute originally passed to assist the government in combating Ku Klux Klan violence in the South after the Civil War—and the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[11] allow individuals to sue government officials for money damages for constitutional torts (personal injuries stemming from violations of constitutional rights). Section 1983 applies to state and local officials, while *Bivens* applies to federal officials. However, protesters face a daunting array of obstacles to recovering civil damages under these laws.[12] The constitutional standards that govern protesters' underlying First Amendment and Fourth Amendment claims may offer less-than-robust substantive protection for protesters' activities. But even with respect to some egregious violations of protesters'

7. *See* Abay v. City of Denver, 445 F. Supp. 3d 1286, 1294 (D. Colo. 2020) (granting a temporary restraining order ("TRO") against police use of chemical agents and projectiles); Don't Shoot Portland v. City of Portland, 465 F. Supp. 3d 1150, 1157 (D. Or. 2020) (granting a TRO against police use of tear gas against peaceful protesters); Black Lives Matter Seattle-King Cnty. v. City of Seattle, 466 F. Supp. 3d 1206, 1216 (W.D. Wash. 2020) (granting a TRO against police use of tear gas and pepper spray as crowd control measures); *see also* Brittnee Bui, Comment, *Class Actions as a Check on LAPD: What Has Worked and What Has Not*, 67 UCLA L. REV. 432, 451–59 (2020).

8. *See* Troy Closson, *N.Y.P.D. Should Discipline 145 Officers for Misconduct, Watchdog Says*, N.Y. TIMES (May 11, 2022, 6:37 PM), https://www.nytimes.com/2022/05/11/nyregion/nypd-misconduct-george-floyd.html [https://web.archive.org/web/20220512004251/https://www.nytimes.com/2022/05/11/nyregion/nypd-misconduct-george-floyd.html].

9. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE xiii (2023). In a few instances, 2020 racial justice protesters sued individual officers and their municipal employers for damages and obtained significant monetary settlements or judgments. Daniel Politi, *Jury Awards $14 Million to George Floyd Protesters Injured by Cops in Denver*, SLATE (Mar. 26, 2022, 10:04 AM), https://slate.com/news-and-politics/2022/03/jury-awards-14-million-george-floyd-protesters-denver.html [https://perma.cc/6686-AVEN].

10. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

11. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

12. *See generally* SCHWARTZ, *supra* note 9 (examining the many obstacles to recovery in civil rights lawsuits, including obtaining counsel, pleading rules, and governmental immunities).

constitutional rights, governments and government officials possess broad legal immunities that often prevent recovery of civil damages.

Under section 1983, unless officers violate what the Supreme Court has described as "clearly established law," they cannot sue officials for money damages.[13] The doctrine of "qualified immunity" shields "all but the plainly incompetent" law enforcement and other officials from liability.[14] In general, plaintiffs cannot recover unless they can show that "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority" have recognized the underlying misconduct as a constitutional violation.[15] Municipal employers, who have much deeper financial pockets than individual officers, cannot be held accountable unless plaintiffs can prove they adopted and enforced a "policy or custom" of violating protesters' constitutional rights.[16] Although this evidence is hard to come by, plaintiffs are required to present it as early as the pleadings stage of a lawsuit.[17]

In recent years, the Supreme Court has further narrowed the circumstances in which local and federal officials can be sued for civil rights violations under section 1983 and *Bivens*. For example, in *Nieves v. Bartlett*, a 2019 decision, the Court held that so long as officers have probable cause to arrest protesters for *some* criminal offense, however minor, they cannot pursue a First Amendment claim that the officer retaliated against them for exercising expressive rights—unless they can prove law enforcement singled them out and treated them unequally.[18] With regard to *Bivens* suits against federal officials, the Court has *assumed* such claims can go forward, but has also strongly suggested they are unwarranted extensions of *Bivens*.[19] If these claims are rejected, protesters will be barred from suing National Park Service officials, U.S. Capitol police officers, U.S. Secret Service agents, and other federal defendants for money damages in connection with protest policing.

Protesters whose constitutional rights are violated by law enforcement and other officials deserve to be compensated for their injuries. Further, as

13. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

14. Malley v. Briggs, 475 U.S. 335, 341 (1986).

15. Wilson v. Layne, 526 U.S. 603, 617 (1999); *see also* SCHWARTZ, *supra* note 9, at 76 (noting the requirement that plaintiffs point to "a prior case in which that precise conduct had been held unconstitutional").

16. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–94 (1978).

17. *See* SCHWARTZ, *supra* note 9, at 39–41 (discussing heightened pleading standards).

18. Nieves v. Bartlett, 587 U.S. 391, 403, 407 (2019).

19. *See* Wood v. Moss, 572 U.S. 744, 757 (2014) (assuming *Bivens* extends to First Amendment claims); Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims"); Bush v. Lucas, 462 U.S. 367, 390 (1983) (declining to extend *Bivens* to a claim sounding in the First Amendment); *see also* Egbert v. Boule, 142 S. Ct. 1793, 1807–08 (2022) (rejecting First Amendment "retaliation" claim under *Bivens*).

the 2020–2021 mass protests demonstrated, officials who violate First Amendment, Fourth Amendment, and other constitutional rights need to be deterred from doing so and held accountable.[20] To the extent protesters believe officials cannot or will not be held fully accountable for even egregious and abusive constitutional violations, they may be chilled from exercising protest-related rights.

Despite the importance of these remedial and other concerns, there has been no systematic effort to measure the effects governmental immunities have on protesters' ability to obtain compensation for their constitutional injuries.[21] To obtain a measure of these effects, this Article presents the findings of a unique quantitative and qualitative study. Unlike prior studies, which focused on qualified immunity across cases and contexts, this study focuses on the fate of First Amendment and Fourth Amendment claims brought by plaintiffs against state, local, and federal officials in public protest cases.[22] The study is based on three datasets consisting of more than three hundred federal court decisions and four hundred claims. In addition to qualified immunity in section 1983 cases, the study examines governmental immunities in First Amendment retaliation cases and actions against federal officials. Decisions in each unique dataset were coded to assess defendants' success in invoking immunities to defeat protesters' damages claims. Finally, the study provides a qualitative analysis of protesters' First Amendment and Fourth Amendment rights. This part of the study identifies the types of constitutional claims plaintiffs typically pursued in public protest cases and the substantive "law" as the Supreme Court and lower federal courts have developed it.

The study shows that individual officers had considerable success, particularly at the summary judgment stage, defeating protesters' section 1983 claims, and municipal defendants had even greater success. Defendants also enjoyed substantial success defeating First Amendment "retaliation" claims under the standard adopted in *Nieves*, often based on arrests for minor

20. *See* SCHWARTZ, *supra* note 9, at xiv ("[Q]ualified immunity has come to represent all that is wrong with our system of police accountability.").

21. One commentator has criticized qualified immunity doctrine as applied in recent protest cases involving claims of excessive force. *See generally* L. Darnell Weeden, *Exploring Protest Rights, Unreasonable Police Conduct, and Qualified Immunity*, 45 T. MARSHALL L. REV. 167 (2021) (addressing a limited number of recent decisions without any quantitative analysis).

22. For prior qualified immunity studies, see generally Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123 (1999) (studying federal cases over a two-year period); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009) (studying the disposition of qualified immunity defenses in district court cases); Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523 (2010) (studying appellate decisions). My study focuses on First Amendment and Fourth Amendment claims because they are the primary constitutional rights provisions invoked by protesters in lawsuits against law enforcement and other officials.

offenses. Owing to the Supreme Court's recent skeptical pronouncements regarding *Bivens* claims, the study concludes that defendants are likely to defeat future First Amendment and Fourth Amendment damages claims against federal defendants. While some of the study's quantitative findings differ from those in prior studies, in general, the results support criticisms of qualified immunity and other immunity doctrines.[23] As applied in public protest cases, qualified immunity does not serve the policy goals the Supreme Court has ascribed to the doctrine, including providing a means of redress for constitutional injuries, deterrence of unlawful conduct, and shielding officers from the burdens of discovery.[24] Further, the qualitative portions of the study demonstrates the relatively weak rights protester plaintiffs possess and supports the criticism that qualified immunity doctrine has resulted in a lack of development of substantive rights.[25] Based on these findings, the study concludes that without repeal or reform of governmental immunities, public protest itself may be significantly imperiled.

From here, the Article proceeds in four parts. Part I describes the First Amendment and Fourth Amendment rights at stake in the public protest context and the governmental immunities that affect recovery of monetary damages for rights violations. Part II describes the study design and elaborates further on the content of the three unique datasets. Part III presents the study's quantitative and qualitative findings regarding qualified immunity, municipal liability, First Amendment retaliation claims, and lawsuits against federal officials under *Bivens*. Part IV proposes several reforms and actions to strengthen protesters' rights and remedies.

I. PROTESTER INJURIES AND GOVERNMENTAL IMMUNITIES

Protesters who are injured during a public demonstration or other event can bring various legal claims against those responsible for their injuries. The focus in this study is on alleged violations of First Amendment and Fourth Amendment rights by government officials and entities, which are the most common claims pursued by injured protesters. A variety of officials

23. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) (concluding, based on a study of district court dockets, that courts rarely dismissed cases on qualified immunity grounds and granted dispositive summary judgment motions on that basis in just 2.6% of cases). As discussed *infra* Section III.A., in the decisions examined in this study, courts granted dismissal with respect to about a third of all claims but granted summary judgment on over 60% of all claims. These numbers are somewhat more in line with other studies. *See, e.g.*, Leong, *supra* note 22, at 691 (finding that district courts denied qualified immunity in 14% to 32% of cases); Sobolski & Steinberg, *supra* note 22, at 545 (finding that appellate courts denied qualified immunity in 32% of appellate decisions).

24. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that qualified immunity doctrines do not serve any of the values the Court and scholars have ascribed to it).

25. *See infra* Sections III.A.2.iii, A.3.iii.

and governmental entities participate in policing public protests. Possible defendants in civil rights lawsuits include state and local law enforcement, U.S. Secret Service, National Park Service, and other federal agency officials, and state or local governments. Each type of defendant can rely on robust governmental immunities. Separately and in combination, these immunities are obstacles for protesters seeking compensation for constitutional injuries.

A. PROTESTERS' RIGHTS AND REMEDIES

Protesters can experience a variety of constitutional injuries when they participate in demonstrations and other public events. Although other rights may come into play, the two principal federal constitutional protections available to protesters are the First Amendment, which protects speech and peaceable assembly, and the Fourth Amendment, which generally prohibits unreasonable searches and seizures.[26]

Protesters may be injured owing to a wide array of First Amendment violations.[27] For example, officials may unlawfully deny protesters access to "public forums," including public parks, streets, and sidewalks, where they have recognized rights to speak and assemble.[28] Governments may rely on invalid content-based speech regulations or enforce unlawful speech zones and other regulations that unduly restrict speech and assembly.[29] Law enforcement officers may also unlawfully retaliate against protesters for exercising their First Amendment rights, confiscate their signs and displays, prohibit the recording of police officers at public demonstrations, and engage in abusive protest policing methods.[30]

26. U.S. CONST. amends. I, IV.

27. For a discussion of First Amendment claims in the study datasets, see *infra* Part III.

28. Huminski v. Corsones, 396 F.3d 53, 90, 92–93 (2d Cir. 2004) (concluding that indefinite exclusion of protester from courthouse grounds violated the First Amendment); *see, e.g.*, Dean v. Byerley, 354 F.3d 540, 558 (6th Cir. 2004) (finding that picketers have a First Amendment right to engage in peaceful residential picketing on public sidewalks).

29. *See, e.g.*, Amnesty Int'l v. Battle, 559 F.3d 1170, 1183–84 (11th Cir. 2009) (holding the creation of cordon that rendered protest ineffective violated the First Amendment); Cannon v. City & Cnty. of Denver, 998 F.2d 867, 870–74 (10th Cir. 1993) (holding that arresting abortion protesters based on content of their signs violated the First Amendment). On the use of free speech zones and other uses of space to restrict protest, see generally Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).

30. *See, e.g.*, Davidson v. City of Stafford, 848 F.3d 384, 393–94 (5th Cir. 2017) (concluding that arresting a protester without actual or probable cause in retaliation for expression violates the First Amendment); Allen v. Cisneros, 815 F.3d 239, 245 (5th Cir. 2016) (finding that confiscation of shofar and signs at demonstration did not violate the First Amendment); Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (holding that arresting protesters for filming law enforcement officers in the discharge of their duties in a public space violates the First Amendment); Green v. City of St. Louis, 52 F.4th 734, 740 (8th Cir. 2022) (holding that deploying tear gas against a protester not engaged in illegal activity violated the First Amendment).

Protesters may also suffer physical and other injuries stemming from Fourth Amendment violations.[31] They may be subject to arrest without probable cause or unlawfully detained.[32] Protesters may also be injured when police officers use excessive force, including physical force used during an arrest, handcuffing and other types of restraints, and use of less-lethal munitions including tear gas, pepper spray, and projectiles.[33] These violations may cause physical and psychological injuries.

There are two general types of remedies protesters can pursue when they are the victims of these or other constitutional torts. They can seek injunctive relief against government actions and policies they allege violate the U.S. Constitution (or state constitutional provisions). For example, peaceful protesters expelled from a public park can seek a court order mandating they and others be allowed to protest there in the future. Or protesters could sue for an injunction preventing police from firing tear gas into crowds of peaceful protesters.[34]

Enjoining *current or future* First Amendment or Fourth Amendment violations is an important remedy. However, injunctive relief is forward-looking and declaratory. It does not compensate protesters for physical and other injuries sustained during a demonstration or other protest event because of constitutionally tortious conduct.

The other kind of relief protesters can seek in the event of constitutional violations is an award for monetary damages against individual officials and their government employers. Both section 1983 and the Supreme Court's decision in *Bivens* allow individuals to sue government officials for money damages for constitutional torts (personal injuries stemming from violations of constitutional rights).[35] Section 1983 applies to state and local officials, while *Bivens* applies to federal officials. Both section 1983 and *Bivens* protect against deprivations of rights secured by the U.S. Constitution. Section 1983 explicitly authorizes such claims, while *Bivens* implies such claims from constitutional rights provisions.

31. The type of Fourth Amendment claims commonly pursued in protest cases is discussed in more detail *infra* Part III.

32. *See, e.g.*, *Davidson*, 848 F.3d at 393–94 (holding that arrest of anti-abortion protesters without actual or probable cause violated the Fourth Amendment); Barham v. Ramsey, 434 F.3d 565, 572–77 (D.C. Cir. 2006) (finding that the mass arrest of protesters without prior dispersal order violated the Fourth Amendment right not to be subjected to an unlawful arrest).

33. *See* Fogarty v. Gallegos, 523 F.3d 1147, 1161–62 (10th Cir. 2008) (concluding that using pepper balls and tear gas against non-resisting protesters constituted excessive force under the Fourth Amendment).

34. *See, e.g.*, Don't Shoot Portland v. City of Portland, 465 F. Supp. 3d 1150, 1157 (D. Or. 2020) (granting a TRO against police use of tear gas against peaceful protesters).

35. *See supra* notes 10–11 and accompanying text.

Civil rights suits for money damages are a critically important means of vindicating constitutional rights. Owing to the infrequency of prosecutions brought against law enforcement for civil rights violations and the reluctance of police departments to investigate and punish their own, a lawsuit for damages may be the only way for a protester who has been injured to obtain some measure of justice.[36] Monetary relief compensates injured protesters for physical, economic, and other kinds of tangible harm. It can also have deterrent effects in terms of individual officer actions and municipal policies. As in other legal contexts, damages awarded for constitutional violations are intended to make injured parties whole. The damages include not only monetary and out-of-pocket expenditures, but also recovery for pain, suffering, and emotional distress. When plaintiffs prevail in federal civil rights lawsuits, they are also entitled to recover attorneys' fees.[37]

Although my study focuses on federal constitutional claims, protesters can sue under state civil rights laws and precedents, which generally adopt similar qualified immunity restrictions in cases involving violation of state constitutional rights. They can also bring state common law personal injury claims including assault, battery, false arrest, damages to property, and infliction of emotional distress.

Protesters' remedial menu sounds expansive. However, as this study confirms, protesters' claims for monetary damages against government officials and municipal entities are substantially constrained by an offsetting menu of liability-limiting immunities and related doctrines. As a result, protesters injured while engaged in lawful and peaceful expressive activities often find it difficult or impossible to hold government officials accountable for their actions.

B. SECTION 1983 AND "QUALIFIED IMMUNITY"

Government officials may be entitled to "qualified immunity" in section 1983 and *Bivens* lawsuits. Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations.[38] When government officials are sued, qualified

36. *See* SCHWARTZ, *supra* note 9, at xiii ("[F]or many people, filing a lawsuit is the best available way to punish police when they violate the law and give police reason not to violate the law again.").

37. *See* 42 U.S.C. § 1988 (authorizing award of attorney's fees). As commentators have observed, most damages in civil rights cases are recovered through settlements. SCHWARTZ, *supra* note 9, at 26. The Supreme Court has upheld settlement agreements that waive attorneys' fees. Evans v. Jeff D., 475 U.S. 717, 741–43 (1986), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. These types of waivers are now common. As a result, lawyers frequently do not recover any fees when civil rights lawsuits are settled. SCHWARTZ, *supra* note 9, at 26. Lawyers often view section 1983 cases as contingency fee cases, which affects civil rights plaintiffs' access to representation. *Id.* at 27.

38. *See* SCHWARTZ, *supra* note 9, at 73 ("The Supreme Court created qualified immunity out of

immunity functions as an affirmative defense they can raise, barring damages even if they committed unlawful acts. (Qualified immunity is not, however, a defense to claims for injunctive relief.) As a general matter, officials enjoy broad legal immunity from civil rights claims under this doctrine. As the Supreme Court has observed, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[39]

Historically, under Supreme Court precedents, whether a defendant was entitled to qualified immunity turned on the subjective "good faith" of the official who committed the alleged violation.[40] In 1982, however, the Supreme Court replaced that subjective standard with a new test framed in "objective terms."[41] Under the new test, officials are personally immune from monetary liability "even if they act in *bad faith*, so long as there is no prior court decision with nearly identical facts."[42] As the Court has explained, as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," police officers and other officials are not liable for money damages under section 1983.[43]

The Court has made clear its new standard is intended to be more protective of government officials than the "good faith" test. At the same time, it has also stated that the standard provides "no license to lawless conduct."[44] According to the Court, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[45]

However, as Joanna Schwartz has observed after close examination of section 1983 qualified immunity cases, "the Court's decisions over the next forty years have created a standard that seems virtually impossible to meet."[46] Since the Court adopted its objective test, it has applied the doctrine in several ways that have made it far more favorable to defendants.

First, the Supreme Court adopted a heightened pleading standard for complaints in civil cases. The new standard requires that to avoid having

thin air six years after it recognized the right to sue under Section 1983.").

39. Malley v. Briggs, 475 U.S. 335, 341 (1986). In most states, civil rights actions are similarly limited by qualified immunity.

40. Pierson v. Ray, 386 U.S. 547, 556–58 (1967).

41. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

42. SCHWARTZ, *supra* note 9, at 74.

43. *Harlow*, 457 U.S. at 818.

44. *Id.* at 819.

45. *Id.* at 818–19.

46. SCHWARTZ, *supra* note 9, at 75.

claims dismissed, plaintiffs must state facts supporting a "plausible" claim for relief.[47] Schwartz has observed that this standard "may be particularly difficult for plaintiffs in civil rights cases to overcome."[48] In some kinds of cases, including those that focus on the intent of government actors or the existence of local government policies or practices, "[a] plaintiff will not likely have any evidence . . . until they get to discovery."[49]

Second, to show the law was "clearly established," the Supreme Court has generally required plaintiffs to point to an already existing authoritative judicial decision (or perhaps multiple decisions), with substantially similar facts. The decisional landscape is narrow. Protester plaintiffs must identify "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority."[50] Unpublished decisions do not count, and courts are reluctant to consider district court decisions.[51] The clearly established standard expands the scope of the qualified immunity defense by requiring that plaintiffs identify Supreme Court or published federal appeals court decisions that are identical, or nearly identical, to the one being litigated.[52] For example, plaintiffs' allegation that officers' use of a particular protest policing method violated their constitutional rights would have to point to published appeals court precedents establishing that use of this method was a clearly established violation of the First Amendment or Fourth Amendment.

Third, the Court has instructed that in assessing clearly established law, courts should not define the inquiry "at a high level of generality."[53] As a result, "[c]ourts have granted officers qualified immunity even when they have engaged in egregious behavior—not because what the officers did was acceptable, but because there wasn't a prior case in which that precise conduct had been held unconstitutional."[54]

Fourth, in 2009, the Court altered the way in which courts apply qualified immunity doctrine in a manner that created another significant obstacle for civil rights plaintiffs.[55] In an earlier decision, the Court held that

47. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

48. SCHWARTZ, *supra* note 9, at 43.

49. *Id.*

50. Wilson v. Layne, 526 U.S. 603, 617 (1999).

51. *See, e.g.*, Ullery v. Bradley, 949 F.3d 1282, 1300 (10th Cir. 2020) ("[W]e decline to consider district court opinions in evaluating the legal landscape for purposes of qualified immunity."); Evans v. Skolnik, 997 F.3d 1060, 1067 (9th Cir. 2021) ("We have been somewhat hesitant to rely on district court decisions in this context.").

52. *See* Kisela v. Hughes, 584 U.S. 100, 103–04 (2018) (discussing need for factual similarities).

53. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (quoting *Wilson*, 526 U.S. at 617).

54. SCHWARTZ, *supra* note 9, at 76.

55. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

when assessing a qualified immunity defense, courts must first determine whether there was a violation of a constitutional right and *then* address whether the law was clearly established as to that right.[56] However, the Court's current approach allows courts to grant qualified immunity based solely on whether the law in question was clearly established—that is, without determining whether there was a constitutional violation.[57] This creates a catch-22 for civil rights plaintiffs. If courts resolve cases based on the lack of clearly established authority, there will be fewer precedents defining constitutional violations.[58] That situation, in turn, results in decisions concluding that officials are not liable because of a lack of clearly established law.[59] According to critics, it also has the effect of rendering constitutional protections "hollow."[60] By allowing courts to rely on a lack of clearly established law without ruling on the underlying constitutional claim, the Court "perpetuates uncertainty about the contours of the Constitution and sends the message to officers that they may be shielded from damages liability even when they act in bad faith."[61]

Fifth and finally, the Court's construct of a "reasonable officer" has shifted over time to grant government officials broader deference. In a 1986 decision, the Court famously wrote that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[62] Since then, the Supreme Court has stated that a defendant's conduct is to be judged on the basis of "any reasonable officer"[63] or "every reasonable official."[64] As one scholar observed, this shift implies "that in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff's case would have been obvious not just to the average 'reasonable officer' but to the *least informed*, *least reasonable* 'reasonable officer.' "[65]

56. Saucier v. Katz, 533 U.S. 194, 201 (2001).

57. *Pearson*, 555 U.S. at 223–24.

58. *See* SCHWARTZ, *supra* note 9, at 78 (making this point). *See generally* David L. Hudson, Jr., Pearson v. Callahan *and Qualified Immunity: Impact on First Amendment Law*, 10 FIRST AMEND. L. REV. 125 (2011) (discussing courts' reliance on step two in assessing First Amendment claims by students, public employees, and prisoners).

59. *See* Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS: INVESTIGATES (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://web.archive.org/web/20230929161412/https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus] (examining 252 cases from 2015–2019).

60. Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

61. Schwartz, *supra* note 24, at 1818.

62. Malley v. Briggs, 475 U.S. 335, 341 (1986).

63. Messerschmidt v. Millender, 565 U.S. 535, 556 (2012).

64. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2004 (2018) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

65. *Id.* (emphasis added).

As Joanna Schwartz has observed, the Court has "[created one additional qualified] immunity hurdle for plaintiffs: defendants' right to immediately appeal any qualified immunity denial."[66] Under normal procedural rules, a litigant would have to wait until the court enters a final judgment in the case to file an appeal. The special appeals process in qualified immunity cases can add "months or years to the case and dramatically increas[e] the costs of litigation" for plaintiffs.[67]

The Supreme Court has offered some general justifications for its qualified immunity standards. It has asserted that qualified immunity achieves a "balance" between allowing victims to hold officials accountable and minimizing "social costs" to "society as a whole."[68] Noting that "claims frequently run against the innocent as well as the guilty," the Court has identified four "social costs."[69]

First, the Court has explained that the doctrine aims to avoid "the expenses of litigation" by allowing district courts to dismiss suits against officers at early stages in the litigation—and without making fact-intensive inquiries into a particular officer's motivations.[70] Second, and relatedly, the Court expressed concern that requiring officials to respond to such litigation can "diver[t] . . . official energy from pressing public issues."[71] Third, the Court worried that the threat of litigation would "deter[] . . . able citizens from acceptance of public office."[72] Finally, the Court noted that the threat of lawsuits could chill lawful law enforcement conduct. It posited "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.' "[73] Along similar lines, the Court explained that the doctrine of "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[74]

The Court has also defended qualified immunity's focus on clearly established law on the basis that it would be unfair to hold government officials to constitutional rules they were not aware of at the time of the violation. It first articulated this idea in an early decision, stating that "[a]

66. SCHWARTZ, *supra* note 9, at 79.
67. *Id.*
68. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 589 (1949)).
74. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[75] Later, the Court explained: "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[76] As the Court has observed, "the focus" of qualified immunity is "whether the officer had fair notice that her conduct was unlawful."[77]

Critics have offered strong challenges to these justifications and to qualified immunity generally.[78] Some have attacked qualified immunity as both bad law and bad policy.[79] However, at least for the time being, the Supreme Court appears committed to retaining the doctrine.

C. MUNICIPAL LIABILITY

Qualified immunity doctrine applies to claims against individual government officials. However, protesters can also sue municipalities, counties, and other government bodies under section 1983.

Holding governmental entities liable for constitutional violations is important for several reasons. First, these entities have much deeper pockets than individual law enforcement officers.[80] Second, holding employers liable for constitutional violations caused by their actions or policies puts pressure on those employers to change their unconstitutional behavior.[81] Third, assuming the unconstitutional harm emanated from the employer, it is just to hold it, as opposed to individual officers following the employer's commands, directly responsible for the violations.[82]

In *Monell v. Department of Social Services*, the Supreme Court held that a municipal government can be held liable under section 1983 for

75. Pierson v. Ray, 386 U.S. 547, 555 (1967).
76. *Harlow*, 457 U.S. at 818.
77. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).
78. For a statistical rebuttal of many of the Court's efficiency arguments, see Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHICAGO L. REV. 605 (2021). *See also* Schwartz, *supra* note 24, at 1820 ("The Supreme Court's qualified immunity doctrine is ungrounded in history, unnecessary or ill-suited to serve its intended policy goals, and counter-productive to interests in holding government wrongdoers responsible when they have violated the law.").
79. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 48–49 (2018); Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 383–86 (2018); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6–7 (2015); Schwartz, *supra* note 23, at 11–12.
80. SCHWARTZ, *supra* note 9, at 100.
81. *Id.*
82. *Id.*

constitutionally tortious actions.[83] However, under *Monell* and subsequent precedents, the Court has significantly narrowed the path to recovery.[84]

Local governments can be held liable under section 1983 for enacting unconstitutional policies.[85] They can also be held liable if an official with "final policymaking authority" violates the Constitution.[86] However, these theories are "uncommonly relied upon" because they require plaintiffs demonstrate constitutional wrongdoing "at the highest levels of government."[87] "Final policy makers" such as local police chiefs are rarely directly involved in applying unconstitutional policies.[88] Moreover, as Schwartz has observed, "local governments do not usually adopt policies that are unconstitutional on their face—a policy requiring officers to use excessive force, for example, or requiring officers to arrest people who exercise their First Amendment free speech rights."[89]

Most commonly, to establish *Monell* liability, plaintiffs must demonstrate a deprivation of a federal right occurred because of a "policy or custom" of the local government's legislative body or of those local officials whose acts may fairly be said to be those of the municipality.[90] The informal policy or custom alleged to have caused the constitutional injury must be "so persistent and widespread as to practically have the force of law."[91] Under the policy or custom theory of section 1983 liability, local governments cannot be held liable for the actions of their employees solely because of their employment status.[92] Rather, an employee must be acting pursuant to a municipal policy or custom, and the employer can only be held liable if one of their employees has committed an underlying constitutional violation pursuant to the policy or custom.[93]

One theory or basis of policy or custom municipal liability that is particularly germane to public protest cases is the charge that local governments failed to train and supervise law enforcement and other officers.[94] As with other theories, however, it is very difficult to prevail on

83. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 663 (1978).
84. *See* SCHWARTZ, *supra* note 9, at 93–94 (noting it is "tremendously difficult to succeed in constitutional challenges to these types of institutional failures").
85. *Id.* at 102–03.
86. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).
87. SCHWARTZ, *supra* note 9, at 103.
88. *Id.*
89. *Id.*
90. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690–94 (1978).
91. Connick v. Thompson, 563 U.S. 51, 61 (2011).
92. *Monell*, 436 U.S. at 690.
93. *Id.*
94. *See* City of Canton v. Harris, 489 U.S. 378, 385 (1989) (recognizing this theory of municipal liability).

this claim. Courts have essentially treated the way a police force chooses to train its officers as a matter of policy not generally subject to judicial second-guessing in civil rights lawsuits. As the Supreme Court has noted, "the inadequacy of police training may serve as the basis for § 1983 liability," but "only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact."[95]

At each stage of litigation, protester plaintiffs face severe challenges in terms of alleging and proving a policy or custom sufficient to hold local governments accountable. At the complaint-drafting stage, plaintiffs often lack access to the facts necessary to allege an informal policy or custom.[96] Thus, they may not be able to survive a local government's motion to dismiss for failure to meet basic pleading requirements. Even at later stages of litigation, plaintiffs are likely to struggle to adduce evidence not just that their constitutional rights were violated, but that any violations were caused by an informal policy or custom. Among other issues, the Supreme Court "has not clarified what can serve as evidence of prior constitutional violations sufficient to put police chiefs on notice that their officers need better training or supervision."[97]

The municipal liability standards have resulted in a complex, stringent, and "nonsensical" standard of municipal liability.[98] As one commentator observed, "[the] doctrine of municipal liability is convoluted and can require difficult inquiries into which city officials are 'policymakers' under state law on local government, into whether a[n] official was acting in a 'local' or 'state' capacity, into the extent of departmental 'custom' authorizing constitutional violations, into individual cities' training and hiring processes, and into demanding questions about causation and fault."[99]

95. *Id.* at 388 (emphasis added); *e.g.*, Estate of Jones by Jones v. City of Martinsburg, 961 F.3d 661, 671–72 (4th Cir. 2020) ("If the City's failure to train reflects such a deliberate or consciously indifferent 'policy,' then its failure can fairly be said to be the 'moving force [behind] the constitutional violation.' ").

96. SCHWARTZ, *supra* note 9, at 108.

97. *Id.* at 109.

98. *Id.* at 102.

99. Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 486 (2018) (citations omitted).

D. FIRST AMENDMENT "RETALIATION" CLAIMS

In addition to the many challenges posed by general qualified immunity doctrines under section 1983, the Supreme Court has recently adopted new liability limits on a specific type of claim based on retaliation for the exercise of First Amendment rights. The Court has recognized a general defense to such claims based on a finding of probable cause to arrest the speaker for any violation of law.

The First Amendment prohibits government officials from subjecting individuals to retaliatory actions because they engaged in protected speech.[100] To succeed on a First Amendment retaliation claim, plaintiffs must prove they engaged in a constitutionally protected activity, the defendant's actions would "chill a person of ordinary firmness" from continuing to engage in the protected activity, and the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and the intent to chill speech.[101]

These claims have always been difficult to win. Proving retaliatory motive is difficult, but in any event not sufficient. The speaker must show that the adverse action would not have been taken absent the official's retaliatory motive.[102] For example, suppose participants arrested at a public protest claimed law enforcement restricted or suppressed their speech in retaliation for the message they conveyed. To prevail, plaintiffs must show the officer would not have arrested them or interfered with their protected speech "but for" the retaliatory reason. If the officer can show the protesters were obstructing traffic or there was any other non-retaliatory reason for the arrest, the First Amendment claim would fail.

One long-unsettled question in such cases was whether the existence of probable cause to arrest a speaker *precluded* a First Amendment retaliation claim brought under section 1983. In *Nieves v. Bartlett*, the Supreme Court answered this question in the affirmative.[103]

In *Nieves*, the Court upheld the dismissal of a First Amendment retaliation claim brought by an individual arrested at a festival after he exchanged heated words with officers assigned to police the event. The Court held that when speakers allege officers arrested them in retaliation for the exercise of First Amendment activities, probable cause for the arrest is usually a complete defense.[104] Echoing its justifications for adopting the

100. Hartman v. Moore, 547 U.S. 250, 256 (2006).
101. Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004).
102. *Hartman*, 547 U.S. at 260.
103. Nieves v. Bartlett, 587 U.S. 391, 402 (2019).
104. *Id.* at 400.

general qualified immunity standards, which were discussed earlier, the Court indicated it was concerned that officers who must often make "split-second" decisions when deciding whether to arrest will sometimes rely on the suspect's protected speech in doing so.[105] The Court also reasoned that determining whether the arrest was in retaliation for the speech in such cases would often be difficult.[106] Thus, it concluded plaintiffs should be required in retaliation cases to plead and prove the arrest was objectively unreasonable *before* inquiring into the official's subjective mental state.[107]

The *Nieves* standard applies in a broad variety of contexts. However, the Court justified it using a protest-related example. The Court was concerned, it said, that "policing certain events like an unruly protest would pose overwhelming litigation risks" for officers who arrest participants.[108] "Any inartful turn of phrase or perceived slight during a legitimate arrest," the Court worried, "could land an officer in years of litigation."[109] The Court was concerned officers would be deterred from discharging their duties or "would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off."[110]

The *Nieves* rule is subject to an exception. The Court concluded "the no-probable-cause rule should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[111] If a plaintiff produces this comparative evidence, the burden shifts to the official to show some non-retaliatory basis for the arrest.[112]

The *Nieves* rule makes it more difficult for protesters, reporters, and others attending or participating in a public protest to demonstrate they were arrested in retaliation for their communications or other First Amendment–protected activities.[113] As the data from this study confirm, in most cases it will mean that probable cause to arrest a speaker for any offense, however minor, will negate a First Amendment retaliation claim.[114]

105. *Id.* at 401.
106. *Id.*
107. *Id.* at 403.
108. *Id.* at 404.
109. *Id.*
110. *Id.*
111. *Id.* at 407.
112. *See id.*
113. *See* John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers After* Nieves v. Bartlett, 120 COLUM. L. REV. 2275, 2279 (2020); *see also* Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 616–29 (2017).
114. *See infra* Section III.C.

E. DAMAGES CLAIMS AGAINST FEDERAL OFFICIALS

In *Bivens*, the Court implied a cause of action for damages against federal officials who violate individuals' rights under the Constitution.[115] The claim in *Bivens* was based on a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures.[116] The Court has also recognized *Bivens* actions for Fifth Amendment and Eighth Amendment violations.[117] However, during the past four decades, the Court has not recognized any additional *Bivens* claims. It has become increasingly skeptical of *Bivens* lawsuits in general, and specifically in the context of First Amendment and Fourth Amendment claims.[118] At this juncture, it is not clear protesters have any right to sue federal officials for damages relating to First Amendment or Fourth Amendment violations.

According to the Court, *Bivens* and its progeny "were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated."[119] The Court has criticized this "*ancien regime*," noting that "[i]n later years, [it] came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power."[120] Accordingly, the Court noted, "for almost 40 years," it has "consistently rebuffed requests to add to the claims allowed under *Bivens*."[121]

In 2017, the Court outlined a two-step framework intended to limit the expansion of *Bivens* remedies.[122] Under this framework, a court must first consider whether a case "arises in a 'new context' or involves a 'new category of defendants.' "[123] The Court's "understanding of a new context is broad."[124] The standard is whether "the case is different in a meaningful way

115. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971).

116. *Id.*

117. *See* Davis v. Passman, 442 U.S. 228, 229 (1979) (recognizing damages action against a federal employer for gender discrimination); Carlson v. Green, 446 U.S. 14, 19 (1980) (recognizing an Eighth Amendment claim for failure to provide adequate medical treatment).

118. *See infra* Section III.D.

119. Hernandez v. Mesa, 589 U.S. 93, 99 (2020) (quoting Ziglar v. Abbasi, 582 U.S. 120, 132 (2017)).

120. *Id.*

121. *Id.* at 102.

122. *Abbasi*, 582 U.S. at 138–39. The Court applied the same approach in *Hernandez*, 589 U.S. at 102.

123. *Hernandez*, 589 U.S. at 94 (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).

124. *Id.*

from previous *Bivens* cases" decided by the Court.[125] If so, the court must "ask whether there are any 'special factors that counsel hesitation' about granting the extension."[126]

According to the Court, "special factors" are rooted in concerns about the separation of powers among the branches of federal government.[127] They include, but are not limited to, the existence of alternative remedies and respect for coordinate branches of government. Thus, a court must "consider the risk of interfering with the authority of the other branches, . . . ask whether 'there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy' . . . and 'whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.' "[128] If any factor causes a court to hesitate, the court should "reject the request" to recognize the *Bivens* claim.[129] In general, the Court has described the expansion of *Bivens* as "a disfavored judicial activity."[130]

Although the Court has *assumed* First Amendment claims may be brought under *Bivens*, it has never expressly held as much and has sometimes expressed skepticism regarding such claims.[131] In *Egbert v. Boule* (2022), the Court ruled that plaintiffs could not sue federal officials for money damages based on First Amendment retaliation and Fourth Amendment excessive force claims.[132] The Court rejected both claims on the grounds that implied actions under *Bivens* do not extend to "new" contexts and Congress was in a better position to determine whether to recognize any such actions.[133] Although *Egbert* did not arise in the context of a public protest, the Court's holding that First Amendment retaliation claims and Fourth Amendment excessive force claims are not viable under *Bivens* bodes ill for similar claims in other contexts.

125. *Abbasi*, 582 U.S. at 139.
126. *Hernandez*, 589 U.S. at 102 (quoting *Abbasi*, 582 U.S. at 121).
127. *Id.* (citing "the risk of interfering with the authority of the other branches").
128. *Id.* (quoting *Abbasi*, 582 U.S. at 136, 137).
129. *Id.*
130. *Abbasi*, 582 U.S. at 121 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
131. *See* Wood v. Moss, 572 U.S. 744, 757 (2014) (assuming *Bivens* extends to First Amendment claims); Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."); Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (assuming, without deciding, that a free exercise claim was available because the issue was not raised on appeal, but noting that the reluctance to extend *Bivens* "might well have disposed of respondent's First Amendment claim of religious discrimination" because "we have declined to extend *Bivens* to a claim sounding in the First Amendment"). *See generally* Bush v. Lucas, 462 U.S. 367 (1983) (declining to extend *Bivens* to a claim sounding in the First Amendment).
132. Egbert v. Boule, 596 U.S. 482, 493–501 (2022).
133. *Id.* at 498.

II. STUDY DESIGN AND DATASETS

The purpose of this study is to assess how the foregoing governmental immunities have affected plaintiffs' First Amendment and Fourth Amendment claims against government officials under section 1983 and *Bivens* for injuries sustained at public demonstrations and other events. The study tracks the disposition of more than 400 constitutional claims in over 300 federal civil rights cases.

Unlike other qualified immunity studies, which examined broad categories of decisions or dockets, my study focuses on a discrete set of activities—"public protest"—that gave rise to section 1983 and *Bivens* claims.[134] The decision to focus on public protest cases and claims required that the study define and identify "public protest." For purposes of all three datasets, "public protest" was generally defined as a set of facts in which one or more individuals participated in a public march, rally, demonstration, parade, or other similar activity. Claims involving conduct related to public protest, including leafletting, public displays, and certain kinds of expressive conduct such as flag burning, were also included in the datasets. By contrast, the datasets excluded First Amendment and Fourth Amendment claims in areas including prisoner litigation, employment-related actions, conflicts involving K-12 student speech, and actions filed in connection with ordinary traffic stops or domestic disturbance calls. This definition obviously could be narrower or broader, and the public protest limit necessitated some judgment calls. Not all decisions involved large or mass demonstrations, but many did, and all included claims involving the kind of "out of doors" protest, hand-billing, and related activities typically engaged in during traditional public protest activity.[135]

To conduct the study, I compiled three unique datasets. Each dataset consists of federal district court and appeals courts (including Supreme Court) decisions, which I read and coded. The first dataset, Qualified Immunity, includes 253 district and appellate court decisions, both published and unpublished, in which qualified immunity was raised as a defense to First Amendment or Fourth Amendment claims in the context of public protests.[136] In combination, these decisions addressed a total of 468 First

134. Other studies have focused on broader sets of qualified immunity decisions or dockets in a range of section 1983 claims. *See* sources cited *supra* note 22. The most comprehensive study was conducted by Joanna C. Schwartz, who studied dockets in more than 1,000 cases. *See* Schwartz, *supra* notes 23–24.

135. *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2008).

136. The decisions were collected using the following Westlaw searches in the Federal Cases database: *("first amendment" (freedom /3 (speech assembly))) /p (demonstration protest protestor protester rally rallies street park sidewalk plaza pavement mall parade walk-out sit-in picket) &*

Amendment and Fourth Amendment claims. The study examined cases from 1982, when the Supreme Court adopted its modern "two-step" qualified immunity approach, to December 2022.[137]

Each of the 253 decisions in the Qualified Immunity dataset was coded for: (1) court; (2) date of decision; (3) whether the decision was published or unpublished; (4) type of constitutional claim (First Amendment or Fourth Amendment); (5) procedural posture in which a qualified immunity defense was raised (Summary Judgment, Motion to Dismiss, or Trial); (6) disposition of the motion to dismiss on qualified immunity grounds (granted or denied); (7) whether denials of summary judgment addressed the merits or were based on the existence of genuine issues of material fact; (8) whether a motion to dismiss or for summary judgment was granted based on Step One, Step Two, or Both steps of the qualified immunity analysis; (9) in appeals, whether the appellate court affirmed or reversed the district court's qualified immunity disposition; (10) description of the First Amendment or Fourth Amendment claim; and (11) basis for the court's conclusion on the qualified immunity motion. All decisions in the Qualified Immunity database were also coded for (12) whether plaintiffs pursued a claim for municipal liability under *Monell*; (13) whether a defense motion to dismiss or for summary judgment on the *Monell* claim was granted or denied; and (14) general grounds for the court's disposition of the municipal liability claim.

The other two datasets are more limited in scope. The *Nieves* Retaliation Claims dataset includes forty-one published and unpublished federal court decisions from 2019 through December 2022.[138] Each decision was coded for (1) procedural posture; (2) disposition of a defense motion to dismiss or for summary judgment based on *Nieves*; (3) criminal offense(s) charged; (4) whether the decision addressed the *Nieves* unequal treatment exception

"qualified immunity"; *("first amendment" (freedom /3 (speech assembly))) & "qualified immunity" & (public demonstration protest! rally rallies street park highway sidewalk plaza road pavement mall boulevard parade walk-out sit-in picket) & (1983 bivens)*; *"first amendment" /40 "qualified immunity" /p (protest demonstration rally parade)*; and *SY,DI(92k1430 92k1431 92k1529 92k1732 92k1736 92k1744 92k1758 92k1759 92k1760 92k1761 92k1762 92k1764 92k184* 92k185* 92k1864) & (SY,DI(78k1373 78k1374 78k1376 78k1398 78k1407 78k1432 78k1440 170Bk3295 170Bk3323(2) 170Bk3625(2) 393k1472 393k1475 393k1483) "qualified immunity")*. Returned results for all searches were then reviewed to isolate claims brought in connection with public protest activities, per the study definition.

137. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982) (rejecting the "good faith" standard and adopting the "clearly established law" standard).

138. Westlaw searches in the federal district court and appellate court databases were as follows: *(protest demonstration rally picket) /30 retaliation /p nieves* and *retaliation /20 "First Amendment" /p nieves*. The results were then reviewed to isolate claims arising in the context of public protest activity. Several retaliation claims were also collected from the Qualified Immunity dataset, which swept in some post-*Nieves* retaliation claims.

and, if so, the court's disposition of that part of the claim; (5) whether plaintiffs pursued a claim for retaliation against the municipality; and (6) disposition of the retaliation claim.

The *Bivens* Claims dataset includes twenty-six published and unpublished decisions between 1971 and the end of December 2022 in which courts addressed First Amendment or Fourth Amendment *Bivens* claims in the context of public protests.[139] Each decision was coded for (1) type of constitutional claim (First Amendment, Fourth Amendment, or both); (2) whether the court recognized a *Bivens* First Amendment or Fourth Amendment cause of action; and (3) in the event the court did not recognize the *Bivens* action, its reasoning (for example, claim arises in a "new context," the presence of "special factors," and so forth).

All three datasets have statistical and other limitations that narrow the study's scope and findings. Most empirical qualified immunity studies have relied on decisions available on Westlaw.[140] However, as Joanna Schwartz has observed, because Westlaw omits many unpublished opinions as well as lawsuits resolved without any opinion, such studies can "say little about the frequency with which qualified immunity is raised, the manner in which all motions raising qualified immunity are decided, and the impact of qualified immunity on case dispositions."[141] However, as Schwartz acknowledges, such studies can "offer insights about the ways . . . courts assess qualified immunity . . . in a written opinion."[142] The study examines opinions accessible to courts when they analyzed qualified immunity and other defenses in protest cases.

There are some quantitative limitations. Since my study is limited to claims brought in "public protest" cases, it is not based on a random or complete sample of all qualified immunity decisions. Thus, quite intentionally, it does not purport to make claims about the dispositions of *all* qualified immunity motions. Moreover, because my study considers both district court and appeals courts decisions, and primarily claims addressed at both the motion to dismiss and summary judgment stages, it cannot account

139. The Westlaw search in the federal district court and appellate court databases was as follows: *bivens /p protest or demonstration or rally /p "first amendment" or "fourth amendment" and DA (aft 1971)*. These results were then reviewed to isolate claims arising in the context of public protest activity. The relatively low number of reported *Bivens* protest decisions available in Westlaw is not surprising. Westlaw coverage for older unpublished decisions is spotty so the database does not include all *Bivens* protest-related decisions. Further, state and local officials are far more likely than federal officials to be involved in law enforcement and other activities giving rise to protest-related constitutional claims.

140. *See* sources cited *supra* note 22; *see also* Schwartz, *supra* note 23, at 20 n.64 (acknowledging that most studies have relied on decisions available on Westlaw).

141. Schwartz, *supra* note 23, at 20–21.

142. *Id.* at 21.

for all *final* dispositions of qualified immunity motions in the study.[143] For example, a qualified immunity motion denied at the motion to dismiss stage could be granted or denied later at summary judgment. Or the case may settle. The Retaliation Claims and *Bivens* Claims datasets, which are smaller samples, have similar quantitative limitations. In addition, the sample sizes in these two datasets are relatively small. The three datasets provide snapshots of how courts have disposed of qualified immunity and other motions in public protest cases during the relevant time periods.

Even with the foregoing limitations, the study offers a rare glimpse into how courts address qualified immunity in public protests cases. The data also provide information about the most common types of claims protesters pursued and how these different claims fared under qualified immunity, whether defense motions to dismiss or for summary judgment were successful, how courts applied the two-step qualified immunity analysis, whether *Monell* claims were pursued and sustained, the effect of *Nieves* on First Amendment retaliation claims, and whether protesters have been able to pursue *Bivens* actions. In addition, the study's qualitative analysis helps reveal the extent to which First Amendment and Fourth Amendment law has developed—or failed to develop—in the public protest context and the extent to which courts have left important questions unanswered. In sum, the study offers an in-depth analysis of how qualified immunity has affected constitutional claims brought by protester plaintiffs.

III. DATA AND FINDINGS

This Part presents the study's data and principal findings. It begins with a quantitative and qualitative examination of the largest dataset, Qualified Immunity. The Part then turns to the effect of governmental immunities and defenses on municipal liability, First Amendment retaliation claims, and protesters' *Bivens* actions.

A. SECTION 1983 AND QUALIFIED IMMUNITY

This Section presents findings from the Qualified Immunity dataset. It begins with a general overview of the dataset, and then discusses more detailed quantitative findings concerning First Amendment and Fourth Amendment claims. In connection with the discussion of these claims, the Section also presents qualitative assessments of the state of clearly established First Amendment and Fourth Amendment law in public protest cases.

143. The study data include a few decisions following bench trials.

1. Qualified Immunity Dataset: Overview

Table 1 contains general information about the overall number of cases, whether decisions were published or unpublished, and the distribution of federal district court and courts of appeals decisions in the Qualified Immunity dataset. As indicated, this dataset includes federal district and appellate court public protest decisions from 1982 through the end of 2022 in which defendants sought dismissal or summary judgment based on qualified immunity. It does not include state-level constitutional claims or qualified immunity decisions.

The Qualified Immunity dataset consists of 253 (published and unpublished) federal district court and appellate court decisions. As noted earlier, for purposes of establishing whether there is clearly established law regarding a constitutional right, courts look primarily to published courts of appeal decisions (although some will also look to published district court decisions). There are more than twice as many published (170) as unpublished (83) decisions in the database. In terms of precedents most likely to be considered controlling, there are eighty-six published appeals court decisions—including two decisions from the Supreme Court.[144]

TABLE 1. General Case Data

Cases in the Dataset	253
Published Cases	170
Unpublished Cases	83
Appellate Cases (Including Supreme Court)	114
District Court Cases	139
Published Appellate Cases	86

The study of the Qualified Immunity dataset focused primarily on the disposition of First Amendment and Fourth Amendment *claims* subject to defense motions for dismissal or summary judgment based on qualified immunity. As indicated in Table 2, the dataset includes 468 distinct First Amendment and Fourth Amendment claims as to which defendants filed such motions. A claim was counted just once, even if brought against multiple defendants—unless the court disposed of the claim differently for

144. These decisions are the primary basis for the description and analysis of substantive First Amendment and Fourth Amendment rights below. *See infra* Sections III.A.2–3.

certain defendants, in which case the claim was counted more than once. In general, courts tended to analyze qualified immunity motions by multiple defendants together.

There were slightly more First Amendment (253) than Fourth Amendment (215) claims in the dataset. More qualified immunity motions concerning these claims were decided by federal district courts (287) than by federal appellate courts (181). In many cases, no appeal appears to have been filed after the district court disposition of defense qualified immunity motions. Although it is possible appeals were filed but not noted on Westlaw, many cases appear to have terminated at the district court level without any interlocutory or other appeals.

The study examines constitutional claims subject to defense qualified immunity motions, again in cases that resulted in a published or unpublished opinion available on Westlaw. If, at the time the study period closed, an appellate decision was not available in Westlaw, then the district court decision was included in the dataset. In all other cases, the highest available appellate decision (Supreme Court or federal court of appeal) was coded instead of the district court opinion.

TABLE 2. General Claims Data

Claims in the Dataset	468
First Amendment Claims	253
Fourth Amendment Claims	215
Claims Considered in District Courts	287
Claims Considered in Appellate Courts (Including Supreme Court)	181

Like other studies, mine tracks the disposition and analysis of constitutional claims brought by protester plaintiffs.[145] A docket study focusing on public protest cases, as defined for purposes of the study, was not feasible. Even if all public protest cases could be identified through a review of court dockets, to get a substantial sample one would need to review complaints filed in a multitude of districts.[146] Focusing on defendants would provide some information about how many individual officers were sued and

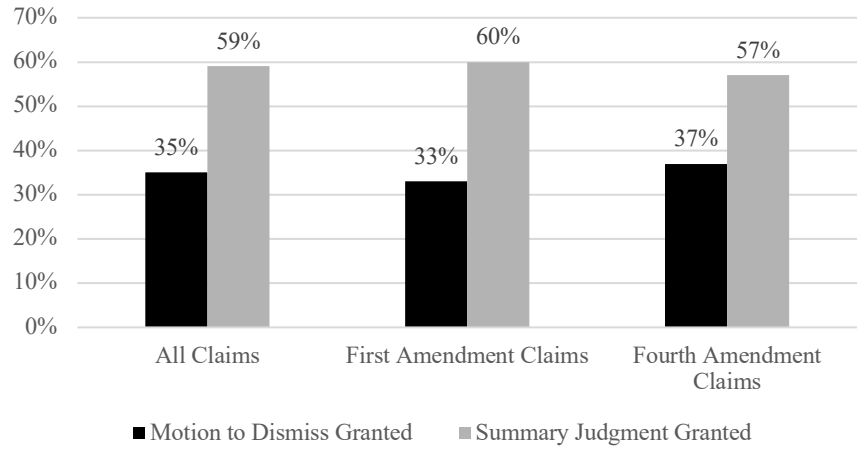
145. *See, e.g.*, Leong, *supra* note 22, at 684–88 (accounting for separate claims in study of district court decisions).

146. *See* Schwartz, *supra* note 23, at 19–25 (basing study on a review of dockets for section 1983 claims filed in five districts).

how many achieved dismissals, but it would not provide information about *why* they were sued or *how* courts analyzed constitutional claims in qualified immunity cases.[147] Focusing on case-level data, for example, how many cases resulted in dismissal on qualified immunity grounds, would likewise not tell us what kinds of claims protesters typically bring, the dispositions or success rates of defense motions to dismiss or for summary judgment regarding specific claims, and information about substantive First Amendment and Fourth Amendment law. My study focuses primarily on claim-level findings to learn how courts have analyzed motions to dismiss claims based on qualified immunity in the specific context of public protest.

Success rates overall and by claim for defense motions to dismiss or for summary judgment based on qualified immunity are reported in Figure 1. The Qualified Immunity dataset includes only cases in which defendants raised a qualified immunity defense as to one or more constitutional claims and courts explicitly addressed the defense. A defense qualified immunity motion was deemed "successful" if it was granted or dismissal of the claim was upheld on qualified immunity grounds. Motion success was not defined as disposing of *all* claims in the case, including *Monell*, state law, and other actions.[148] Rather, my study focused on the qualified immunity determination with respect to each claim of constitutional wrong.

FIGURE 1. Defense Q.I. Motion Success Rates



147. There is also the problem of what to do about "Doe" defendants, which appeared in several cases in the Qualified Immunity dataset.

148. *Cf.* Schwartz, *supra* note 23, at 45 (finding that qualified immunity resulted in dismissal of all claims in just 0.6% of cases and summary judgment on all claims in 2.6% of cases).

Although approximately a third of qualified immunity motions succeeded at the pleadings stage (53/152 for all claims), as in other studies defendants were far more likely to prevail at summary judgment.[149] Examination of qualified immunity decisions in protest-related cases thus adds some support for the claim that the defense does not generally serve the goal of weeding out cases at the earliest stages of litigation and sparing defendants the expenses of discovery.[150] Defense success rates at the motion to dismiss stage in my study are somewhat higher than those reported in some others, but generally consistent with dismissal findings across studies.[151] In sum, in most protest cases plaintiffs were able to proceed to discovery on their claims.

As noted, courts were more likely to grant summary judgment on qualified immunity grounds than to dismiss at the pleadings stage. Across all claims, defendants prevailed on 58% (183/313) of their motions. That success rate was consistent across claims, with courts granting 60% (101/168) of defense qualified immunity motions in First Amendment cases and 57% (82/145) of summary judgment motions in Fourth Amendment cases. Again, these numbers are generally consistent with those reported in other studies.[152]

Courts denied summary judgment as to 130 claims. In 53% of those cases (69/130), the defense motion was denied because there were genuine issues of material fact at issue. In the other 47% (61/130) of summary judgment motions, courts denied the motions on the merits (that is, held that plaintiffs had met their burden of showing a violation of clearly established law).

As shown in Figure 2, appellate courts were more likely than district courts to rule in defendants' favor on qualified immunity. In published and unpublished decisions available on Westlaw, district courts granted 45% (128/287) of defense motions. Appellate courts ruled in defendants' favor on 60% (109/181) of plaintiffs' constitutional claims. These numbers are likely owing in part to defendants' low rate of success at the pleadings stage, which

149. *See* Schwartz, *supra* note 23, at 39 ("[C]ourts were more likely to grant summary judgment motions on qualified immunity grounds than they were to grant motions to dismiss on qualified immunity grounds.").

150. *See id.* at 11 (observing that "plaintiffs can often plausibly plead clearly established constitutional violations and thus defeat motions to dismiss").

151. *See id.* at 39 (finding 26.6% dismissal rate for motions to dismiss).

152. *See id.* (finding courts granted 39.7% of qualified immunity summary judgment motions); *see also* sources cited *supra* note 22 (reporting low denial rates ranging from 14% to 32%).

in many instances were the last results coded. District courts, which faced more defense motions at the pleadings stage, were inclined to allow for some factual development before dismissing plaintiffs' claims.

FIGURE 2. Q.I. Motion Success Rates by Court

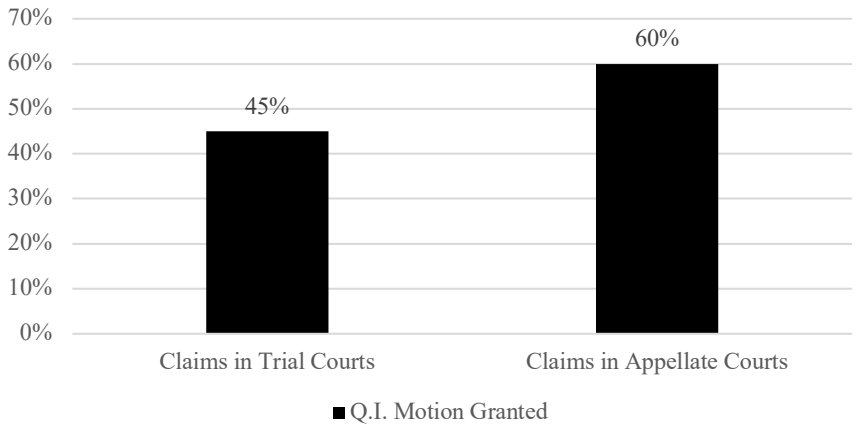
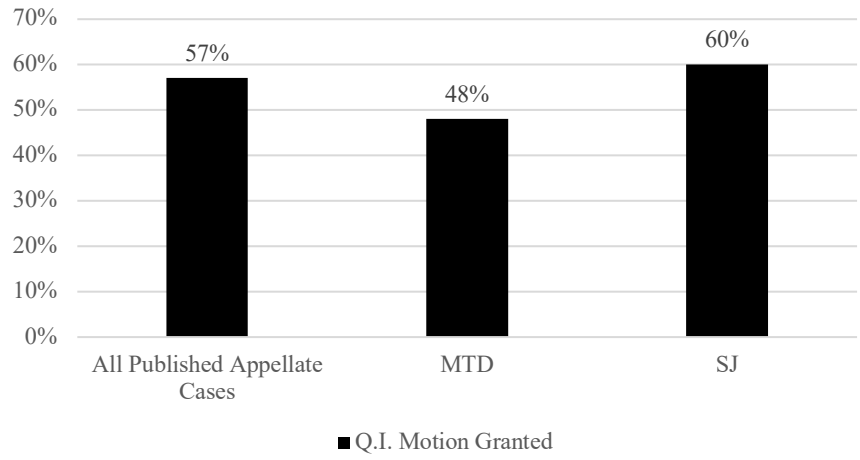


Figure 3 shows that appellate court success rates were similar if one considers only the eighty-six *published* decisions. Courts granted or upheld defense qualified immunity defenses with respect to 57% (77/135) of all constitutional claims. In published appellate decisions, the rate of success for defendants was still lower (48% or 15/31) at the motion to dismiss stage than when the case had reached the summary judgment stage (60% or 62/103). However, in published decisions appellate courts ruled in defendants' favor at the pleadings stage at a somewhat higher rate than did all courts at that stage.[153] Appellate courts may have been responding to the Supreme Court's directive that non-meritorious cases should be dismissed at an earlier stage, or they may simply have been convinced that plaintiffs had not adequately pleaded a clearly established violation under applicable pleading rules.

153. *See supra* Figure 1 (finding dismissal rate of 35% for all claims).

FIGURE 3. Q.I. Motion Success Rates in Published Appellate Decisions

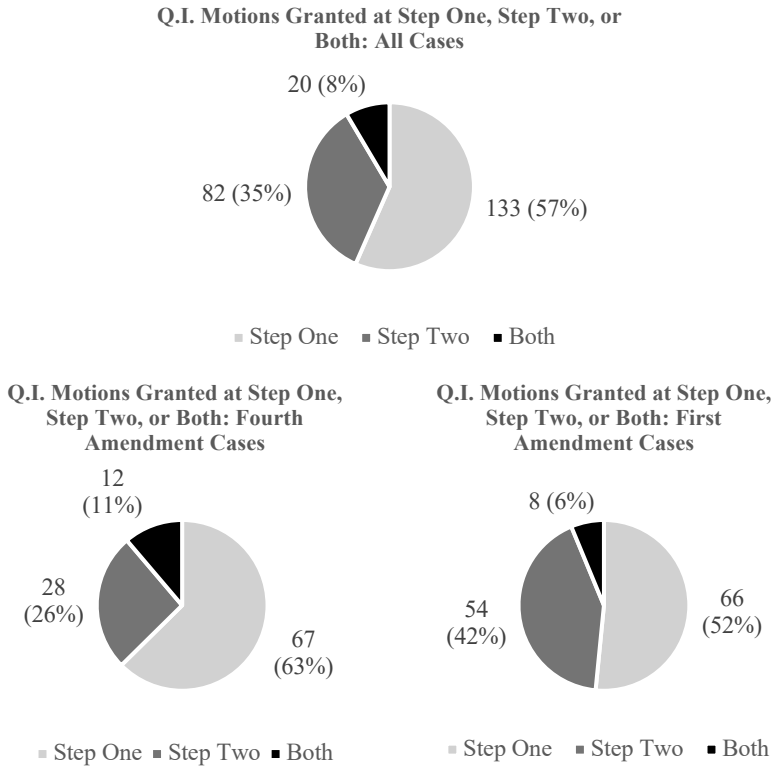


As discussed earlier, under qualified immunity doctrine, courts can dismiss or grant summary judgment for defendants if the plaintiff has not demonstrated a constitutional violation occurred ("Step One") or if, despite the occurrence of a constitutional violation, the law was not "clearly established" at the time the violation occurred ("Step Two").[154] Prior to 2009, the Supreme Court instructed lower courts to address these two steps in order.[155] In 2009, the Court held the sequence was not mandatory; thus, courts could skip Step One and base decisions solely on analysis at Step Two.[156]

Grants of defense qualified immunity motions were coded for sequencing. If a claim was dismissed or defendants prevailed on summary judgment, the disposition was coded "Step One" when the basis for granting or upholding qualified immunity was the absence of a constitutional violation, "Step Two" if the sole basis for granting or upholding qualified immunity was the court's conclusion that the law was not "clearly established," and "Both" if the court granted or upheld qualified immunity on the basis that there was a constitutional violation but the law was not "clearly established" at the time. The few instances in which the court's decision was unclear regarding which Step it was relying on were also coded as "Both."

154. *See supra* notes 55–61 and accompanying text.
155. Saucier v. Katz, 533 U.S. 194, 200–07 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).
156. *Pearson*, 555 U.S. at 236.

FIGURE 4. Sequencing and Success Rate



As indicated in Figure 4, when courts ruled in defendants' favor in public protest cases, they did so at Step One 57% of the time (133/235). For Fourth Amendment claims, courts granted qualified immunity at Step One 63% (67/107) of the time. That percentage dropped to 52% (66/128) for First Amendment claims. The higher rate for Fourth Amendment claims may be attributable to the lenient probable cause and excessive force standards applied in Fourth Amendment cases, which make it more likely courts will conclude there was no constitutional violation. Of course, the higher success rates for defense motions may also be attributable to the relative weakness of the plaintiffs' Fourth Amendment claims. Although not included in Figure 4, the number of overall Step One dispositions was somewhat higher (65% or 50/77) if one looks only at the eighty-six published appellate court decisions in the dataset.

Scholars have raised the concern that if courts proceed directly to Step Two there will be fewer opportunities to develop "clearly established" law, thus making it more difficult for plaintiffs to prevail in qualified immunity cases.[157] There is also a related concern that constitutional law will stagnate or fail to develop if courts do not rule on the constitutional question at Step One.[158]

My data do not indicate courts are engaged in widespread avoidance of constitutional issues in public protest cases. But again, the findings may be driven in part by the constitutional standards courts are called upon to apply to First Amendment and Fourth Amendment claims. Those standards call for, among other things, consideration of context and assessment of the "reasonableness" of governmental actions. The constitutional doctrine may make it easier for courts to dispose of claims by concluding no violation has occurred, that plaintiffs have not satisfied their burden of providing evidence of a constitutional violation, or that the law is not sufficiently clear.

The data show that in a significant percentage of instances, 35% overall (82/235), courts relied on the Step Two conclusion that the law was not "clearly established."[159] In these instances, courts did not address the substance of the constitutional claims. As discussed later, judicial reliance on a lack of clearly established law in public protest cases has probably limited development of substantive constitutional law regarding First Amendment and Fourth Amendment rights.[160] Consider that in 42% (54/128) of rulings in defendants' favor on First Amendment claims, courts relied on the absence of clearly established law regarding issues ranging from the constitutionality of exclusions of protesters from public properties to the right to record law enforcement. Those rulings make it more difficult for plaintiffs in future cases to prove a violation or show the law is clearly established.[161] Courts also avoided the constitutional question in motions addressing a quarter of Fourth Amendment claims.

Some commentators have suggested that qualified immunity doctrine allows for development of substantive law because it permits courts to find a constitutional violation at Step One but still hold the law was not clearly

157. *See, e.g.*, Schwartz, *supra* note 23, at 76 (discussing the adverse effect sequencing can have on the development of constitutional law).

158. *See* Schwartz, *supra* note 24, at 1814–20 (discussing concerns that qualified immunity results in courts failing to define the contours of constitutional rights).

159. The data did not produce a large enough sample size to assess whether the Court's decision in *Pearson*, which allowed courts to address Step Two first in qualified immunity cases, had any effect on the sequencing.

160. *See infra* Sections III.B–C.

161. *See* Schwartz, *supra* note 24, at 1815 (noting the Court's qualified immunity decisions have created a "vicious cycle").

established at Step Two.[162] My data show little evidence of such innovative judicial practice. Only 6% (8/129) of First Amendment claims were disposed of in this way, with a slightly higher percentage of Fourth Amendment claims (11% or 12/108). Again, these percentages track other studies' findings.[163]

Finally, my data show that appellate reversal or affirmance rates in protest-related qualified immunity cases were very low. Overall, appeals courts reversed lower court decisions on qualified immunity only 33% (59/181) of the time. For First Amendment claims, the reversal rate was 33% (36/108) and for Fourth Amendment claims it was 32% (23/73). These reversal rates are generally consistent with those reported in other qualified immunity studies.[164] A closer look at these data demonstrates that appellate courts reversed district courts 40% of the time (25/62) when they *denied* a qualified immunity motion, but only 26% of the time (30/114) when they *granted* a qualified immunity motion. This finding is consistent with the data in Figure 2, which show appellate courts were more likely to rule in favor of qualified immunity across a range of claims.

2. First Amendment Claims

In addition to the general claims data discussed above, the Qualified Immunity dataset includes more specific information about First Amendment claims. The data include the types of claims protesters pursued, the success rates for qualified immunity motions respecting different types of claims, and the substantive law as it pertains to the First Amendment rights of public protesters.

i. Types of Claims

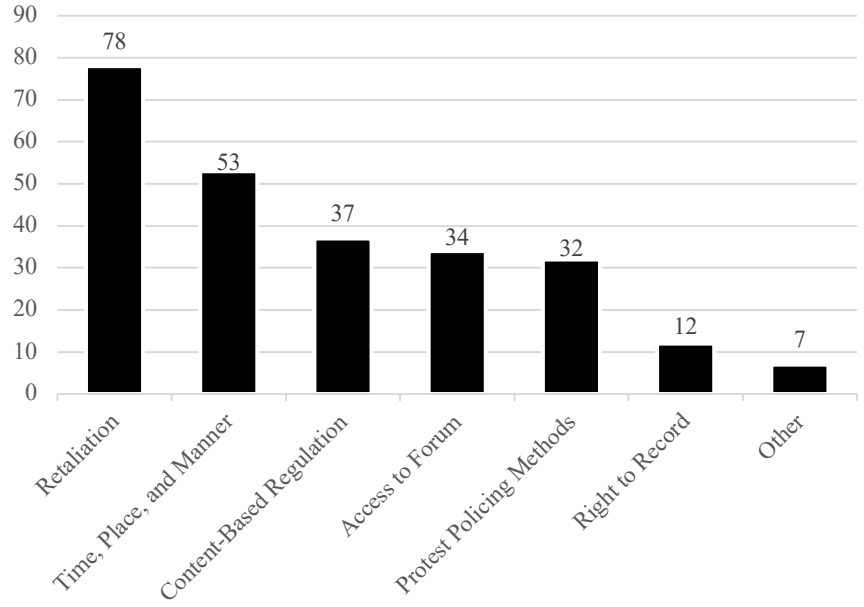
There are 253 First Amendment claims in the Qualified Immunity dataset. Figure 5 shows the distribution and frequency of the six most common types of First Amendment claims.

162. *See, e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999) (arguing that qualified immunity standards allow for judicial innovation).

163. *See* Nielson & Walker, *supra* note 79, at 37 (discussing studies finding that in only 2.5–7.9% of claims did courts find there was a constitutional violation but upheld qualified immunity).

164. *See* Schwartz, *supra* note 23, at 41 (finding an affirmance rate of 65.4%).

FIGURE 5. Types of First Amendment Claims



Retaliation claims were the most frequently litigated type of First Amendment claim. Law enforcement or other government officials violate the First Amendment when they arrest, use force against, or otherwise restrict expressive activity in retaliation for the exercise of First Amendment rights.[165] To prevail on a retaliation claim, "the plaintiffs must show that they engaged in protected activity, that the defendants' actions caused an injury to the plaintiffs that would chill a person of ordinary firmness from continuing to engage in the activity, and that a causal connection exists between the retaliatory animus and the injury."[166]

As discussed earlier, in *Nieves v. Bartlett* (2019), the Supreme Court modified the law with respect to retaliation claims.[167] The Qualified Immunity dataset includes decisions addressing seventy-eight retaliation claims subject to the standards that applied prior to *Nieves*.[168]

165. Hartman v. Moore, 547 U.S. 250, 256 (2006).

166. Bernini v. City of St. Paul, 665 F.3d 997, 1007 (8th Cir. 2012); *see also* Baribeau v. City of Minneapolis, 596 F.3d 465, 481 (8th Cir. 2010).

167. *See* Nieves v. Bartlett, 587 U.S. 391, 400 (2019) (holding that probable cause to arrest generally negates a First Amendment retaliation claim).

168. Post-*Nieves* retaliation claims were collected in a separate dataset and are discussed *infra* Section III.C.

Nearly half (124/253 or 49%) of the First Amendment claims pertained to protesters' rights to access public properties and the doctrines that apply to speech and assembly in those places. Individuals and groups have a First Amendment right to speak and assemble in certain public properties, including public streets, parks, and sidewalks.[169] While governments can impose content-neutral time, place, and manner restrictions on speech and assembly in these "quintessential" public fora, they generally cannot restrict expression based on its content or prohibit access altogether.[170] Under the First Amendment, regulations of speech based on subject matter or viewpoint receive strict judicial scrutiny and must be narrowly tailored to further compelling governmental interests.[171] Thirty-seven First Amendment claims asserted that government regulated speech based on its content. Time, place, or manner regulations are subject to a lower degree of judicial scrutiny. They must be content-neutral, supported by important governmental interests, narrowly tailored to burden no more speech than necessary, and must leave available alternative channels of communication.[172] Fifty-three First Amendment claims involved application of this standard.

Under the First Amendment, protesters and other speakers also have a right to access other public forums, primarily depending on the extent to which governments intend to allow expressive activities in these places and the extent to which such activities would affect their ordinary functioning.[173] In places generally open to the public for expressive purposes, or so-called designated public fora, governments can impose content-neutral time, place, and manner regulations.[174] In "non-public" or "limited" public forums, regulations need only be viewpoint-neutral and reasonable.[175] Thirty-four First Amendment claims concerned government restrictions on access to various public properties.

Rounding out the First Amendment claims, protesters brought thirty-two claims challenging a variety of policing methods—for example, use of tear gas, herding or "kettling" of protesters, and surveillance of protest groups. Protesters claimed these actions chilled or prohibited expression. Plaintiffs also pursued a dozen claims relating to arrests or other adverse

169. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (explaining modern public forum doctrine).

170. *Id.*

171. *See* Reed v. Town of Gilbert, 576 U.S. 155, 170 (2015) (explaining that content-based speech regulations are subject to strict scrutiny).

172. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

173. *See Perry*, 460 U.S. at 45.

174. *Id.* at 45–46.

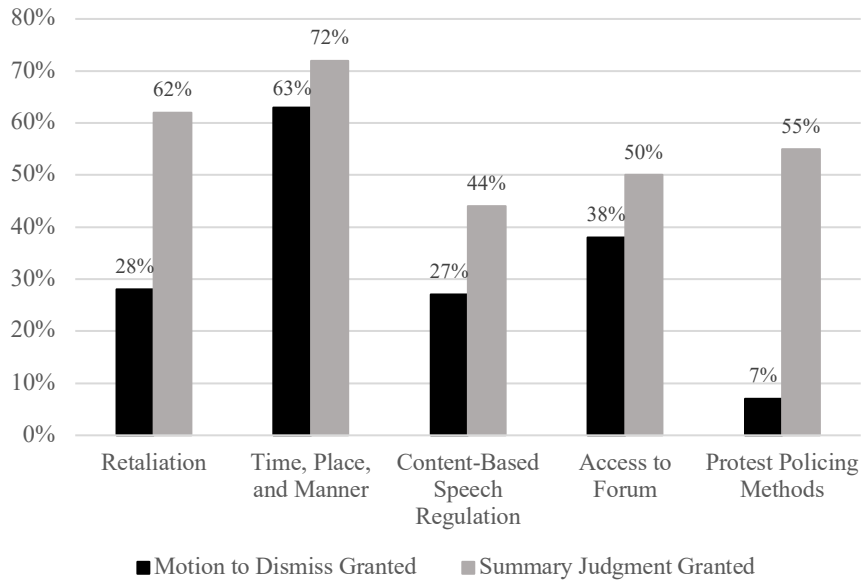
175. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–800 (1985).

actions taken against protesters who were recording law enforcement at public demonstrations. As discussed below, whether there is a First Amendment right to record police is an issue on which courts remain somewhat divided.[176]

ii. Claims Disposition Data

Figure 6 shows the success rates for qualified immunity motions respecting the five most common types of First Amendment claims.[177] Significant findings relate to the procedural posture of qualified immunity dispositions and the disparate success rates for qualified immunity motions challenging certain claims.

FIGURE 6. Q.I. Motion Success Rates by First Amendment Claim



Although some of the sample sizes are small, the data generally show that plaintiffs were able to keep claims alive at the pleadings stage. The success rate percentages for retaliation, content-based speech regulations,

176. *See infra* notes 225–27 and accompanying text; *see also* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1897 (2018) (discussing the circuit split on the right to record).

177. Since the dataset included only twelve "right to record" claims, the sample size was considered too small to produce any meaningful conclusions.

and access to forum claims were in line with the overall pleadings stage dismissal percentages reported earlier.[178]

Two claims produced unanticipated results. In qualified immunity motions respecting challenges to time, place, and manner regulations, defendants prevailed 63% (10/16) of the time. The judicial balancing that applies to time, place, and manner regulations generally requires consideration of factual context not typically available at the pleadings stage. The high success rate may reflect the deferential standard applicable to content-neutral time, place, and manner regulations, the uncertain state of the law as it pertains to application of the standard, the relative strength or weakness of the claims in the dataset, or some combination of these factors.

The other unexpected finding is that only 7% (1/14) of motions to dismiss First Amendment challenges to protest policing methods were successful. However, several of these claims relied on allegations that police had used aggressive policing methods against compliant and peaceful protesters or dispersed assemblies without cause or warning.[179] Taking those allegations as true, courts concluded they stated a clear violation of the First Amendment.

At summary judgment, defendants substantially prevailed on their qualified immunity motions, winning 72% (26/36) of time, place, and manner claims, 62% (33/53) of retaliation claims, and 55% (11/18) of claims challenging protest policing methods. Again, there were a couple of exceptions. Defendants were granted qualified immunity as to only 44% (11/25) of claims involving content-based speech regulations and won only 50% (10/20) of motions relating to claims involving access to public property. This may reflect the fact that the law in both areas is longstanding and relatively clear. As discussed, under the First Amendment, laws or regulations based on content face a heavy presumption of invalidity. Similarly, protesters have a presumptive right to access certain public properties including public parks, streets, and sidewalks.

iii. First Amendment Law and Protesters' Rights

The numbers paint an important, if only partial, picture when it comes to application of qualified immunity doctrine in First Amendment cases. The study was also designed to identify and critically analyze the substantive law

178. *See supra* Section II.A.1.

179. *See* Green v. City of St. Louis, 52 F.4th 734, 740 (8th Cir. 2022) (concluding that deploying tear gas against protesters who were not engaging in illegal activity violated clearly established First Amendment rights); *cf.* Quraishi v. St. Charles County, 986 F.3d 831, 838 (8th Cir. 2021) (holding that using tear gas or other law enforcement tactics to interfere with reporting activity violated clearly established First Amendment rights).

that has developed—or failed to develop—during application of qualified immunity doctrine. The law that matters most is controlling authority in a specific jurisdiction. However, using a qualitative assessment, we can get a more general sense of the development of substantive standards concerning protesters' First Amendment rights. The assessment that follows relies primarily on published appellate court decisions but, when useful in terms of filling some gaps, also considers published district court decisions.

Although retaliation claims were the most common in the Qualified Immunity dataset, the core First Amendment rights of protesters relate to access to public properties and the application of content neutrality standards there. Protesters rely on access to public forums such as public streets, parks, and sidewalks, as well as other public properties, to organize and participate in public demonstrations, rallies, and other events.

In public forum qualified immunity cases, several courts treated arbitrary, broad, and effective denials of access to public fora as First Amendment violations.[180] They also held that precedents clearly established protesters' rights to distribute pamphlets and have access to an audience in a public forum,[181] engage in peaceful residential picketing,[182] protest on private property with the owner's consent,[183] be present on State House grounds after 6:00 p.m.,[184] and engage in non-disruptive activity on a public sidewalk adjacent to a public school.[185]

180. *See* Collins v. Jordan, 110 F.3d 1363, 1371 (9th Cir. 1996) (holding that dispersing protesters absent evidence they are unlawful, violent, pose a clear and present danger of imminent violence, or violate some law violated the First Amendment); Dean v. Byerley, 354 F.3d 540, 559 (6th Cir. 2004) (holding that picketer has a First Amendment right to engage in peaceful targeted residential picketing); Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 898 (9th Cir. 2008) (concluding that the complete exclusion of plaintiffs from a public sidewalk violated the First Amendment); Huminski v. Corsones, 396 F.3d 53, 92–93 (2d Cir. 2004) (finding that although the right was not clearly established, issuance of trespass notices indefinitely excluding a protester from state courthouses and lands violated the First Amendment); McGlone v. Bell, 681 F.3d 718, 733–35 (6th Cir. 2012) (holding that a state university's fourteen business day advance notice requirement in policy requiring nonaffiliated individuals and groups to obtain permission before speaking on certain parts of its campus was an unconstitutional restriction on free speech); Occupy Columbia v. Haley, 738 F.3d 107, 125 (4th Cir. 2013) (holding that arresting protestors for their presence and protests on state house grounds after a certain time of day violated their First Amendment rights).

181. *See* Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1185 (11th Cir. 2009) (observing that while none of the cases "are on all fours with the instant case, and do not clearly elucidate the fact-specific rule that police may not create a police cordon that makes a protest rally totally ineffective," prior cases "need not be 'materially similar' to the present circumstances so long as the right is 'sufficiently clear that a reasonable official would understand that what he is doing violates that right' " and "[t]here need not . . . be a prior case wherein 'the very action in question has previously been held unlawful' "). The court concluded the defendants "had fair warning that Amnesty had a clearly established right to assemble, to protest, and to be heard while doing so." *Id.*

182. *Dean*, 354 F.3d at 559.

183. Jones v. Parmley, 465 F.3d 46, 58–59 (2d Cir. 2006).

184. *Occupy Columbia*, 738 F.3d at 125.

185. People for the Ethical Treatment of Animals v. Rasmussen, 298 F.3d 1198, 1204 (10th Cir.

However, appellate courts upheld several bans on protest in government properties other than public streets, parks, and sidewalks.[186] In addition, they concluded the following actions did *not* violate clearly established First Amendment rights to access public properties:

- Enforcing an invalid permit ordinance that violated the First Amendment, on the ground that the officer was entitled to rely on the ordinance;[187]
- Excluding a protester from state courthouse grounds and lands, because the "right of access to judicial proceedings" was not clearly established at the time;[188]
- Arresting a protester for refusing to move a rally from the sidewalk adjacent to Liberty Bell Center in Independence National Historic Park, because it was not clearly established at the time that the sidewalk was a public forum;[189]
- Promulgating and enforcing a curfew, since protestors did not have a clearly established right under the First Amendment to continuously occupy a plaza on state capitol grounds for an indefinite time;[190] and
- Denying a state university student's request to set up a table in the patio area outside the student union, since the right to access such space was not clearly established.[191]

As one might expect based on qualified immunity doctrine, the forum access precedents allow protesters to hold officials liable for egregious restrictions, including flat bans on access to traditional or quintessential public fora. However, they also permit officials to enforce otherwise unconstitutional permit requirements and exclude protesters from important venues on the ground that there is insufficient controlling authority addressing access to those places or no reasonable official would know this violated the First Amendment.

2002).

186. *See* Braun v. Baldwin, 346 F.3d 761, 765–66 (7th Cir. 2003) (finding that it was not a First Amendment violation to arrest a speaker for disorderly conduct when he distributed pro-jury nullification pamphlets inside a courthouse and refused to desist when ordered to do so); Oberwetter v. Hilliard, 639 F.3d 545, 554 (D.C. Cir. 2011) (concluding that arresting a protester for staging an unlawful performance inside the Jefferson Memorial did not violate a clearly established First Amendment right); Paff v. Kaltenbach, 204 F.3d 425, 433–34 (3d Cir. 2000) (holding that it was not a violation of the First Amendment to arrest political party activists for criminal trespass while they were leafleting on the sidewalk outside a U.S. Post Office on income tax day).

187. Grossman v. City of Portland, 33 F.3d 1200, 1210 (9th Cir. 1994).

188. Huminski v. Corsones, 396 F.3d 53, 68 (2d Cir. 2005).

189. Marcavage v. Nat'l Park Serv., 666 F.3d 856, 859 (3d Cir. 2012).

190. Occupy Nashville v. Haslam, 769 F.3d 434, 445–46 (6th Cir. 2014).

191. Turning Point USA at Ark. State Univ. v. Rhodes, 973 F.3d 868, 880 (8th Cir. 2020).

According to the decisions, it is difficult for protesters to prove a clearly established right to access a property unless that same property has been previously declared a public forum for First Amendment purposes. But when courts rely on the absence of controlling authority with respect to a public place, they fail to develop forum law. This is part of qualified immunity's "vicious cycle."[192]

Protesters also rely on courts to enforce content neutrality rules in public places. The data suggest they have done so unevenly and inconsistently. The Supreme Court has admonished lower courts not to define constitutional issues at a high level of generality but to rely only on controlling precedent.[193] Nevertheless, in some contexts, courts applied general doctrinal rules to deny qualified immunity. In these instances, failure to follow the Court's instructions benefitted protester plaintiffs.

For example, courts relied on the general principle that content-based regulations of expression violate the First Amendment. Based on that principle, they held that forcing abortion protesters to vacate a public sidewalk based on the content of their signs or arresting someone for, without more, burning an American flag violated clearly established First Amendment rights.[194] They also concluded, again based on general standards forbidding content-based speech regulations, that public university officials cannot prohibit student protests because of the content of their message and law enforcement officers violated the First Amendment when they made no serious effort to quell hecklers before shutting down a public protest.[195] Similarly, appellate courts held that it is clearly established that protesters cannot be arrested for communicating protected profanity.[196] Finally, one appeals court held that protesters cannot be arrested for engaging

192. Schwartz, *supra* note 24, at 1815.

193. White v. Pauly, 580 U.S. 73, 78–79 (2017).

194. *See* Cannon v. City and Cnty. of Denver, 998 F.2d 867, 878–79 (10th Cir. 1993) (holding arrest of anti-abortion protesters for carrying signs reading "the killing place" on public sidewalk violated the First Amendment); Logsdon v. Hains, 492 F.3d 334, 346 (6th Cir. 2007) (holding police officers who allegedly removed anti-abortion protester from public sidewalk based on the content of his expression were not entitled to qualified immunity); Snider v. City of Cape Girardeau, 752 F.3d 1149, 1158–59 (8th Cir. 2014) (concluding the First Amendment prohibits the arrest and prosecution of an individual for, without more, burning the American flag to express an opinion).

195. *See* Crue v. Aiken, 370 F.3d 668, 680–81 (7th Cir. 2004) (holding it is clearly established that the First Amendment protects the rights of students and faculty to address student athletes on the issue of the racist nature of mascot); Bible Believers v. Wayne County, 805 F.3d 228, 256 (6th Cir. 2015) (concluding that imposing content-based heckler's veto violated clearly established First Amendment rights; crowd's violence was not substantial, evangelists were peaceful, and officers made no serious attempt to quell hecklers).

196. *See* Sandul v. Larion, 119 F.3d 1250, 1256 (6th Cir. 1997) (concluding that well-established Supreme Court precedents demonstrate that saying "f—k you" to abortion protesters is constitutionally protected speech).

in an unusual form of dissent, on the ground that the First Amendment "protects bizarre behavior."[197]

By contrast, when courts followed qualified immunity law to the letter, they frequently upheld government actions that violated content neutrality rules. In several cases courts concluded defendants were entitled to qualified immunity even though they adopted or enforced content-based regulations. For example, courts held that the following actions and regulations did *not* violate clearly established First Amendment law:

- Ordering anti-abortion activists displaying fetuses near a middle school to disperse under a law prohibiting disruptive presence at schools;[198]
- Arresting protesters for demonstrating publicly in thong underwear;[199]
- Arresting the driver of a truck who painted words on the side of his truck indicating he was "a fucking suicide bomber communist terrorist!" with "W.O.M.D. on Board";[200]
- Excluding a protester from a welcoming ceremony authorized by U.S. Senate resolution for carrying a sign objecting to the intended disposition of Olympic dormitories for correctional purposes;[201]
- Preventing a journalist from engaging with a counter-protester, under threat of arrest, at a public library children's book reading event called "Drag Queen Story Hour";[202] and
- Excluding protesters from an official speech on private property because of the viewpoint of a message displayed on a bumper sticker on their car.[203]

In these instances, courts did not apply *general* content neutrality principles. Instead, they required that protesters identify controlling authority with facts similar or identical to those in the case under review—a case (or two) involving protesters in thong underwear or messages on bumper stickers, for example. With respect to novel claims, or at least claims

197. *See* Tobey v. Jones, 706 F.3d 379, 388 (4th Cir. 2013) (concluding the First Amendment "protects bizarre behavior," including airline passenger's right to display peaceful non-disruptive message in protest of government policy).

198. Ctr. for Bio-Ethical Reform v. L.A. Cnty. Sheriff Dep't., 533 F.3d 780, 794 (9th Cir. 2008).

199. Egolf v. Witmer, 526 F.3d 104, 111 (3d Cir. 2008).

200. Fogel v. Collins, 531 F.3d 824, 827 (9th Cir. 2008).

201. Kroll v. U.S. Capitol Police, 847 F.2d 899, 904 (D.C. Cir. 1988).

202. Saved Mag. v. Spokane Police Dep't., 19 F.4th 1193, 1195 (9th Cir. 2021).

203. Weise v. Casper, 593 F.3d 1163, 1169 (10th Cir. 2010).

courts viewed as such, they were quite strict about application of qualified immunity standards. To be fair to lower courts, even the Supreme Court has sometimes equivocated on the content neutrality point in the context of protests. The Court held in one case that it was not clearly established that Secret Service agents bore a responsibility to ensure that protest groups with different viewpoints had access to comparable locations during a presidential visit.[204] Even so, looking for precedential twins and dead ringers in highly context-specific protest cases led courts to uphold qualified immunity.

Protesters' speech and assembly rights are substantially affected by the enforcement of time, place, and manner regulations. Here, too, the data show very mixed success for protester plaintiffs. In several cases challenging time, place, and manner restrictions, courts concluded protesters had either not alleged or adduced evidence of a First Amendment violation.[205] In others, courts concluded that the applicable law concerning time, place, and manner was not clearly established:

- The Fourth Circuit held that a reasonable officer could have believed, in 2005, that prohibiting an abortion protester from displaying large, graphic signs depicting aborted fetuses at a major intersection was lawful because case law from the Fourth Circuit and Supreme Court was ambiguous on that issue.[206]
- The Ninth Circuit concluded that denial of protestors' application for a march permit without a promise on protestors' part not to engage in

204. Wood v. Moss, 572 U.S. 744, 759–60 (2014).

205. *See* Frye v. Kansas City Missouri Police Dep't., 375 F.3d 785, 790 (8th Cir. 2004) (holding officers did not violate the First Amendment when they ordered anti-abortion protesters to relocate signs depicting aborted fetuses, which were distracting to drivers); Hartman v. Thompson, 931 F.3d 471, 480–81 (6th Cir. 2019) (holding it did not violate the First Amendment to move protesters to a speech zone at a state fair); Kass v. City of New York, 864 F.3d 200, 209 (2d Cir. 2017) (concluding that ordering person obstructing sidewalk to move along or use protest zone did not violate the First Amendment); Marcavage v. City of Chicago, 659 F.3d 626, 631 (7th Cir. 2011) (city police officers did not violate the First Amendment free speech rights of religious organization's members by refusing to permit them to stand on sidewalks leading to homosexual athletic and cultural events in order to conduct outreach activities, despite members' contention that alternative venues were inadequate); Marcavage v. City of New York, 689 F.3d 98, 109 (2d Cir. 2012) (holding city's restrictions on expressive activity on a public sidewalk during a national political convention did not violate protestors' First Amendment rights; city had significant interest in keeping the sidewalk across from an arena in which the convention was being held clear for pedestrians and in maintaining security, and even though there were no specific threats of violence, where area was generally crowded, the sidewalk next to the arena had been closed to pedestrian traffic, fifty thousand attendees were expected for the convention itself, and the President, Vice President, and other government officials were attending the convention); Pahls v. Thomas, 718 F.3d 1210, 1234–35 (10th Cir. 2013) (holding enforcing viewpoint-neutral policy to move protesters to the south side of a road while opponents were allowed to stay in a more favorable location on private property did not violate the First Amendment); Ross v. Early, 746 F.3d 546, 558 (4th Cir. 2014) (enforcement of a free speech zone against demonstrator who was arrested for leafleting outside of designated area near arena did not violate the First Amendment).

206. Lefemine v. Wideman, 672 F.3d 292, 300–01 (4th Cir. 2012), *vacated*, 568 U.S. 1 (2012).

civil disobedience was unlawful, but the condition did not violate clearly established First Amendment rights under controlling circuit and Supreme Court precedent.[207]

- The D.C. Circuit held that a reasonable police officer could have believed that, given its proximity to the Capitol, a protest on the East Front sidewalk of the U.S. Capitol was subject to different First Amendment standards than apply in similar public properties.[208] The court also agreed with the government's assertion that because narrow tailoring is " 'not an exact science,' a reasonable officer should not be expected to perform that analysis prior to arresting an individual for violating a time, place, and manner restriction governing expressive activity in a public forum."[209]

As critics of qualified immunity doctrine have complained, in determining whether the law of time, place, and manner was clearly established, some courts engaged in factual parsing and line-drawing. For example, the Ninth Circuit concluded that relegation of a public prayer event to a "First Amendment area" burdened the plaintiffs' speech to a substantially greater degree than necessary to achieve the government's purposes.[210] However, the court held officials were entitled to qualified immunity because the relevant case law indicated that time, place, and manner doctrine, in particular the narrow tailoring requirement, distinguished between claims that an audience is essential to the message being conveyed and claims that location was essential for that purpose.[211] Since plaintiffs were challenging the regulation based on *locational* as opposed to *audience* proximity, the court reasoned, a reasonable official would not have had sufficiently clear legal guidance to avoid violating the plaintiffs' First Amendment rights.[212] The Ninth Circuit's "narrow tailoring" analysis highlights a central challenge plaintiffs face in terms of identifying clearly established law.

Protesters also brought First Amendment challenges to various protest policing methods, including issuance of unlawful dispersal orders, use of less-lethal weapons during protest events, and surveillance of protest groups. The Eleventh Circuit held that using cordons or barriers that prevent protesters from being seen or heard by anyone violates the First

207. Galvin v. Hay, 374 F.3d 739, 746–47 (9th Cir. 2004).
208. Lederman v. United States, 291 F.3d 36, 47–48 (D.C. Cir. 2002).
209. *Id.* at 47.
210. *Galvin*, 374 F.3d at 755.
211. *Id.* at 757.
212. *Id.*

Amendment.[213] Several courts held that arbitrary dispersals of otherwise lawful public protests violate clearly established First Amendment law.[214] Courts also concluded that deploying tear gas and other less-lethal munitions against protesters who are not engaging in any illegal activity is unconstitutional.[215] Finally, the Ninth Circuit held that government officials violated clearly established First Amendment law when they conducted an eight-month investigation into a vocal, but entirely peaceful group.[216]

However, results changed dramatically if courts discerned even an inkling of disruption or potential for violence at a public protest. In that event, they were far more likely to give law enforcement the benefit of the doubt in terms of protest-policing methods. For example, courts held that confiscating signs at demonstrations, using tear gas against protesters blocking egress from an industrial plant, arresting protesters who refused law enforcement directives to use a "free speech zone," and making preemptive arrests did not violate the First Amendment or did not violate clearly established law.[217] In sum, while peaceful and compliant protesters were successful in pursuing challenges to protest policing methods, evidence or even allegations of disruption or potential for violence made success far less likely.

213. *See* Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1184–85 (11th Cir. 2009) (holding that the creation of a cordon that rendered a protest ineffective by preventing protesters from being seen or heard by anyone violated First Amendment rights).

214. *See* Collins v. Jordan, 110 F.3d 1363, 1371–73 (9th Cir. 1996) (explaining that it is clearly established law that protests cannot be dispersed on ground they are unlawful unless they are violent or pose a clear and present danger of imminent violence or they are violating some other law in the process; a reasonable officer could not have believed that violent protests that occurred in the wake of a verdict in a highly publicized criminal trial in another city justified a ban on all public demonstrations the following evening); Davidson v. City of Stafford, Texas, 848 F.3d 384, 393–94 (5th Cir. 2017) (holding that arresting an anti-abortion protester while he was protesting outside an abortion clinic, without actual or arguable probable cause to support arrest, violated clearly established First Amendment rights).

215. *See* Green v. City of St. Louis, 52 F.4th 734, 740 (8th Cir. 2022) (concluding that deploying tear gas against protesters who were not engaging in illegal activity violated clearly established First Amendment rights); *cf.* Quraishi v. St. Charles Cnty., 986 F.3d 831, 839 (8th Cir. 2021) (explaining that it was clearly established that using tear gas or other law enforcement tactics to interfere with reporting activity violated First Amendment).

216. White v. Lee, 227 F.3d 1214, 1239 (9th Cir. 2000).

217. *See* Allen v. Cisneros, 815 F.3d 239, 245 (5th Cir. 2015) (concluding that confiscation of shofar and signs at a demonstration did not violate the plaintiff's first amendment rights); Ellsworth v. City of Lansing, No. 99-1045, 2000 U.S. App. LEXIS 2049, at *8 (6th Cir. Feb. 10, 2000) (concluding that use of tear gas against picketers blocking egress from industrial plant did not violate the First Amendment); Marcavage v. City of New York, 689 F.3d 98, 110 (2d Cir. 2012) (holding that probable cause supported protestors' warrantless arrests for obstruction of governmental administration, where protestors rejected seventeen directives by three officers to leave no-demonstration zone, insisting on their constitutional right to demonstrate where they stood); Cross v. Mokwa, 547 F.3d 890, 897 (8th Cir. 2008) (explaining that it was not clearly established that a police officer could be liable on a prior restraint theory for conducting a search and making arrests supported by probable cause when occupants of condemned buildings were there illegally).

As noted earlier, the most frequently pursued First Amendment claim was that officials unlawfully retaliated against protesters for engaging in protected speech and assembly.[218] Lower federal court decisions in the Qualified Immunity dataset did not produce much law concerning First Amendment retaliation claims. Retaliation claims often turn on the motive of the defendant, thus making them poor vehicles for establishing bright line rules.[219] They are also fact-dependent in other ways.

In a typical case, the Eighth Circuit held that when protesters moved toward officers "in a threatening manner" and blocked traffic, "[a] reasonable officer could conclude that this conduct violated Minnesota law and was not protected speech."[220] Further, the court concluded that since there was no evidence the protesters had been singled out while other similarly situated speakers had not been arrested, "[t]he only reasonable inference supported by the record is that the group's unlawful conduct, not the protected speech, motivated the officers' actions."[221]

Nevertheless, a few retaliation decisions produced intriguing results. In one case, a district court held that retaliating against protesters for their speech by surveilling them and pointing a red laser from a sniper rifle at a group member during a speech violated the First Amendment.[222] In an unpublished decision, the Ninth Circuit concluded that a reasonable official would know that directing a train into the path of demonstrators, one of whom lost his legs as a result, to stop a protest violated the First Amendment.[223] In these decisions, at least, the courts did not point to any prior precedent with similar facts. Perhaps when the facts are so egregious, courts are willing to bend the clearly established standard.

Finally, courts addressed claims that officers violated the First Amendment when they interfered with or prevented the recording of officers as they engaged in protest policing. As Joanna Schwartz has observed, "[c]oncerns that the Court's qualified immunity jurisprudence renders the Constitution hollow are even more acute for constitutional claims involving new technologies and techniques."[224] Several courts have held that there is a First Amendment right to record police at a public protest and that right is

218. Hartman v. Moore, 547 U.S. 250, 256 (2006).

219. *See, e.g.*, Brown v. City of St. Louis, No. 18 CV 1676, 2022 U.S. Dist. LEXIS 85588, at *13 (E.D. Mo. May 12, 2022) (explaining that protesters' retaliation claim failed because they did not show officers were aware of their presence, that they objected in any way to their presence or activities, or that they intentionally directed the pepper spray at them because of their First Amendment activities).

220. Bernini v. City of St. Paul, 665 F.3d 997, 1007 (8th Cir. 2012).

221. *Id.*

222. Black Lives Matter v. Town of Clarkstown, 354 F. Supp. 3d 313, 327 (S.D.N.Y. 2018).

223. Willson v. Hubbard, No. 88-15671, 1990 WL 43011, at *2 (9th Cir. Apr. 6, 1990).

224. Schwartz, *supra* note 24, at 1817.

clearly established.[225] However, other courts have held that at the time of the alleged violation, the right to record was not clearly established or not apparent to all reasonable officers.[226] Courts have also observed that the right is not unlimited, and that arresting protesters for recording officers in ways that interfere with their duties does not violate clearly established law.[227]

In sum, First Amendment decisions in the Qualified Immunity dataset demonstrate many of the pathologies of qualified immunity doctrine. While courts have held that egregious forms of governmental abuse can be the basis for a claim under section 1983, they have also upheld qualified immunity in cases involving denial of access to public fora, content discrimination, and questionable time, place, and manner regulations. Courts have applied the doctrine inconsistently, sometimes relying on general principles and in other instances demanding precise controlling authority.

We also learned that although wholly peaceful and compliant protesters can pursue claims for damages, at the first sign of disruption or potential violence, courts deferred to officers' choice to use aggressive protest policing methods. In terms of retaliation, government actors *probably* cannot mow down demonstrators with a train—although the only opinion on this matter is unpublished and is not controlling authority concerning other types of conveyances. Again, in instances in which the facts are truly egregious, courts may apply the qualified immunity standard more flexibly. Finally, the

225. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that there is a First Amendment right to record the police at a public protest, but that plaintiffs did not demonstrate the right had been violated); Gericke v. Begin, 753 F.3d 1, 10 (1st Cir. 2014) (holding that arresting person for attempting to film officer in a public place and in the absence of any order to stop filming violated the plaintiff's First Amendment rights); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (concluding that arresting citizens for filming law enforcement officers in the discharge of their duties in a public space violates the First Amendment).

226. *See* Fields v. City of Philadelphia, 862 F.3d 353, 361–62 (3d Cir. 2017) (explaining that there is a First Amendment right to record police, but it wasn't clear that the law gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording police activity at a public protest was constitutionally protected; there was "no robust consensus" concerning the right to record police in public places); Fordyce v. City of Seattle, 55 F.3d 436, 439–40 (9th Cir. 1995) (concluding that all individual police officers were entitled to qualified immunity with respect to plaintiff's section 1983 damages claims relating to his arrest under a Washington statute prohibiting the recording of private conversations; at time of arrest, whether and under what circumstances conversations in public streets could be deemed private within the meaning of the privacy statute was not yet settled under state law and under the facts, a reasonable officer could have believed the plaintiff was recording private conversations in violation of the statute); *see also* Blum, *supra* note 176, at 1895 (noting the circuit split on the right to record).

227. *See, e.g.*, Fleck v. Trs. of Univ. of Pa., 995 F. Supp. 2d 390, 398, 408 (E.D. Pa. 2014) (concluding that a preacher engaging in disruptive behavior in a mosque entryway did not have a clearly established right to continue to record a police officer while holding camera close to the officer's face after the officer requested that the preacher stop recording).

cases indicate that not all appellate courts have concluded that there is a clearly established First Amendment right to record police at demonstrations.

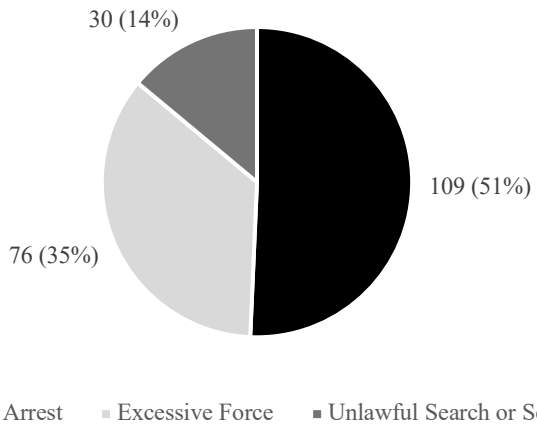
3. Fourth Amendment Claims

The Qualified Immunity dataset includes court decisions in which 215 Fourth Amendment claims were the subject of defense qualified immunity motions. Although the data support some clear limitations on governmental actions under the Fourth Amendment in the protest context, they also demonstrate an overall lack of substantive development.

i. Types of Claims

Figure 7 shows the most common Fourth Amendment claims plaintiffs pursued in the cases in the Qualified Immunity dataset. The general standards governing these 215 Fourth Amendment claims are well-established.

FIGURE 7. Types of Fourth Amendment Claims



The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures."[228] To prevail on a claim for false arrest, a plaintiff must demonstrate that officers lacked probable cause to make the arrest. Probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in

228. U.S. CONST. amend. IV.

the belief that the person to be arrested has committed or is committing a crime.[229] The existence of probable cause to arrest, even for a very minor offense, is a complete defense to a Fourth Amendment false arrest claim.[230]

In an excessive force claim, a plaintiff must show that the use of force was excessive under the facts and circumstances presented.[231] In making this determination, the Supreme Court has instructed lower courts to pay "careful attention" to factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[232] As the Court has emphasized, "[t]he '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."[233]

Finally, a seizure of the person occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*."[234] To be valid under the Fourth Amendment, a seizure or detention must be reasonable under the circumstances. Under the Fourth Amendment, an officer may seize an individual's property from a public area "only if Fourth Amendment standards are satisfied—for example, if the items are evidence of a crime or contraband."[235] Officers may also conduct searches incident to arrest when they have reasonable suspicion contraband is present.[236]

ii. Claims Disposition Data

The success rates for defense motions to dismiss or for summary judgment based on qualified immunity are shown in Figure 8. The same caveats that applied to determining successful disposition of defense motions respecting First Amendment claims apply to Fourth Amendment claims. The findings count granted motions to dismiss and for summary judgment, and appellate court rulings upholding those grants as successful whether or not plaintiffs amended their complaints or their claims were considered on remand after appeal. The success rates are, as indicated, snapshots of dispositions in reported decisions available on Westlaw.

229. Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979).

230. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

231. Graham v. Connor, 490 U.S. 386, 396 (1989).

232. *Id.*

233. *Id.*

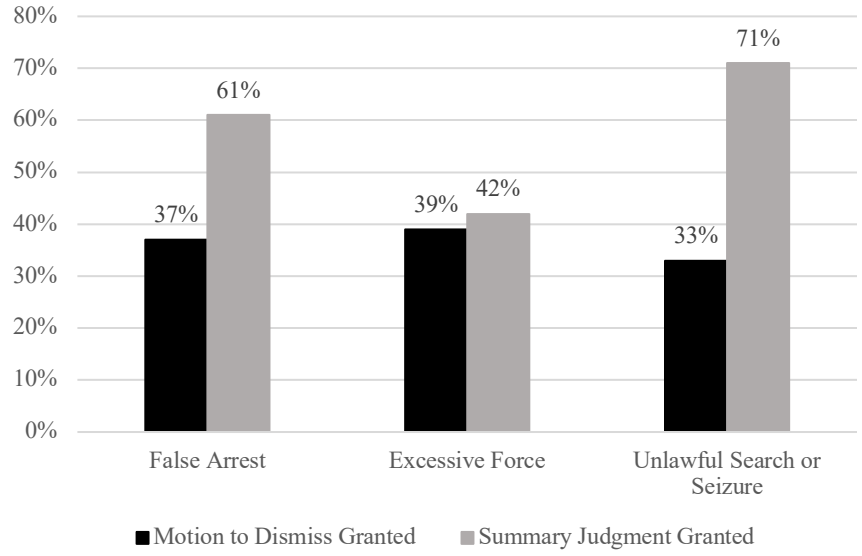
234. Brower v. Cnty. of Inyo, 489 U.S. 593, 597 (1989); *see* Torres v. Madrid, 141 S. Ct. 989, 998 (2021).

235. Soldal v. Cook Cnty., 506 U.S. 56, 68 (1992).

236. Terry v. Ohio, 392 U.S. 1, 30 (1968).

Figure 8 shows that, like the First Amendment claims in the dataset, two-thirds or more of Fourth Amendment claims survived defense motions to dismiss. By contrast, at summary judgment, courts were much more inclined to grant or uphold qualified immunity for defendants for false arrest (61% or 48/79 claims) and unlawful search or seizure (71% or 15/21 claims).

FIGURE 8. Q.I. Motion Success Rates by Fourth Amendment Claim



As discussed earlier in the general data findings, when addressing qualified immunity respecting Fourth Amendment claims, courts were more likely to grant immunity at Step One. In those instances, courts held that no violation had occurred, instead of concluding that there was a lack of clearly established law at Step Two.[237] As we have seen, courts were overall likely to grant defense motions for summary judgment. But the high rate of summary judgment for false arrest and unlawful search and seizure claims likely also reflects the deferential probable cause and reasonableness standards that apply to such claims.

The exception was defense motions for summary judgment on excessive force claims, which succeeded only 42% (19/45) of the time. As discussed below, several courts held that law enforcement uses of force

237. *See supra* Section III.A.1.

against peaceful assemblies or compliant protesters constituted clear Fourth Amendment violations.[238] In other cases, courts concluded that the degree or amount of force used against protesters violated clearly established Fourth Amendment standards.[239] These decisions account for the lower defense success rates regarding excessive force claims at summary judgment.

iii. Fourth Amendment Law and Protesters' Rights

Substantive Fourth Amendment law in the context of public protest has developed slowly in lower courts. Like the discussion of First Amendment law, the following analysis focuses primarily on published federal courts of appeals decisions to assess what substantive Fourth Amendment law has been established. However, it also considers district court decisions that apply circuit precedents in Fourth Amendment qualified immunity determinations.

Appellate courts consistently held that arresting protesters without actual or arguable probable cause violated clearly established Fourth Amendment law.[240] They also concluded that it is a clear violation of the Fourth Amendment to arrest protesters without first issuing a dispersal order (although one district court held that officers are under no obligation to determine whether the order is lawful prior to enforcing it).[241] Notwithstanding these limits, courts applied a flexible probable cause standard and upheld arrests for various offenses, some very minor—using noise amplification near an abortion clinic,[242] falling asleep in a zipped tent in a public park,[243] openly carrying firearms on a public fishing pier,[244] burning the Mexican flag in public without a permit,[245] and unfurling a banner outside a designated "speech zone."[246]

Fourth Amendment law is unsettled when it comes to the validity of protesters' arrests for engaging in protected expression. The Eighth Circuit

238. *See infra* notes 252–54 and accompanying text.

239. *See infra* notes 252–54 and accompanying text.

240. *See* Davidson v. City of Stafford, 848 F.3d 384, 393–94 (5th Cir. 2017) (concluding that the arrest of an anti-abortion protester without probable cause violated clearly established Fourth Amendment law).

241. *See* Barham v. Ramsey, 434 F.3d 565, 573 (D.C. Cir. 2006) (holding that arresting protesters without first providing a dispersal order violated clearly established Fourth Amendment rights); Bidwell v. Cnty. of San Diego, 607 F. Supp. 3d 1084, 1099–100 (S.D. Cal. 2022) (finding no violation of clearly established Fourth Amendment law when officers failed to engage in an "individualized inquiry" regarding validity of dispersal order).

242. Duhe v. City of Little Rock, 902 F.3d 858, 861–63 (8th Cir. 2018).

243. Williamson v. Cox, 952 F. Supp. 2d 176, 184 (D.D.C. 2013).

244. Fla. Carry, Inc. v. City of Mia. Beach, 564 F. Supp. 3d 1213, 1233 (S.D. Fla. 2021).

245. Bohmfalk v. City of San Antonio, No. SA-09-CV-0497, 2009 U.S. Dist. LEXIS 109710, at *11 (W.D. Tex. 2009).

246. Asprey v. N. Wyo. Cmty. Coll. Dist., 823 F. App'x. 627, 633–34 (10th Cir. 2020).

held that arresting protesters solely for engaging in protected speech violates clearly established Fourth Amendment rights.[247] Similarly, the Sixth Circuit held that the law was clearly established that a county fair patron could not be arrested for disorderly conduct based on his spewing profanities at police and a fairgrounds executive director when he was being escorted off the fairgrounds (apparently for wearing a shirt stating "Fuck the Police").[248]

However, a federal district court applying circuit law concluded that officers who arrested a protester for anonymous comments made *by others* on his livestream after he posted the Chief of Police's address did not violate clearly established Fourth Amendment law.[249] Another district court held that officers did not act recklessly, negligently, or unreasonably in relying on a fellow officer's determination that probable cause existed to arrest a protester for walking along the public sidewalks displaying "a gigantic Styrofoam middle finger emblazoned with the letters 'Fuck cops.' "[250] A district court also held that officers did not violate clearly established Fourth Amendment law when they arrested a protester for "interference" when he refused to relinquish a camera—something he otherwise had a right to possess under the circumstances—when ordered to do so.[251]

As these decisions demonstrate, probable cause reasonableness standards make it difficult for courts to develop clearly established law concerning false arrest. As in other areas, egregious mass arrests and other actions not supported by *any* probable cause have been condemned as violating clearly established Fourth Amendment law. However, precedents show that even arrests closely related to, if not directly based on protected expression, have been the basis for qualified immunity for Fourth Amendment claims. The absence of precedents addressing similar or nearly identical circumstances has prevented courts from recognizing some clear constitutional violations.

In terms of excessive force claims, courts have consistently held that using less-lethal force, such as pepper spray and tear gas, against compliant and peaceful protesters violates clearly established Fourth Amendment law.[252] The same goes for using other types of force when arresting or

247. *See* Baribeau v. City of Minneapolis, 596 F.3d 465, 478–79 (8th Cir. 2010) (concluding that the arrest of protesters for playing music, broadcasting statements, dressing as zombies, and walking erratically violated clearly established Fourth Amendment rights).

248. Wood v. Eubanks, 25 F.4th 414, 425–27 (6th Cir. 2022).

249. Zinter v. Salvaggio, 610 F. Supp. 3d 919, 939–40 (W.D. Tex. 2022) (observing that the speaker had not identified any case law indicating that arrest based on others' anonymous comments was unlawful).

250. Brandt v. City of Westminster, 300 F.Supp.3d 1259, 1264, 1273 (D. Colo. 2018).

251. *Zinter*, 610 F. Supp. 3d at 941.

252. *See* Buck v. City of Albuquerque, 549 F.3d 1269, 1291 (10th Cir. 2008) (concluding that the

subduing a compliant protester.[253] Driving a train into a crowd of peaceful demonstrators *may* constitute excessive force, although the only decision reaching that conclusion is unpublished.[254]

However, as was true of some First Amendment claims, excessive force results sometimes hinged on whether the protest was *wholly* peaceful and non-disruptive. Courts held that the use of less-lethal munitions to disperse violent or unruly protests, tasing protesters in the context of "hostile" protest environments, and even kicking or choking protesters who refused to comply with officers' commands did *not* constitute excessive force under the Fourth Amendment.[255]

law was clearly established that the use of force against nonviolent antiwar protestors facing misdemeanor charges, who did not flee or actively resist arrest, was excessive); Fogarty v. Gallegos, 523 F.3d 1147, 1163 (10th Cir. 2008) (concluding that the law was clearly established that the use of pepper balls and tear gas against non-resisting protesters constitutes excessive force under the Fourth Amendment); Headwaters Forest Def. v. Cnty. of Humboldt, 276 F.3d 1125, 1130–31 (9th Cir. 2002) (concluding that the use of pepper spray on a gathering of fewer than ten protesters when they already had control of the crowd and could have used more peaceful methods of maintaining public order violated clearly established law concerning excessive force); Johnson v. City of San Jose, 591 F. Supp. 3d 649, 662–63 (N.D. Cal. 2022) (holding that it was clearly established at the time that a police officer shot a protester with a foam projectile as the protester attempted to leave the scene of the protest that firing a less lethal projectile that risked causing serious harm at an individual who was not an imminent threat to officers in the midst of an allegedly unlawful assembly, resulting in an injury restricting the movement of that individual, amounted to a seizure and an excessive use of force); Laird v. City of St. Louis, 564 F. Supp. 3d 788, 800–01 (E.D. Mo. 2021) (holding it was unreasonable to use pepper spray against a protestor, throw him against the wall, kick and choke him while he was handcuffed, and dragged another protestor across pavement, when the protesters were nonviolent misdemeanants who did not flee or actively resist arrest and posed no threat to the security of the officers or the public); Lamb v. City of Decatur, 947 F. Supp. 1261, 1264–65 (C.D. Ill. 1996) (concluding that pepper spraying peaceful and non-resisting demonstrators violates the Fourth Amendment's ban on the use of unnecessary force).

253. *See Zinter*, 610 F. Supp. 3d at 955 (holding that Fifth Circuit precedents clearly established that "once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive") (quoting Carroll v. Ellington, 800 F.3d 154, 177 (5th Cir. 2015)); Jones v. City of St. Louis, 599 F. Supp. 3d 806, 821 (E.D. Mo. 2022) (holding that "[u]nder Eighth Circuit precedent, it was 'clearly established' . . . that the 'gratuitous' use of force 'against a suspect who is handcuffed, not resisting, and fully subdued [was] objectively unreasonable under the Fourth Amendment' ") (quoting Krout v. Goemmer, 583 F.3d 557, 566 (8th Cir. 2009)).

254. Willson v. Hubbard, No. 88-15671, 1990 WL 43011, at *2 (9th Cir. Apr. 6, 1990).

255. *See* Bernini v. City of St. Paul, 665 F.3d 997, 1006 (8th Cir. 2012) (concluding that the use of non-lethal munitions to disperse a violent crowd did not amount to the use of excessive force under the Fourth Amendment); Lash v. Lemke, 786 F.3d 1, 10 (D.C. Cir. 2015) (holding that tasing a protester in the context of a hostile protest environment does not constitute use of excessive force in violation of the Fourth Amendment); *Laird*, 564 F. Supp. 3d at 800–01 (concluding that it was not clearly established that herding protestors to an intersection where officers deployed pepper spray against one protestor, threw him against the wall, kicked and choked him while he was handcuffed, and dragged another protestor across pavement, or that kettling detainees or applying zip cuffs too tightly rose to the level of excessive force); Poemoceah v. Morton Cnty., No. 20-cv-00053, 2020 U.S. Dist. LEXIS 249116, at *23–24 (D.N.D. Dec. 29, 2020) (concluding that tackling a protester did not violate clearly established Fourth Amendment law); Abdur-Rahim v. City of Columbus, 825 F. App'x. 284, 288 (6th Cir. 2020) (finding that pepper spraying a protester after repeated orders to disperse did not violate a clearly established Fourth Amendment right).

Several district courts also rejected excessive force claims concerning the use of handcuffs or zip ties so tight they caused physical injuries to protesters. In some cases, courts reasoned that under circuit precedent, only force *sufficient to break a person's wrist* violated clearly established Fourth Amendment law.[256] The handcuffing/zip tie decisions demonstrate how the requirement that plaintiffs identify controlling precedent with the same facts undermines constitutional rights and prevents plaintiffs from being compensated for injuries. Absent a particular circuit court or Supreme Court decision (or perhaps more than one) holding that inflicting pain through bindings short of breaking the person's wrist violates the Fourth Amendment, a protester plaintiff cannot recover even for serious injuries.

Several decisions in the Qualified Immunity dataset addressed the law as it relates to seizures under the Fourth Amendment. Some courts have held that warrantless seizures of protesters' signs and other possessions violated the Fourth Amendment.[257] By contrast, when officers had probable cause to believe the item was unlawful, or reasonable suspicion it could be dangerous, courts have upheld seizures of items including shofars and firearms.[258] The fact that a shofar could "reasonably" be considered dangerous highlights the deference officers enjoy under Fourth Amendment cause and suspicion standards.

District courts applying circuit precedents disagreed concerning whether law enforcement uses of less-lethal weapons such as tear gas, pepper spray, and projectiles constituted "seizures" under the Fourth Amendment.[259] Some decisions suggested that the answer turns on whether

256. *See* Robertson v. City of St. Louis, No. 18-CV-01570, 2021 U.S. Dist. LEXIS 186855, at *22 (E.D. Mo. Sept. 29, 2021) (concluding that the use of zip ties to detain arrested protesters did not violate clearly established Fourth Amendment law concerning excessive force because it has not been clearly established that anything less than force that breaks the person's wrist constitutes excessive force); Thomas v. City of St. Louis, No. 18-CV-01566, 2021 U.S. Dist. LEXIS 193964, at *23 (E.D. Mo. Oct. 7, 2021) (explaining that it is not clearly established that applying zip ties too tightly violates the Fourth Amendment); Zinter v. Salvaggio, 610 F. Supp. 3d 919, 953 (W.D. Tex. 2022) (explaining that in the Fifth Circuit, tight handcuffing that causes acute contusions of the wrist is insufficient to demonstrate excessive force).

257. *See* Menotti v. City of Seattle, 409 F.3d 1113, 1154 (9th Cir. 2005) (concluding that the seizure of a protester's sign without an arrest and without exigency offended the Fourth Amendment); Bloem v. Unknown Dep't of the Interior Emps., 920 F. Supp. 2d 154, 166 (D.D.C. 2013) (concluding that the seizure of expressive materials from a park absent probable cause constitutes a Fourth Amendment violation).

258. *See* Allen v. Cisneros, 815 F.3d 239, 245 (5th Cir. 2016) (concluding that the confiscation of a shofar and signs carried at a protest in violation of law restricting size of items did not violate the plaintiff's Fourth Amendment rights); Torossian v. Hayo, 45 F. Supp. 2d 63, 68 (D.D.C. 1999) (upholding the confiscation of protest signs and the cursory search of protesters when the counter-demonstration was unlawful); *Zinter*, 610 F. Supp. 3d at 948 (concluding that the temporary seizure of a protester's openly carried firearm and recording devices did not violate the Fourth Amendment).

259. *Compare* De Mian v. City of St. Louis, 625 F. Supp. 3d 864, 873 (E.D. Mo. 2022) (explaining that it was not clearly established at the time police officers allegedly deployed pepper spray against a

the protester's movement was otherwise constrained, which implies that the use of less-lethal munitions by itself does not constitute a "seizure."[260] Other courts expressly held that the use of tear gas and other munitions can constitute a "seizure."[261] At present, there is a lack of consensus or appellate authority on this important issue.[262]

Courts have also upheld brief detentions and searches incident to detention during public protests.[263] They considered such actions justified as means of maintaining public safety and order. In some decisions, courts again relied on narrow factual distinctions relating to the detentions in determining whether they violated clearly established law. For example, although prior precedents in a circuit had established that a two-hour detention in which the plaintiff was handcuffed and detained in the back of a police cruiser was an unlawful seizure, a district court observed that in the case before it, protesters were not handcuffed, were not placed in the back of

protestor at a protest that deploying pepper spray on a person who was free to leave constituted a seizure for the purposes of an excessive force claim under the Fourth Amendment), Dundon v. Kirchmeier, 577 F. Supp. 3d 1007, 1036–37, 1040 (D.N.D. 2021) (concluding that law enforcement officers' use of less-lethal force, including water cannons, tear gas, and flash-bang grenades, against protestors of oil pipeline construction did not constitute a Fourth Amendment "seizure" supporting an excessive force claim, even though some protestors were subject to force while moving away from officers, since force was used to disperse protestors, not detain them, officers remained behind a blockade on the north side of a bridge, officers did not march toward protestors in an attempt to detain them, herd them into a certain location in such a way that protestors were unable to get away, or encircle them without a way out, and all protestors were free to leave to the south and disengage law enforcement contact), Brown v. City of St. Louis, No. 18 CV 1676, 2022 U.S. Dist. LEXIS 85588, at *14 (E.D. Mo. May 12, 2022) (concluding that pepper spraying protesters does not constitute a "seizure" under the Fourth Amendment; there is no evidence that the officer detained or arrested the protesters or directed them to stop or stay in place, nor were there any barriers to her leaving the scene), *and* Molina v. City of St. Louis, No. 17-CV-2498, 2021 U.S. Dist. LEXIS 62677 at *32 (E.D. Mo. Mar. 31, 2021) (concluding that protesters were not seized within the meaning of the Fourth Amendment when they merely felt the effects of tear gas without suffering any corporal impact), *with* Johnson v. City of San Jose, 591 F. Supp. 3d 649, 659 (N.D. Cal. 2022) (concluding that shooting a protester with a foam projectile as the protester attempted to leave the scene of the protest amounted to a seizure and an excessive use of force), *and* Jennings v. City of Miami, No. 07-23008-CIV, 2009 U.S. Dist. LEXIS 5430, at *22 (S.D. Fla. Jan. 27, 2009) (noting that the protesters alleged a seizure under the Fourth Amendment from the use of pepper spray, tear gas and other devices and holding it is a violation of the Fourth Amendment to use these methods of "herding" peaceful protesters).

260. *Dundon*, 577 F. Supp. 3d at 1034–35.

261. *Johnson*, 591 F. Supp. 3d at 662–63.

262. *See* Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. DAVIS L. REV. 347, 352–58 (2021) (arguing that courts should treat the use of tear gas against protesters as a "seizure").

263. *See, e.g.*, Marcavage v. City of Philadelphia, 481 F. App'x. 742, 749–50 (3d Cir. 2012) (holding that police officers' brief detention of a counter-protester at a gay pride march was reasonable when officers had reasonable articulable suspicion that one of the counter-protester's group members was involved in a physical altercation with a march participant, the counter-protester approached a group that was with a member and started arguing with officers, the seizure did not last for much more than one minute and the force applied was reasonable, and the detention ended once the situation with the counter-protester, his group, the crowd, and officers was stabilized); *Zinter*, 610 F. Supp. 3d at 948 (W.D. Tex. 2022) (noting the lack of clearly established law that an officer violates the Fourth Amendment by stopping a potential witness for several minutes and demanding his recording devices).

police vehicles, and were released after approximately one hour.[264] Thus, the district court held, circuit precedents did not make clear to "every reasonable official" that detaining witnesses to a crime, without handcuffs and without moving them to a police vehicle, violated the Fourth Amendment.[265]

Fourth Amendment qualified immunity decisions exhibited some of the same pathologies as First Amendment decisions. While courts condemned some egregious law enforcement practices, they declined to recognize others as violations of clearly established law. Courts relied on narrow factual distinctions and the absence of controlling authority. Together the decisions have resulted in a largely under-developed law of public protest in the Fourth Amendment area.

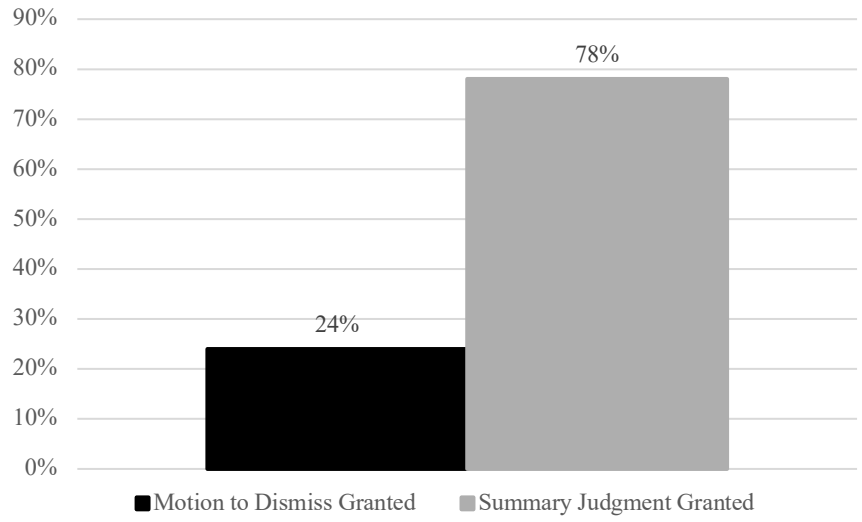
B. MUNICIPAL LIABILITY – *MONELL* CLAIMS

The Qualified Immunity dataset also collected information about plaintiffs' claims against municipal defendants. Recall that to successfully hold a municipal defendant liable under section 1983, plaintiffs must demonstrate that the municipality directly violated their constitutional rights by, among other things, adopting and enforcing an unconstitutional "policy or custom."[266] In order to sue the municipality, plaintiffs must demonstrate that an official has violated their constitutional rights because of the municipal policy or custom.[267]

As shown in Figure 9, defendants were not successful at the motion to dismiss stage, as courts granted or upheld only eighteen of seventy-five (24%) dismissal motions. However, once cases reached the summary judgment stage, defendants were remarkably successful: 78% (113 out of 145) of municipal defendants' motions for summary judgment were granted or upheld on appeal. Thus, although courts were inclined to allow plaintiffs to pursue discovery on *Monell* claims, they were overwhelmingly rejected at summary judgment.

264. *Zinter*, 610 F. Supp. 3d at 946.
265. *Id.*
266. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).
267. *Id.* at 690.

FIGURE 9. Defense Motion Success Rates for *Monell* Claims



The data show that in most instances, municipal liability was rejected, owing to a lack of evidence of a "policy or custom." Courts also frequently relied on a lack of underlying constitutional violation and plaintiffs' failure to identify a policymaking official who acted in a manner that violated their constitutional rights.

Although municipalities represent deep financial pockets and are responsible for making law enforcement and other policies, the data confirm that *Monell* claims are among the most difficult for plaintiffs to pursue. Defendants' efforts to defeat these claims were largely successful.

C. FIRST AMENDMENT RETALIATION CLAIMS

As discussed earlier, in *Nieves*, the Supreme Court adopted a probable cause standard for determining whether plaintiffs could bring a First Amendment retaliation claim.[268] It also recognized a narrow exception for plaintiffs who could demonstrate they had been subject to unequal treatment. Concurring and dissenting Justices sounded various alarms about the Court's reliance on probable cause. In general, the Retaliation Claim dataset, which includes all public protest retaliation claims subject to the *Nieves* standard, supports the dissenters' objections and concerns.

268. Nieves v. Bartlett, 587 U.S. 391, 400–01 (2019); *see supra* notes 103–14 and accompanying text.

A significant concern is that law enforcement officers possess broad discretion to charge protesters with even minor public disorder offenses. Under *Nieves*, an officer who can show a protester's arrest for disorderly conduct, breach of peace, or other minor crimes is likely to have a complete defense to a First Amendment retaliatory arrest claim. As Justice Gorsuch observed in his partial dissent:

> History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age. The freedom to speak without risking arrest is 'one of the principal characteristics by which we distinguish a free nation.'[269]

Justice Gorsuch noted an additional shortcoming of the majority's approach. When it folded the free speech claim into the unreasonable arrest inquiry, he asserted, the Court made a category error. As Justice Gorsuch explained, "the *First* Amendment operates independently of the Fourth and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech."[270] By hanging so much on probable cause to arrest protesters and other speakers, the Court elided important free speech claims and interests.

In her dissent, Justice Sotomayor took aim at the exception to the *Nieves* rule, which requires protesters to produce "objective evidence that [they were] arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[271] She characterized the exception as unclear and irrational and argued it will lead to perverse results. Which protesters, she asked, are "otherwise similarly situated" to the plaintiff, and who is engaged in the "same sort of protected speech"?[272] Further, under the Court's approach, protesters who have more direct evidence of retaliatory motive, including officers' own statements, cannot rely on that evidence, but must instead produce hard-to-come-by comparison-based evidence.[273]

269. *Nieves*, 587 U.S. at 412–13 (Gorsuch, J., concurring in part and dissenting in part) (quoting Houston v. Hill, 482 U.S. 451, 463 (1987)).
270. *Id.* at 414.
271. *Id.* at 424 (Sotomayor, J., dissenting).
272. *Id.*
273. *Id.* at 425–26.

Justice Sotomayor surmised that plaintiffs who can satisfy the *Nieves* exception "predominantly will be arrestees singled out at protests or other large public gatherings, where a robust pool of potential comparators happens to be within earshot, eyeshot, or camera-shot."[274] However, she failed to consider that even *those* plaintiffs would be hard-pressed to gather such evidence in chaotic mass protest environments. Among other complications, during mass protests, ideological and other affiliations can be difficult to discern. Moreover, the exception incentivizes protest policing activities that data show to be already prevalent, including "herding" or "kettling" all participants regardless of specific offense, using tear gas and other force indiscriminately, and engaging in mass arrests. No officer can be accused of singling anyone out if everyone is subject to the same dragnets and other abuses. For a few reasons, there will, as Justice Sotomayor warned, be "little daylight between the comparison-based standard the Court adopts and the absolute bar it ostensibly rejects."[275]

Finally, Justice Sotomayor worried that the majority's approach would "breed opportunities for the rare ill-intentioned officer to violate the First Amendment without consequence—and, in some cases, openly and unabashedly."[276] For example, "a particularly brazen officer could arrest on transparently speech-based grounds and check the statute books later for a potential justification."[277] She and the other dissenters might also have raised the possibility that racial disparities in protester arrests might affect First Amendment retaliation claims.[278]

The Retaliation Claim dataset confirms many of the dissenters' objections and concerns. Counting *Nieves* itself, there have been forty-one federal court decisions that applied the probable cause defense in protest-related cases. In twenty-seven of those decisions, or more than 65%, courts granted defendants' motions to dismiss or for summary judgment with respect to First Amendment retaliation claims. An "absolute bar" may not have materialized. However, thus far, post-*Nieves* retaliation claims have not fared well at all in reported decisions. Courts granted or upheld dismissal at the pleading stage 56% of the time (10/18) and granted summary judgment to defendants 74% (17/23) of the time.

274. *Id.* at 430.
275. *Id.* at 432.
276. *Id.* at 427.
277. *Id.* at 431.
278. *See, e.g.*, Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black?: The Differential Policing of American Activism, 1960 to 1990*, 76 AM. SOCIO. REV. 152, 166 (2011).

TABLE 3. Defense Motions in Post-*Nieves* Retaliation Cases

Posture	*Motion Granted*	*Motion Denied*	*Total*
MTD	10 (56%)	8 (44%)	18
SJ	17 (74%)	6 (26%)	23

The nature of the charges underlying dismissal or summary judgment substantiates Justice Gorsuch's concern that "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."[279] The criminal charges that ultimately defeated First Amendment retaliation claims included disorderly conduct (6), trespass (5), failure to disperse (4), disturbing the peace (3), violation of a curfew order (2), obstructing vehicular or pedestrian traffic (3), obstructing government functions (1), and jaywalking (1). As Justice Gorsuch predicted, probable cause to arrest protesters for even very minor or trivial offenses was enough to defeat the retaliation claims.

What about the exception based on evidence of unequal treatment? Courts addressed the exception on the merits in only 24% (10/41) of cases. In six of those decisions (60%), courts concluded there was insufficient evidence of unequal treatment or that the plaintiff was not "similarly situated" to the comparator class. In three decisions, courts concluded there were sufficient allegations or evidence of disparate treatment to defeat defendants' motions to dismiss or for summary judgment. In one decision, the court concluded that the plaintiff had produced evidence that "similarly situated" speakers had not been arrested under the narrow exception *Nieves* recognized.[280] In that case, plaintiffs demonstrated that *no one* had ever been arrested for the offense (chalking public property).[281]

The post-*Nieves* results suggest courts are engaging in a wooden application of the probable cause standard, rather than a "commonsensical[]" analysis.[282] They have generally been willing to accept officers' claims that arrests for minor offenses were reasonable under the circumstances, a conclusion that in most cases defeated protesters' First Amendment retaliation claims.

279. *Nieves*, 587 U.S. at 412 (Gorsuch, J., concurring in part and dissenting in part) (quoting Houston v. Hill, 482 U.S. 451, 463 (1987)).

280. *Id.* at 393.

281. Ballentine v. Las Vegas Metro. Police Dep't, 480 F. Supp. 3d 1110, 1116 (D. Nev. 2020).

282. *Nieves*, 587 U.S. at 432 (Sotomayor, J., dissenting).

Review of post-*Nieves* decisions also supports other criticisms. Justice Gorsuch criticized the majority opinion in *Nieves* for failing to recognize the First Amendment and Fourth Amendment as independent sources of rights.[283] As he predicted, *Nieves* has encouraged lower courts to focus on the legitimacy of the arrest to the exclusion of free speech, press, and assembly concerns.[284] While courts have been hyper-focused on probable cause to arrest, they have had little to say about the effects of the arrests on collecting petition signatures, public preaching and singing, videorecording protest arrests, and participation in protests involving LGBTQ rights, Occupy Wall Street, the Dakota Access Pipeline, Black Lives Matter, Juneteenth, and the removal of Confederate monuments.

The data do not provide a basis for assessing Justice Sotomayor's concern about rogue officers suppressing speech. However, post-*Nieves* decisions have dismissed retaliation claims in which protesters were arrested while singing anti-LGBT songs, confronting public officials at public events, and videotaping protest policing. In these and other cases, there is at least the possibility that officers have targeted or suppressed speech based on its content.

Finally, commentators have warned that *Nieves* may have negative effects on newsgatherers.[285] Even if reporters have a First Amendment right to record government officials at public demonstrations, the decisions show that probable cause to arrest reporters for some minor offense may effectively negate press rights by allowing officials to target newsgatherers.

Prior to *Nieves*, the Supreme Court recognized another possible exception to the probable cause requirement. If a municipality adopts an official *policy* of retaliation against a speaker or group, the Court held, it may be held liable even if there is probable cause to arrest the speaker.[286] Assuming this exception survives *Nieves*, it applies only in exceptional situations when a governmental body adopts a policy of retaliating against an individual or group for protected expressive activities.[287]

The Retaliation Claims dataset suggests plaintiffs are not likely to pursue this type of claim. Only five of the forty-one decisions (12%) addressed such a claim. Three claims were dismissed for failure to allege or provide sufficient evidence of a policy or custom of retaliation or failure to

283. *Id.* at 414–15 (Gorsuch, J., concurring in part and dissenting in part).

284. *See* Michael G. Mills, *The Death of Retaliatory Arrest Claims: The Supreme Court's Attempt to Kill Retaliatory Arrest Claims in* Nieves v. Bartlett, 105 CORNELL L. REV. 2059, 2083–84 (2020).

285. *See generally* Clayton, *supra* note 113.

286. Lozman v. City of Riviera Beach, 585 U.S. 87, 99–101 (2018).

287. *See id.* at 100 (alleging "that the City, through its legislators, formed a premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials and his open-meetings lawsuit").

establish an underlying constitutional violation.[288] One district court concluded that the plaintiff had alleged sufficient facts in the complaint to demonstrate a policy or custom of retaliation or harassment.[289] Another district court concluded genuine issues of material fact concerning whether a defendant had final policymaking authority precluded summary judgment on the municipal retaliation claim.[290]

Lower courts have not had much time to adjust to and apply the *Nieves* standard. However, evidence indicates that concerns about how the probable cause and other aspects of the decision will be applied have already surfaced in early cases.

D. CLAIMS AGAINST FEDERAL OFFICIALS

As discussed, the Supreme Court has never formally recognized a First Amendment claim under *Bivens* for monetary damages against federal officials.[291] Recent decisions have expressed general skepticism concerning *Bivens* claims and rejected certain types of claims under the First Amendment and the Fourth Amendment.[292] The twenty-six decisions included in the *Bivens* Claims dataset suggest that while lower courts have long recognized protest-related claims against federal officials, the Supreme Court's recent decisions have placed such claims in jeopardy.

The data show that lower courts have long recognized protesters' ability to pursue First Amendment and Fourth Amendment *Bivens* claims. Courts recognized a cause of action for First Amendment or Fourth Amendment violations against federal defendants under *Bivens* in 81% (21/26) of protest-related decisions.

However, twelve, or nearly half, of these decisions are from the D.C. Circuit and D.C. district courts. The D.C. Circuit first recognized a First Amendment protest-related *Bivens* claim in *Dellums v. Powell*, which was decided in 1977.[293] The District of Columbia is the site of iconic protest

288. *See* Blake v. Hong, No. 21-CV-0138, 2022 U.S. Dist. LEXIS 70194, at *11–12 (D. Colo. Mar. 30, 2022) (finding insufficient allegations of a "policy or practice" of retaliation); Fenn v. City of Truth or Consequences, 983 F.3d 1143, 1150 (10th Cir. 2020) (finding that a supervisory liability claim failed for lack of an underlying constitutional violation); Packard v. City of New York, No. 15-CV-07130, 2019 U.S. Dist. LEXIS 38791, at *22–23 (S.D.N.Y. Mar. 8, 2019) (finding no evidence of a "policy or custom" of retaliation).

289. Goodwin v. Dist. of Columbia, 579 F. Supp. 3d 159, 170–71 (D.D.C. 2022).

290. Bledsoe v. Ferry Cnty., 499 F. Supp. 3d 856, 879 (E.D. Wash. 2020).

291. *See supra* notes 115–33 and accompanying text.

292. Reichle v. Howards, 566 U.S. 658, 663 n.4 ("We have never held that *Bivens* extends to First Amendment claims."); Egbert v. Boule, 142 S. Ct. 1793, 1807 (2022) (holding that the plaintiff could not sue federal border patrol agents for First Amendment retaliation or Fourth Amendment excessive force violations).

293. Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir. 1977).

venues, including the grounds near the U.S. Capitol and Lafayette Park near the White House. National Park Service, U.S. Marshals officials, U.S. Capitol Police, Secret Service, and other federal officials are involved in policing and managing mass and other protest events in the District.

In addition to the D.C. Circuit, the Third, Fourth, Eighth, Ninth, and Tenth Circuits have also recognized First Amendment and Fourth Amendment *Bivens* claims in protest-related cases.[294] Constitutional claims in these cases have run the gamut from violation of protesters' right to speak and assemble in a public forum under the First Amendment to allegations of excessive force, false arrest, and unreasonable seizure under the Fourth Amendment. One might assume decisions recognizing these *Bivens* claims long predated the Court's recent turn against expanding *Bivens*. However, ten out of fifteen lower court decisions (67%) recognizing such claims or assuming they are viable were decided during the last decade, when the Court was expressing increasing skepticism about them.

There is some evidence that the Court's *Bivens* negativity is starting to affect lower court decisions in protest cases. In the four most recent decisions, including one by the D.C. Circuit regarding the clearing of Lafayette Park during the 2020 Black Lives Matter protests, courts expressly rejected protesters' First Amendment and Fourth Amendment *Bivens* claims.[295] The courts emphasized the Supreme Court's admonition not to expand *Bivens* into "new" contexts and to apply a "special factors" analysis to prevent expansion of *Bivens* claims. Applying those standards, only one recent federal district court decision has upheld a protest-related Fourth Amendment claim and none have recognized a First Amendment claim.[296]

294. *See* Marcavage v. Nat'l Park Serv., 666 F.3d 856, 858 (3d Cir. 2012); Tobey v. Jones, 706 F.3d 379, 386 (4th Cir. 2013); Galvin v. Hay, 374 F.3d 739, 757 (9th Cir. 2004); Pahls v. Thomas, 718 F.3d 1210, 1225–26 (10th Cir. 2013).

295. *See* Clark v. Wolf, No. 20-CV-01436, 2022 U.S. Dist. LEXIS 20027, at *20 (D. Or. Feb. 3, 2022) (Fourth Amendment claim); Kristiansen v. Russell, No. 21-CV-00546, 2022 U.S. Dist. LEXIS 99459, at *3 (D. Or. June 2, 2022) (Fourth Amendment claim); Ferguson v. Owen, No. 21-02512, 2022 U.S. Dist. LEXIS 120281, at *33 (D.D.C. July 8, 2022) (First Amendment claim); Black Lives Matter D.C. v. Trump, 544 F. Supp. 3d 15, 34 (D.D.C. 2021) (First Amendment and Fourth Amendment claims), *aff'd sub nom* Buchanan v. Barr, 71 F.4th 1003 (D.C. Cir. 2023).

296. Applying the Supreme Court's recently adopted standards, one district court recognized a Fourth Amendment *Bivens* claim brought by protesters. *See* Graber v. Dales, No. 18-3168, 2019 U.S. Dist. LEXIS 169594, at *4–6 (E.D. Pa. Sept. 30, 2019).

The loss of a *Bivens* remedy would leave protesters without full recourse against federal officials who violate their First Amendment or Fourth Amendment rights. Officials with the National Park Service, Secret Service, and other federal agencies would be immunized from damages claims. As the 2020 racial justice protests demonstrated, holding federal officials liable for protest policing that violates individuals' constitutional rights remains critically important.

IV. STRENGTHENING PROTESTER RIGHTS AND REMEDIES

This study confirms that protesters face steep obstacles in terms of holding government officials accountable for constitutional injuries. If protesters cannot be made whole in the event of serious injuries, they may be deterred from organizing and participating in public demonstrations. Thus, what is at stake is not just the important compensation owed to injured protesters but also broader injuries to our culture of public dissent. This final Part offers five proposals to strengthen protesters' rights and remedies.[297]

First, as other scholars have advocated, qualified immunity should be abandoned or reformed.[298] This study confirms that courts are disposing of a significant percentage (approximately 60% at summary judgment) of protesters' First Amendment and Fourth Amendment claims based on qualified immunity. The data also show that qualified immunity shields officials from liability in all but the most egregious cases (and even in some egregious cases), is based on an impossibly narrow standard of controlling authority and reduces opportunities for courts to innovate and develop substantive law. The Court or Congress should abolish qualified immunity or reform it by, for example, changing the liability standard or doing away with the "clearly established law" requirement.[299] Protesters and others would then be better able to recover for patently unconstitutional content-based regulations, abusive uses of force, invalid arrests, and other unconstitutional behavior.

Second, also in the realm of qualified immunity reform, the Supreme Court or Congress should revisit *Nieves v. Bartlett*. This study shows that

297. The proposals focus on federal laws and institutions. However, states and localities can also take steps to strengthen civil rights claims. *See* Emma Tucker, *States Tackling 'Qualified Immunity' for Police as Congress Squabbles Over the Issue*, CNN (Apr. 23, 2021, 7:45 AM), https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html [https://perma.cc/WP46-YTCZ]; Jeffery C. Mays & Ashley Southall, *It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html [https://web.archive.org/web/20220305142403/https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html].

298. *See, e.g.*, Schwartz, *supra* note 24; *see also* sources cited *supra* note 79.

299. *See* Schwartz, *supra* note 24, at 1833–35 (proposing various qualified immunity reforms).

First Amendment retaliation claims are frequently pursued in protest cases. Early lower court applications of *Nieves*'s probable cause rule confirm the objections raised by Justices Gorsuch and Sotomayor. The Supreme Court should at least clarify that probable cause is not an absolute bar to retaliation claims. Some commentators have also urged Congress to overturn *Nieves*.[300] If neither institution is willing to act, civil rights lawyers will need to focus on collecting the necessary evidence of disparate treatment to defeat the probable cause bar. As Justice Sotomayor has urged, lower courts can also adopt a "commonsensical[]" interpretation of the standard.[301]

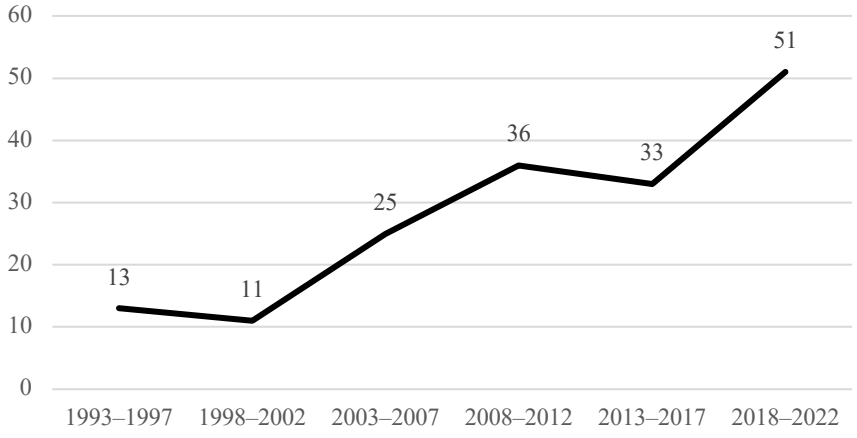
Third, as this study confirms, courts need to strengthen constitutional protections under the First Amendment and Fourth Amendment. The lack of strong First Amendment and Fourth Amendment rights reduces and undermines protesters' constitutional protections. Applications of qualified immunity doctrine show that First Amendment doctrines allow officials to exclude protesters from public properties, enforce restrictive speech zones, and significantly displace demonstrations. Joanna Schwartz has criticized substantive Fourth Amendment law, specifically the "reasonableness" standard that allows officers to "stop, arrest, beat, shoot, or kill people who have done nothing wrong without violating their constitutional rights."[302] Similarly, she argues, the Court's "excessive force" doctrine has "left officers with few limits on their power."[303] The First Amendment and Fourth Amendment doctrines addressed in this study are longstanding. However, the Supreme Court should more clearly establish the limits they place on government officials when they regulate protest activity and lower courts should apply these limits in ways that better protect the rights of protesters.

Fourth, and relatedly, courts must publish more decisions elaborating on applications of First Amendment and Fourth Amendment rights. Figure 10 shows the number of published qualified immunity protest-related decisions over time available on Westlaw. The Qualified Immunity dataset covers four decades but includes only eighty-six published federal appellate court decisions. To be sure, there are likely more such decisions; but if they are not accessible, they cannot be used to analyze qualified immunity. If published appellate decisions are to be the primary sources of clearly established law, it is obvious that litigants and courts need significantly more guidance. The uptick in published decisions during the last five years is encouraging, even if it may partially be related to the 2020–2021 mass street protests. More published decisions should produce more clearly established

300. *See* Clayton, *supra* note 113, at 2315; Mills, *supra* note 284, at 2063.
301. Nieves v. Bartlett, 587 U.S. 391, 431 (2019) (Sotomayor, J., dissenting).
302. SCHWARTZ, *supra* note 9, at 52.
303. *Id.*

limits on protest policing and other activities. The Supreme Court could also take steps such as loosening the requirement of controlling circuit precedent and allowing courts to consult other decisions or to rely on general principles, rather than requiring plaintiffs to identify in-circuit cases involving the same or similar factual circumstances.

FIGURE 10. Published Qualified Immunity Protest Decisions over Time



Fifth, and finally, governmental immunity doctrines must allow injured plaintiffs to hold *all* parties that cause injuries accountable. This means reducing or repealing municipal immunities and allowing injured protesters to sue federal officials under *Bivens* for First Amendment and Fourth Amendment violations. In my study, although plaintiffs frequently sued municipalities, nearly 80% of their *Monell* claims failed at summary judgment.[304] As Joanna Schwartz has argued, "[o]ne way to make sure that people are paid what they are owed is to do away with *Monell* standards and hold cities legally responsible for the constitutional violations of their officers—just as private companies are held vicariously liable for the acts of their employees."[305] Protester plaintiffs must also have the opportunity to hold Secret Service, National Park Service, and employees of other federal

304. *See* discussion *supra* Section III.B.

305. SCHWARTZ, *supra* note 9, at 230. Some have urged plaintiffs to pursue "failure to supervise" claims, which have been recognized in some federal appellate court decisions. *See* Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 371–72 (2023). However, the liability standard for these claims, "deliberate indifference," is difficult to meet. Connick v. Thompson, 563 U.S. 51, 61 (2011) (quoting Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997)). In the Qualified Immunity dataset, protester plaintiffs brought seventy-five "failure to train" claims, which are subject to the same standard. Municipal defendants successfully moved to dismiss fifty-two of those claims, or 75%.

agencies accountable. Lower courts have traditionally perceived no impediment to recognizing and adjudicating such claims.[306] As some recent decisions demonstrate, the Supreme Court's negativity regarding *Bivens* threatens to undermine the fundamental right to express political dissent.[307] Although the Supreme Court has not expressly rejected protest-related First Amendment claims against federal officials, it has crept ever closer to doing so. As the Court itself has urged, Congress should codify *Bivens* by creating civil damages claims against federal officials who violate First Amendment, Fourth Amendment, and other constitutional rights.

CONCLUSION

Governmental immunities have had a profoundly negative effect on public protesters' ability to obtain compensation for constitutional harms. This study's quantitative analysis shows defendants' significant success using qualified immunity to defeat a variety of First Amendment and Fourth Amendment claims. Its qualitative analysis illustrates how application of qualified immunity and other doctrines have defeated protesters' claims, even when defendants have engaged in egregious constitutional violations.

The study lends additional support to general criticisms of qualified immunity and related doctrines. More broadly, it shows that failure to reform or abolish governmental immunities will affect the right to protest peacefully, safely, and with high confidence that officials who regulate and police protests will respect constitutional rights.

This Article offers several proposals for strengthening protesters' remedies or at least limiting obstacles to monetary recovery. These include judicial or legislative repeal of qualified immunity, developing stronger substantive First Amendment and Fourth Amendment protections, abandoning municipal liability restrictions, and retaining civil liability for federal officials. Without serious reform, in most cases protesters will continue to be un- or under-compensated, public officials will continue to escape liability, and traditionally valued public protest activity will be encumbered and chilled.

306. *See, e.g.*, Dellums v. Powell, 566 F.2d 167, 194–95 (1977) (recognizing a *Bivens* action in the context of a protest at the U.S. Capitol).

307. *See, e.g.*, Black Lives Matter D.C. v. Trump, 544 F. Supp. 3d 15, 31–32 (D.D.C. 2021) (rejecting a *Bivens* claim brought by racial justice protesters).