

1. 1. INTRO TO SECTION 1983 - ORIGINS
2. 2. NUTS & BOLTS\_FILE\_INTAKE\_CONFLICTS\_SCREENING
3. 3. REPRESENTING INDIVIDUAL\_DEFENDANTS\_QI

# SECTION I INTRODUCTION TO SECTION 1983 ACTIONS



Prepared by R.J. Navarro / DNRBS&Z, P.C.

Presented By MCLE Sponsor:



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- ✓ Course Name: Section 1983 Defensive Litigation for County Gov't
- ✓ Course No. 1744229110.
- ✓ Please sign in to the Sessions. You must fill out the number of credit hours you are claiming directly via your own State Bar account.

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## I. INTRO & HOUSE-KEEPING

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- ✓ *Dred Scott v John F.A. Sanford*, 60 U.S. 393 (1857)(Power of SCOTUS; Slavery; Citizenship; Missouri Compromise)(slaves are not citizens entitled to sue in court)
- ✓ Arguably sparked the Civil War
- ✓ Which then led to the Civil War Constitutional Amendments
- ✓ Which then led to the Civil Rights Acts
- ✓ Which then led to Section 1983

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## DRED SCOTT V JOHN F.A. SANFORD, 60 U.S. 393 (1857)

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- ✓ *The Civil War*
- ✓ *Lincoln* (2012), w/ Daniel Day Lewis (Steven Spielberg, Director) provides decent context regarding passage of the 13<sup>th</sup> Amendment
- ✓ And for our purposes, the subsequent 14<sup>th</sup> and 15<sup>th</sup> Amendments and related legislation.

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## THE CIVIL WAR

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- ✓ Section 1: Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
- ✓ Section 2: Congress shall have power to enforce this article by appropriate legislation.
- ✓ Approved 2/1/1865; Ratified 12/6/1865

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## THE 13<sup>th</sup> AMENDMENT

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- ✓ Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
- ✓ ...
- ✓ Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
- ✓ Approved 6/16/1866. Certified 7/28/1868

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## THE 14<sup>th</sup> AMENDMENT

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- ✓ Section 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude
- ✓ Section 2: The Congress shall have power to enforce to enforce this article by appropriate legislation.
- ✓ Approved 2/27/1869. Certified 3/30/1870

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## THE 15<sup>th</sup> AMENDMENT

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- ✓ Civil Rights Act of 1866 (14 Stat. 27) Equal Rights (now 42 USC sec. 1981, 1982 & 1983)
- ✓ Enforcement Act of 1870 (16 Stat. 140)[a/k/a First KKK Act]. Empowered federal government to enforce voting rights and gave federal courts jurisdiction.
- ✓ Enforcement Act of 1871 (16 Stat. 433) [a/k/a Second KKK Act]. Also focused on protection of voting rights. Amended the 1870 Act.
- ✓ Enforcement Act of 1871 (17 Stat. 13) [Third KKK Act]. The last of the Enforcement Acts. Signed into law by President Ulysses S. Grant on April 20, 1871. Section 1983 derives from Section 1 of the Third KKK Act
- ✓ Civil Rights Act of 1875 (18 Stat. 335)(last Reconstruction Act) relating to enforcement of equal access to public accommodations and providing statutory penalties.

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## THE 14<sup>th</sup> AMENDMENT ENFORCEMENT ACTS

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- ✓ See Slaughter-House Cases, 83 U.S. 36 (1872)(adopting narrow view of “privileges and immunities clause; discussion of federalism vis-à-vis recent amendments)(set tone for high level of deference to state police powers)
- ✓ See Civil Rights Cases, 109 U.S. 3 (1883) (striking down Sections 1 & 2 of Civil Rights Act of 1875 (addressing access to public accommodations). Primary holding is that the civil war amendments did not reach private actions of discrimination.

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## SCOTUS CASE LIMITING SCOPE OF LEGISLATION

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- ✓ See Strauder v West Virginia, 100 U.S. 303 (1880)(“exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but fact that a particular jury or series of juries did not statistically reflect racial composition of the community does not by itself state a claim)
- ✓ Washington v Davis, 462 U.S. 229 (1976)(addressed application of invidious discrimination from disparate impact discrimination under the Equal Protection Clause)

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## SCOTUS CASES APPLYING THE LEGISLATION

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- ✓ Relevant provision of 17 Stat. 13, now codified as 42 U.S.C. §1983, provides:
- ✓ “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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”
- ✓ Be aware that other Section of the Third KKK Act were codified as 42 USC §1985 (Sec. 2) and 42 USC §1986 (Sec. 6) and have their own fascinating history but outside the scope of this presentation.

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## 17 STAT. 13, SECTION 1

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- ✓ Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
- ✓ Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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## IV. THE FOURTEENTH AMENDMENT

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- ✓ Enforcement Act of 1870 (16 Stat. 140)[a/k/a First KKK Act]. Empowered federal government to enforce voting rights and gave federal courts jurisdiction.
- ✓ Enforcement Act of 1871 (16 Stat. 433) [a/k/a Second KKK Act]. Also focused on protection of voting rights. Amended the 1870 Act.
- ✓ Enforcement Act of 1871 (17 Stat. 13) [Third KKK Act]. The last of the Enforcement Acts. Signed into law by President Ulysses S. Grant on April 20, 1871. Section 1983 derives from Section 1 of the Third KKK Act
- ✓ Enforcement Act of 1875 a/k/a Civil Rights Act of 1875 extending civil rights protections to quasi-public facilities.

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## V. THE 14th AMENDMENT ENFORCEMENT ACTS

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- ✓ Dealt with 1875 Enforcement Act, which addressed enjoyment of transportation facilities, hotels, inns, theatres, etc.
- ✓ Passed on the premise that although privately owned, these facilities were quasi-public and therefore subject to regulation.
- ✓ SCOTUS held that 1875 Act was unconstitutional in that it purported to regulate private action and was not limited to state action. Precursor to “state action doctrine”.
- ✓ SCOTUS noted that that time had come when former slaves were to be considered normal citizens rather than a special group favored by the law.
- ✓ Quasi-public facilities later came under regulation in the 1960’s under Commerce Clause legislation.

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## Civil Rights Cases, 109 U.S. 3 (1883)

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✓ 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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## 42. U.S.C. §1983 [17 Stat. 13][KKK Act of 1871 Sec. 1]

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# END QUESTIONS COMMENTS?


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# Section 2 File Intake; Screening; Conflicts Review; Ethical Considerations



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- ✓ Review of Petition or Complaint
- ✓ Identity of Parties; Capacity in which Sued
- ✓ Which Parties are Within Client Group
- ✓ Status of Service on Parties; Deadlines
- ✓ If State Court Suit, Removability
- ✓ Nature of the Causes of Action Asserted
- ✓ Screening for Conflicts
- ✓ Assessing defense and indemnification obligations

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## LAWSUIT INTAKE

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- ✓ a. Can I represent the organization and the individual without compromising the interests of either? If not, representation of individual will need to go to independent attorney.
- ✓ b. Consider whether representation is an official capacity or individual capacity representation. This factor is material to the representation analysis.
- ✓ c. Consider confidentiality of communications as between the two defendants and duty owed to each as a test of a conflict?
- ✓ d. When doing informal discovery, you may want to reserve interview of individual till last to avoid disclosures that could compromise the representation.
- ✓ e. Beware of imputed knowledge within the organization. It is not easy to create a wall within the organization sufficient to overcome the imputed knowledge dynamics of ethics rules.

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## INTAKE ISSUES TO RESOLVE BEFORE APPEARING IN LAWSUIT

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### ✓ Texas Center for Legal Ethics

- ✓ a. Texas Disciplinary Rules of Professional Conduct
- ✓ b. Texas Lawyers Creed:
- ✓ c. Ethics Opinions

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## ETHICS: GOVERNING RULES & REGULATIONS

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DR 1.12 Organization as Client

Primary duty is to the organization, especially if employed by the organization as legal counsel

DR 1.06 Conflict of Interest: General Rule

Addresses conditions under which representation of multiple defendants is proscribed or allowed with conditions.

DR 1.05 Confidentiality of Information

What is likelihood that some information may not be shareable as between the two clients.

DR 1.15 Declining or Terminating Representation

Conflict analysis may require declining representation or withdrawing from representation should a conflict arise.

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# KEY DISCIPLINARY RULES

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DR 1.12 – Organization as Client

❖ Primary duty is to the organization, especially if employed by the organization as legal counsel

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# DR 1.12 ORGANIZATION AS CLIENT

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- ✓ a. DR 1.06 Conflict of Interest: General Rule
  - 1. Addresses conditions under which representation of multiple defendants is proscribed or allowed with conditions.

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## DR 1.06 CONFLICT OF INTEREST: GENERAL RULE

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- ✓ a. DR 1.05 Confidentiality of Information
  - 1. What is likelihood that some information may not be shareable as between the two clients.
- ✓ d.

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## DR 1.05 CONFIDENTIALITY OF INFORMATION

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✓ DR 1.15 Declining or Terminating Representation

1. Conflict analysis may require declining representation or withdrawing from representation should a conflict arise.

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## DR 1.15 DECLINING OR TERMINATING REPRESENTATION

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### Ascertaining Defense and Indemnification Coverage Obligations for Individual Defendants

This is component of conflict analysis too

There are statutory obligations. See e.g. Chapter 180, TLGC.

Other relevant coverages may be contained in risk pool coverages, labor contracts, or insurance coverages obtained by the Commissioners Court – especially for law enforcement personnel.

This area is complex and varies from entity to entity.

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## ASCERTAINING DEFENSE AND INDEMNIFICATION COVERAGE OBLIGATIONS

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In Section 1983 claims, assuring that individually named defendants acting under color of law get a full defense. This ethical obligation may and often is mitigated by other considerations, such as criminal prosecution, civil employment action, conflicts with other co-defendants

Conflict analysis should be done as thoroughly as possible at intake. However, conflict analysis is on-going and must be constantly evaluated and re-evaluated as a case proceeds and as more detailed facts are ascertained

If because of ethical considerations use of different counsel for different defendants is needed, joint defense considerations still must be considered

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## TAKE-AWAY SUMMARY

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## END OF SECTION 2. QUESTIONS COMMENTS



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# SECTION III REPRESENTING INDIVIDUAL DEFENDANTS

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- a. This next section will focus on the defense of individuals, including supervisors, and bystanders
- b. Covers origins of immunity defenses, primarily qualified immunity, but touches on absolute immunity and 11<sup>th</sup> Amendment immunity
- c. Covers motion practice pertaining to immunity defense
- d. Covers what is “clearly established” for purposes of QI defense and the incorporation doctrine.
- e. Covers interlocutory appeal from denial of MTD or MSJ.

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## DEFENSE OF INDIVIDUALS, SUPERVISORS & BYSTANDERS

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- a. Is there “state action” that would be covered by a Section 1983 claim?
- b. If there is state action, what are the constitutional claims being urged?
- c. What legal and / or equitable relief is requested against the individual?
- d. Has a claim been stated, that is, has the purported constitutional right been incorporated through the 14<sup>th</sup> Amendment to apply to the state action in question?
- e. Does the complaint state a claim? If so, does qualified immunity apply?
- f. Is the constitutional claim clearly established for purposes of overcoming the assertion of qualified immunity?

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## PRELIMINARY ANALYSIS OF THE CLAIMS

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Development of the Qualified Immunity Doctrine.

1. *Pierson v Ray*, 386 U.S. 547 (1967) (recognizing judicial immunity and incorporating common law immunities as a defense to alleged constitutional violations, ie, qualified immunity defense)

2. *Bivens v Six Unnamed Agents*, 403 U.S. 388 (1971)(police conduct by federal agents is actionable under the 4<sup>th</sup> Amendment in action for damages against individual federal agents)

3. *Paul v Davis*, 424 U.S. 693 (1976)(claim for defamation , without a showing of more tangible damage, does not state a claim under the 14<sup>th</sup> Amendment)

4. *Harlow v Fitzgerald*, 457 U.S. 800 (1982) ( protection of officials for civil damages performing discretionary functions; defining “clearly established statutory or constitutional rights of which a reasonable person would have known.”; establishes to resolve the issue at the front end of litigation as an immunity from suit)

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## ORIGINS OF IMMUNITY DEFENSE (1)

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5. *Siegert v Gilley*, 500 U.S. 226 (1991)(failure to allege a clearly established constitutional right as a "liberty" interest)

6. *Saucier v Katz*, 533 U.S. 194 (2001) (two step qualified immunity evaluation standard)

7. *Pearson v. Callahan*, 555 U.S. 223 (2009) (finding the Saucier two-step standard does not have to be followed exactly; can skip first step of determining "violation of constitutional right" and go to evaluation of "was the right clearly established" for analyzing qualified immunity)

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## ORIGINS OF IMMUNITY DEFENSE (2)

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### SUPERVISOR AND BYSTANDER LIABILITY

See *Whitley v Hanna*, 726 F.3d 631 (5<sup>th</sup> Cir. 2013) for discussion of supervisory and bystander liability; see also *Hale v Townley*, 45 F.3d 914 (5<sup>th</sup> Cir. 1995)

Elements stated as 1) official knows another official is violating constitutional rights; 2) has a reasonable opportunity to prevent the harm; and 3) chooses not to act. 726 F.3d at 646.

Cases cited indicate that this premise is "clearly established" in a 4<sup>th</sup> and 14<sup>th</sup> Amendment context.

Bystander claim not stated if official is not present at the scene.

Whitley notes that while bystander liability often arise in a UOF context (4<sup>th</sup> Amendment), "other constitutional violations may also support a theory of bystander liability. 726 F.3d at 647.

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## SUPERVISOR AND BYSTANDER LIABILITY CLAIMS

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PLEADING SPECIFICITY

Elliott v Perez, 751 F.2d 1472 (5<sup>th</sup> Cir. 1985)(requiring that complaints against individual defendants be plead with “factual detail and particularity”) 751 F.2d at 1473.

Anderson v Creighton, 483 U.S. 635 (1987)(addressing practical difficulties of qualified immunity pleading and protection from burdens of discovery)

Schultea v Wood, 47 F.3d 1427 (5<sup>th</sup> Cir. 1995)(en banc)(requiring a heightened pleading requirement in response to a Schultea motion that rests on more than conclusions alone).

# PLEADING SPECIFICITY

✓ a. General Principles

1. “Indeed, we have made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that “ ‘insubstantial claims’ against government officials [will] be resolved prior to discovery.” *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 (1987).
2. The officer is “entitled to qualified immunity if his or her conduct was objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions,” even if the conduct violated the plaintiff’s constitutional right. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)(en banc).
3. “Where a plaintiff resists . . . and officers react with force that corresponds to the resistance, it cannot be said that the officers’ force is objectively excessive or clearly unreasonable; the Supreme Court therefore requires qualified immunity.” See, *Poole v. City of Shreveport*, 691 F.3d 624, 633 (5th Cir. 2012)(citing, *Anderson v. Creighton*).

# CLEARLY ESTABLISHED GENERALLY

#### THE INCORPORATION DOCTRINE

- ❖ *Barron v Baltimore*, 32 U.S. 243 (1833) – Bill of Rights does not apply to state governments, only to the federal government
- ❖ *United States v Cruikshank*, 9 U.S. 542 (1876) – First and Second Amendment did not apply to private actor or to state government. Federal criminal convictions arising out of Colfax massacre were reversed.
- ❖ In *De Jonge v Oregon*, 299 U.S. 353 (1937) – First Amendment freedom of assembly incorporated via the 14<sup>th</sup> Amendment regarding freedom of assembly
- ❖ In *McDonald v City of Chicago*, 561 U.S. 742 (2010) – incorporating the 2<sup>nd</sup> Amendment via the 14<sup>th</sup> Amendment to the States and holding that the right of an individual “to keep and bear arms” is protected under the 2<sup>nd</sup> Amendment.

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## THE INCORPORATION DOCTRINE

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#### THE INCORPORATION DOCTRINE

See Constitution Annotated – Essay on Doctrine on Incorporation of Bill of Rights

[https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE\\_00013746/](https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/)

A grasp of the specific caselaw with respect to each aspect of each BOR is a good baseline for researching the “clearly established” requirement of qualified immunity vis a vis the specific constitutional right at issue.

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## SUMMARY OF INCORPORATION DOCTRINE

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- ✓ a. *Taylor v. Riojas*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 52, (11-2-2020)(per curium)(jail conditions) “But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time. Case vacated and remanded for further proceedings.
- ✓ b. *Taylor cites Hope v Pelzer*, 536 U.S. 730 (2002) (explaining that “ a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question’ ” (quoting *United States v. Lanier*, 520 U.S. 259 (1997)); 536 U.S. at 745 (holding that “[t]he obvious cruelty inherent” in putting inmates in certain wantonly “degrading and dangerous” situations provides officers “with some notice that their alleged conduct violate[s]” the Eighth Amendment).

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## CLEARLY ESTABLISHED – RECENT SCOTUS CASELAW

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- a. *Roque v Harvel*, 993 F.3d 325 (5th Cir. 2021). “The critical question when ascertaining the clearly established law is “whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional.” Put differently, “[a] clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” (citations omitted).
- b. *Brown v Tarrant County, Texas*, 985 F.3d 489 (5th Cir. 2021) (“[W]e must frame the [clearly established law question] with specificity and granularity.” *Morrow v. Meachum*, 917 F.3d 870, 874–75 (5th Cir. 2019), for “[t]he dispositive question is whether the violative nature of particular conduct is clearly established.

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## CLEARLY ESTABLISHED – U.S. FIFTH CIRCUIT CASES (1)

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INTERLOCUTORY APPEAL

Mitchell v Forsyth, 472 U.S. 511 (1985) (denial of qualified immunity defense is a “final decision” subject to immediate appeal under 28 U.S.C. §1291.

Johnson v Jones, 515 U.S. 304 (1995)(interlocutory appeal allowable “to the extent it turn on an issue of law”)

Behrens v Pelletier, 516 U.S. 299 (1996) (despite prior appeal, denial of MSJ on grounds of qualified immunity was still appealable final judgment, even if other claims remained for trial); but see

Tamez v San Marcos, 62 F.3d 123 (5<sup>th</sup> Cir. 1995)(Magistrate Judge finding on dispositive motion that genuine issues of material fact existed which precluded summary judgment; case remanded for trial)

Ashcroft v Iqbal, 556 U.S. 662 (2009) for more recent application of when the collateral order doctrine may be invoked.

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# INTERLOCUTORY APPEAL

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STAY OF DISCOVERY

Carswell v Camp, 37 F.4<sup>th</sup> 1062 (2022)(reaffirming collateral order doctrine; stay of discovery; immunity from liability and from suit; scope applies to all public defendants)

Citing Ashcroft Iqbal, 556 U.S. 662 (2009)(plaintiff not entitled to discovery, cabined or otherwise before resolving all immunity issues in the case)

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# STAY OF DISCOVERY

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[Tamez v City of San Marcos](#), 118 F.3d 1085 (5<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 1125 (1998).

Use as example of start to finish handling of file from intake to final judgment.

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## TAMEZ II – AN OVERVIEW

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Lesson Learned – Be Sure Your Right and then Never Give Up!

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## TAMEZ II – AN OVERVIEW

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**END**  
**QUESTIONS COMMENTS?**



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