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Asymmetric review of qualified immunity appeals

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Abstract

This article presents results from the most comprehensive study to date of the resolution of qualified immunity in the federal courts of appeals and the US Supreme Court. By analyzing more than 4000 appellate decisions issued between 2004 and 2015, this study provides novel insights into how courts of appeals resolve arguments for qualified immunity. Moreover, by conducting an unprecedented analysis of certiorari practice, this study reveals how the US Supreme Court has exercised its discretionary jurisdiction in the area of qualified immunity. The data presented here have significant implications for civil rights enforcement and the uniformity of federal law. They show that qualified immunity, when deployed, often bars relief for plaintiffs. Moreover, they show that courts of appeals reverse decisions to deny qualified immunity far more often than they reverse decisions to grant qualified immunity, and that this asymmetric review is correlated with traditional indicators of judicial ideology, among other variables. Significantly, the data also suggest that the asymmetric review that characterizes appellate decisions is also present in the Supreme Court's certiorari practice.

KEYWORDS
civil rights, judicial ideology, qualified immunity

INTRODUCTION

Qualified immunity is a powerful doctrine that can bar a damages remedy in civil rights cases even where a plaintiff can establish that their constitutional rights were violated. An affirmative defense that arises principally in suits brought under

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42 U.S.C. § 1983,[1] qualified immunity applies where defendants can show that the law governing their conduct was not "clearly established" or that they acted reasonably in light of clearly established law.[2] Academic literature, mostly critical, has focused on many different aspects of the defense.[3] In the backdrop, however, is the longstanding assumption that qualified immunity has a significant impact on the resolution of litigated cases.[4] For many years, that assumption was not subjected to empirical scrutiny (Schwartz, 2017, p. 8) and had been shared not just by academics but also by civil rights practitioners (Reinert, 2011, pp. 494–495; Schwartz, 2020b, pp. 1131–1138; 2001, p. 547).

Recent empirical work has undermined some of these assumptions. Schwartz's (2017, p. 10) empirical study of cases involving law enforcement suggests that qualified immunity is rarely dispositive in Section 1983 litigation brought for alleged Fourth Amendment violations. And in earlier work studying *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) litigation,[5] I reported data along the same lines about the role of qualified immunity in litigated cases (Reinert, 2010, p. 843).[6] At the same time, it is clear that qualified immunity plays an outsized role in the resolution of civil rights actions that reach the Supreme Court. For example, within the last 20 years, when certiorari has been granted, it has almost always resulted in the Court finding that a defendant is entitled to qualified immunity, and almost always in cases involving alleged Fourth Amendment violations (Baude, 2018, p. 82).

There is a disjunction, then, between empirical work regarding the role of qualified immunity in trial courts and the resolution of qualified immunity in the handful of cases that reach the Supreme Court. Missing from the discussion, and critical to understanding the role of qualified immunity in the resolution of

[1]Section 1983 was enacted by the Reconstruction Congress to help enforce the Fourteenth Amendment against state actors. Though it lay dormant for nearly a century, it is now one of the most common devices used by plaintiffs seeking to vindicate their constitutional rights in federal court. See Eisenberg (2015, p. 4) (compiling statistics for four decades of civil filings and noting that "litigation under Section 1983 and [employment discrimination] statutes has constituted the largest fraction of the nonprisoner federal civil docket"); Schlanger (2015) (reporting yearly data on Section 1983 filings by incarcerated people).

[2]See infra pp. 7–9.

[3]Scholarship regarding qualified immunity is broad and deep. By way of illustration, Westlaw reports that as of December 31, 2021, since 1980 there have been 428 law review articles with the words "qualified immunity" in the title and 1654 law review articles in which the phrase "qualified immunity" was used 10 times or more. For articles questioning the origins of qualified immunity, see generally Baude (2018), Coleman (1986), and Schwartz (2018). For a structural critique of qualified immunity, see Crocker (2019). For a critique of the practical consequences of qualified immunity, see Adelman (2018) and Chen (2006). These are just a sampling of the many scholarly and practical broadsides mounted against the doctrine.

[4]For a discussion of this literature, see generally Schwartz (2017, pp. 6–7).

[5]In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971, p. 389), the Supreme Court held that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment. *Bivens* claims are similar to § 1983 claims against state officials, but much more limited in scope. See generally Reinert and Mulligan (2013).

[6]To be clear, both Schwartz and I have also shown how, even if the doctrine is not formally the driver of failure for civil rights plaintiffs in litigated cases, it still does significant work in the civil rights ecosystem (Reinert, 2011, pp. 494–495; Schwartz, 2020b, pp. 1131–1138).

cases, is empirical examination of appellate decision-making. To the extent that prior empirical work has considered the resolution of qualified immunity on appeal, it has been limited in scope and design.[7]

This paper fills this significant gap in the literature by providing the most comprehensive study to date of the resolution of qualified immunity appeals in federal court. It does so by analyzing the results of over 4000 decisions in the federal courts of appeals, encompassing every appellate opinion issued regarding qualified immunity in the years 2004–2008 and 2010–2015.[8] Prior studies, while informative, have been limited in scope and have focused on different questions. Some studies have covered only published decisions, only a random selection of decisions issued in a given time frame, or both, and no prior study has evaluated more than 850 total opinions.[9] Moreover, none of the prior studies was designed to evaluate the basic, but central, question addressed here: who succeeds on qualified immunity arguments in the courts of appeals, and what variables are correlated with success.[10] This on its own provides a significant contribution to the understanding of this important doctrine.

This paper goes further, however, because it is also the first to report data relating to certiorari practice in qualified immunity cases. It does so by following every appellate decision in the dataset to determine whether any party filed a petition for certiorari, whether the petition was granted, and if so, how the case was resolved in the Supreme Court. These data shed light on the disjunction between the data suggesting that qualified immunity is not as significant a presence in trial courts as advocates and commentators have assumed,[11] and the Supreme Court's docket, in which qualified immunity has taken an outsized importance, almost always to the benefit of defendants in civil rights cases (Kinports, 2016, pp. 63–65).

The results of the study provide several insights that have not been addressed in past empirical work. First, even if qualified immunity plays a limited role in the resolution of litigated cases in federal district court, this study shows that when the defense is deployed, it has a significant impact. Over the course of the study period, defendants prevailed on appeal in cases involving qualified immunity much more than plaintiffs—the rate at which qualified immunity was granted in its entirety was twice as high as the rate at which it was denied in its entirety.[12] Second, and relatedly, this study shows that part of the key to defendants' overall success in the courts of appeal was asymmetric treatment of

[7]See infra pp. 9–14.
[8]The study did not include decisions in the year 2009 because the Supreme Court announced a significant decision (*Pearson v. Callahan*, 2009) that year.
[9]See infra pp. 9–14.
[10]Instead, almost every prior study was designed to determine whether, when courts addressed qualified immunity, they clarified the law. See id.
[11]See supra note 6.
[12]See infra pp. 23–24. Qualified immunity was granted in whole in 61% of appeals, denied entirely in 30% of appeals, and granted and denied in part in 7% of appeals. See id.

district court decisions granting or denying qualified immunity. Courts of appeals were far more likely to affirm district court decisions granting qualified immunity than district court decisions denying qualified immunity and, inversely, far more likely to reverse decisions denying qualified immunity than decisions granting qualified immunity.[13] Third, these observations were remarkably stable over time, notwithstanding that during the entirety of the study period, the Supreme Court increasingly signaled that qualified immunity should be granted early and often.

The results also show that, even though the courts of appeals as a whole have been relatively consistent in their treatment of qualified immunity from 2004 through 2015, some variables were significantly correlated with how the defense was resolved. Two stand out: circuit court identity and the political party of the president who appointed appellate judges. As to the first, some circuits were more generous to defendants in cases involving qualified immunity than others. In some circuits, reversal rates for district court decisions denying qualified immunity were far higher than reversal rates for decisions granting immunity, resulting in a higher overall success rate for defendants in those circuits. And in other circuits, there was far less asymmetry. In other words, if the Supreme Court is trying to achieve uniformity in the federal courts by focusing attention on qualified immunity, it has so far not succeeded.

The other variable that was significantly related to reversal rates and overall success of the parties was the political party of the president who appointed the judges on each appellate panel, a rough proxy for judicial ideology.[14] The data reveal a nearly linear relationship between the number of judges appointed by the president of a particular party and appellate outcome—as the number of Democrat-appointed judges on a panel decreased by one and the number of Republican-appointed judges increased by one, defendants were more likely to prevail on appeal at each iteration from zero to three Republican-appointed judges. Moreover, there was evidence of a significant interaction between presumed district court ideology, appellate court ideology, and asymmetric review of qualified immunity decisions. The district court decisions denying qualified immunity were reversed most often when they were issued by Democrat-appointed district judges and reviewed by appellate panels with three Republican-appointed judges; and district court decisions granting qualified immunity were reversed most often when they were issued by Republican-appointed district judges and reviewed by appellate panels with three Democrat-appointed judges. This is the first paper to study the

[13]These data are consistent with one other study I discuss in detail below. See infra p. 14 (discussing Nash, 2016).
[14]There is ample debate about how best to measure judicial "ideology." See, for example, Yung (2006, pp. 1138–1153) (discussing challenge of measuring ideology). And some prominent critics argue that legal scholars who attempt to study the impact of ideology fail to account for many significant and difficult-to-measure variables. See Edwards and Livermore (2009); Epstein (2016, pp. 2045–2047). But many studies have used the political party of the appointing president as a rough proxy for federal judges' attitudinal priors. See Sunstein, et al. (2004, p. 302, note 1).

interaction between district court and appellate panel ideology, and it expands on prior scholarship studying the impact of ideology on appellate decision-making in other contexts.[15]

Analysis of the data relating to certiorari practice and outcomes provides additional novel insights. First, the asymmetric review that was present in the courts of appeals was even stronger in Supreme Court certiorari practice. Although plaintiffs sought certiorari at a slightly higher rate than defendants, the Supreme Court was about six times as likely to grant certiorari when requested by a defendant as by a plaintiff. Second, the ideological hue of asymmetric review also was reflected in certiorari practice. When defendants sought certiorari from an appellate decision denying qualified immunity, they had a much higher rate of success when seeking review of decisions issued by appellate panels with more Democrat-appointed judges. The Court was much less likely to grant certiorari when all-Republican-appointed panels denied qualified immunity. Third, the Supreme Court also was more likely to grant certiorari in decisions appealed from particular circuits. Fourth, and finally, the Supreme Court's certiorari practice focused much more on Fourth Amendment claims raised in litigated cases than in other substantive topics. And in that subset of cases, like all other cases, the Court almost uniformly found for the defendant.

These data are significant for what they suggest about the resolution of qualified immunity in the courts of appeals and the Supreme Court. At the appellate level, the data suggest that resolution of an appeal is influenced by (1) who prevailed in the district court, (2) which circuit decided the case, and (3) the political party of the president who appointed the district court judge who heard the case in the first instance and the appellate judges who heard the appeal. At the certiorari level, the data suggest that much depends on which party seeks certiorari, which circuit announced the decision on appeal, the presumed ideology of the judges on the appellate panel, and the subject matter of the litigation. These data thus have implications in multiple arenas.

First, for those who have argued for revisiting or eliminating qualified immunity, these data offer additional evidence that, when raised, the immunity is a powerful defense. Moreover, these data undermine qualified immunity's presumption that "clearly established" law has an objectively

[15]As with literature regarding qualified immunity, it would be foolhardy to attempt to synthesize all of the research by political scientists and legal scholars attempting to evaluate the relationship between judicial decision-making and ideology. See, for example, Adelman & Glicksman (2020, p. 182) (suggesting that ideology of judge is most likely to be a factor "when the politics of a presidential administration are most at odds with the legal mandate of a statute under review"); Miles and Sunstein (2008) (presenting data regarding link between judicial ideology and agency review); Posner (2008, p. 853, note 2) (collecting research); Revesz (1997) (finding significant influence of ideology on voting in environmental cases); Sunstein, et al. (2004, p. 305) (summarizing findings that political party of the appointing president is a good predictor of how judges will vote in cases involving civil rights, employment discrimination, and governmental regulation).

verifiable content.[16] Rather, the data suggest that perceptions of when law is so clear that it is obvious to any reasonable officer are filtered to a significant degree by attitudinal priors. This may offer further reasons to restrict or eliminate access to the defense.

Second, these data cast doubt on the ability of the Supreme Court to ensure uniformity in the application of federal law in the qualified immunity arena.[17] Despite the Court's consistent attention to the doctrine over the past two decades, disuniformity in its application persists.

Third, these data offer some clues to addressing some of the difficulties with studying judicial decision-making in other contexts. For example, although other studies have provided evidence that courts of appeals review district court decisions differently depending on which party prevailed in district court, researchers have also noted that other variables may contribute to these observed differences (Eisenberg, 2004, pp. 670–678). And although many studies have suggested a link between judicial outcomes and attitudinal variables such as the political party of the president who nominated the judge, some have raised questions about the validity of these observations. In this study, the novel testing of the interaction between district court outcome, appellate outcomes, and the political party of the president who nominated district and appellate judges, helps to cut through some of the potentially confounding variables identified by prior researchers. The results bolster the evidence both of asymmetrical standards of review and the influence of presumed judicial ideology on outcomes.

As with all empirical studies, one must be careful to draw firm conclusions based on one set of analyses, and this study raises as many questions as it answers. These questions include the impact that representation by counsel has for plaintiffs seeking to defeat qualified immunity, potential strategic differences between the plaintiffs' and defense bar in taking qualified immunity appeals, and the possibility that differences in substantive law are reflected in qualified immunity outcomes. These are just a few of the areas that merit further research based on the results presented here.

I develop this paper in four parts. In the next section, I briefly review qualified immunity doctrine and identify the nature of the empirical question at hand. I then review prior empirical studies and summarize the methodology of this paper. After I report the results of the study, I offer a preliminary analysis of the significance of these results and suggestions for future research.

[16]The Supreme Court often speaks of the law being clear to a "reasonable" officer (*District of Columbia v. Wesby*, 2018, p. 590).

[17]The Supreme Court's certiorari jurisdiction is exercised to address important issues of law on which the lower courts are divided, not to correct "erroneous factual findings or the misapplication of a properly stated rule of law." U.S. S. Ct. R. 10; *Braxton v. United States* (1991, p. 347).

AN OVERVIEW OF QUALIFIED IMMUNITY

When civil rights litigants seek damages against state and local officials under 42 U.S.C. § 1983, or against federal officials via *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) actions, there are many barriers to success (Reinert, 2010, pp. 842–844; Schwartz, 2017, pp. 29–38). Among the most closely scrutinized is the doctrine of qualified immunity, which protects officers from damages liability even when they violate the constitution, if the law was not "clearly established" or if the officers reasonably believed they were not acting unconstitutionally (*Kisela v. Hughes*, 2018, p. 1152). The defense was first recognized by the Supreme Court in 1967 as a version of the "good-faith" defense which according to the Court was in existence as a matter of common law when Section 1983 was enacted (*Pierson v. Ray*, 1967, p. 555), but it has morphed since that time.

The most consequential transformation occurred in 1982, when the Court rejected the "good-faith" version of qualified immunity, choosing instead an objective test that focused on the reasonableness of the officer's behavior in light of "clearly established" law (*Harlow v. Fitzgerald*, 1982, p. 818; *Malley v. Briggs*, 1986, p. 341). The Court saw the good-faith standard, with its emphasis on the subjective intentions of the defendant, as insufficiently protective because of the abilities of "ingenious plaintiff's counsel" to create material issues of fact based on little evidence, thereby surviving summary judgment and forcing a trial or settlement (*Harlow v. Fitzgerald*, 1982, p. 817, note 29). Thus, the Court stated that moving to an "objective reasonableness" standard was necessary to "permit the resolution of many insubstantial claims on summary judgment" (*Harlow v. Fitzgerald*, 1982, p. 818). Much of *Harlow*'s basic structure survives to this day. If an official can establish either that the relevant constitutional law was not clear enough, *or* that they reasonably believed their conduct was lawful in light of clearly established law, under the circumstances as they understood them,[18] then they are immune from damages liability.

On its own, the qualified immunity defense is a powerful tool for defendants. But the Court has surrounded it with defendant-friendly procedural devices that enhance its effectiveness. Qualified immunity can be raised at any time as many times as a defendant wishes: at the motion to dismiss stage, after limited or full discovery through summary judgment, or at trial (*Behrens v. Pelletier*, 1996, pp. 306–307; *Mitchell v. Forsyth*, 1985, p. 526). Once the defense is raised by motion, defendants may be able to seek protection from discovery until it is resolved (*Siegert v. Gilley*, 1991, p. 232). And if the defendant loses the motion in the district court, they may immediately appeal as of right, an exception to the general rule in federal court that litigants may only appeal final judgments

[18]Qualified immunity has been described as an affirmative defense (*Gomez v. Toledo*, 1980, p. 640), but not every circuit consistently allocates to the defendant the burdens of establishing the defense.

(*Behrens v. Pelletier*, 1996, pp. 307–309; *Mitchell v. Forsyth*, 1985, pp. 526–527).[19] All of these innovations are in service of the goal that immunity be resolved as early as possible, for the value of the immunity is "effectively lost if a case is erroneously permitted to go to trial" (*Pearson v. Callahan*, 2009, p. 231; *Behrens v. Pelletier*, 1996, p. 306).

The Court also has gradually narrowed what constitutes "clearly established" law for the purposes of the defense, insisting on more and more factual similarity between prior cases and the complained of conduct before a plaintiff can overcome qualified immunity. For law to be "clearly established," precedent must speak with such clarity that only a "plainly incompetent" official would fail to see the unlawfulness of their conduct (*Malley v. Briggs*, 1986, p. 341; *Kisela v. Hughes*, 2018, p. 1152).

At the same time that the Court has narrowed the meaning of "clearly established" law, it has made it less likely that law will be established with sufficient precision. As law develops and becomes better established, qualified immunity becomes a less effective defense. But law cannot become "clearly established" unless courts resolve the predicate, merits-based question, of whether a plaintiff's constitutional rights were even violated by the defendant's conduct. Up until 2009, the Court directed lower courts to apply a mandatory two-step analysis (*Saucier v. Katz*, 2001, p. 201). First, defendants were required to show that, after drawing all factual inferences in plaintiffs' favor, plaintiffs have not alleged facts which "show the officer's conduct violated a constitutional right" (*Saucier v. Katz*, 2001, p. 201). If defendants could not meet this burden, then they were required to show that they nonetheless were entitled to qualified immunity under either of the two prongs identified above. This "*Saucier* rule," named after the 2001 decision that solidified the practice, struck a balance in favor of forcing courts to first resolve the merits of a plaintiff's constitutional claim before turning to qualified immunity.

Saucier's mandatory rule was retired in *Pearson v. Callahan* (2009), in which the Court gave lower courts discretion to decide for themselves whether to address the merits question or the immunity question first. After *Pearson*, there is a significant risk that constitutional law will become static because courts will focus on whether particular rights were clearly established at the time of alleged violations, rather than whether the right exists at all. And if courts do not decide whether the right exists at all, no new clearly established law will be created,

[19]Not every issue raised in the district court will be reviewable by an appellate court, however. In general, what is immediately appealable in a qualified immunity case is the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law" (*Mitchell v. Forsyth*, 1985, p. 526). Thus, a district court's order rejecting a qualified immunity defense at the summary judgment stage is not immediately appealable if the order is based on the sufficiency of evidence, because that determination "is not truly 'separable' from the plaintiff's claim" (*Johnson v. Jones*, 1995, p. 313). And when bringing a qualified immunity appeal, the defendant must accept the plaintiff's version of the facts as adopted by the district court so that the appellate court can review the district court's determination of the "purely legal issue [of] what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts (*Johnson v. Jones*, 1995, p. 313).

leaving victims of constitutional violations unprotected unless officers act so outrageously to justify denying them qualified immunity.

The Court's strengthening of qualified immunity's protections over time has prompted significant academic critique. Scholars have questioned the genesis of the doctrine, arguing that the Court misconstrued the common law at the time Section 1983 was enacted.[20] And commentators have criticized the significant degree of protection against liability conferred by qualified immunity (Achtenberg, 1992, pp. 499–500; Chemerinsky, 2014, pp. 6–7; Rudovsky, 1989, p. 77). Through it all, scholars have assumed the defense plays a significant role in litigated cases, amplifying their concerns about the doctrine's validity. If one just focused on Supreme Court decisions, that assumption would be warranted. Of the scores of qualified immunity cases that the Supreme Court has decided since it created the modern version of the defense in *Harlow v. Fitzgerald* (1982) including many involving the use of deadly force by police officers, a majority of Justices has almost always found that officers should have been granted qualified immunity (Baude, 2018, p. 82).

But more recently, empiricists have questioned whether the pattern of decisions in the Supreme Court is recapitulated in lower courts. Joanna Schwartz, in a pathbreaking study, analyzed 1183 cases litigated in five district courts and concluded that the defense rarely plays a significant role in litigated cases (Schwartz, 2017, p. 23). I found similar results in a detailed study of *Bivens* cases litigated over the course of 3 years in five district courts (Reinert, 2010, p. 845).

There is a gap in our knowledge, however. We have a clear picture of what happens when the Supreme Court addresses qualified immunity in its decisions. And we are starting to have a better sense of how qualified immunity affects litigated cases in trial courts. But in the courts of appeals, to the extent scholars have addressed empirical questions, they have focused not on whether qualified immunity is successful as a defense, but instead on the different question of how the defense affects the development of constitutional law. And no one has provided an empirical analysis of the path of cases from district to appellate to Supreme Court review. This paper fills those gaps.

PRIOR EMPIRICAL RESEARCH AND METHODOLOGY OF CURRENT STUDY

In this section, I summarize prior empirical studies of qualified immunity appeals before moving to a description of the current study's methodology. As I show, none of the prior studies approaches the scale of this study. The current study was designed with two goals in mind. First, to collect and analyze federal

[20]This argument was recently endorsed by Justice Clarence Thomas in concurrence in *Ziglar v. Abbasi* (2017). Citing Baude (2018), Justice Thomas noted his "growing concern with our qualified immunity jurisprudence" (*Ziglar v. Abbasi*, 2017, p. 1870).

appellate decisions resolving qualified immunity appeals to better understand how the defense is resolved at the appellate stage and second, to track certiorari practice in the Supreme Court to better understand the dynamics which lead to appellate decisions being selected for Supreme Court review.

Prior empirical study of qualified immunity in the courts of appeals

The vast majority of prior research regarding the treatment of qualified immunity in the courts of appeals has focused on a distinct question: to what extent has qualified immunity had an impact on the development of constitutional law. Recall that qualified immunity is an affirmative defense which is unnecessary to address if the plaintiff cannot even allege a violation of the constitution. As discussed above, in 2009 the Supreme Court moved from *Saucier*'s rule—requiring that the merits of a plaintiff's claim be addressed prior to qualified immunity—to *Pearson*'s discretionary framework, in which lower courts could use their discretion to decide whether to address qualified immunity before addressing the merits of a plaintiff's claim (*Pearson v. Callahan*, 2009, p. 237). Some scholars have examined whether this transition has had an impact on the development of constitutional law.

In particular, scholars hypothesized that *Saucier*'s mandatory sequencing would result in more law-announcing by federal courts. Correlatively, with *Pearson*'s abandonment of a mandatory rule, scholars hypothesized lower courts might decline altogether to decide whether or not particular conduct violated the constitution because they could answer a different and sometimes easier question first—that the law was not clearly established, thereby demonstrating the defendant's entitlement to qualified immunity. And several researchers have set out to test this hypothesis—for ease of reference, I will refer to the question assessed in these studies as one relating to the implications of "sequencing" in qualified immunity decision-making.

Early work in this area focused on whether the transition to *Saucier's* mandatory sequencing rule resulted in more law-giving by lower courts. Four of these studies were completed before the Supreme Court's decision in *Pearson* (Healy, 2005; Hughes, 2009; Leong, 2009; Sobolski & Steinberg, 2010). Leong (2009) focused on qualified immunity decisions issued at three critical moments—2 years before the Supreme Court's decision in *Siegert v. Gilley* (1991), because at that point the Court had not indicated any preference for how to sequence qualified immunity decision-making; 2 years before the Court announced a mandatory rule for sequencing in *Saucier v. Katz* (2001); and during the years 2006 and 2007 (Leong, 2009, p. 670). To do so, Leong identified every case in the Westlaw database during each of the relevant 2-year time periods containing the term "qualified immunity" and randomly sampled 100 district court decisions and 100 appellate decisions (Leong, 2009, pp. 685–686). Leong then separately coded

how each claim was resolved in each decision, and those data reflected that over the three time periods, qualified immunity was denied in between 20% and 26% of the claims (Leong, 2009, pp. 691, 711, table 4). For two of the time periods (pre-*Saucier* and 2006–2007), Leong found that district court judges appointed by Democrats were more likely to deny qualified immunity that district court judges appointed by Republicans, but Leong did not examine ideology at the appellate level (Leong, 2009, pp. 698, 712, table 5).[21]

Hughes (2009) also published a study attempting to understand the significance of sequencing in qualified immunity decision-making. He analyzed *published* appellate opinions[22] decided in 1988, 1995, and 2005, like Leong focusing on the time periods in which no sequencing was required, sequencing was suggested, and sequencing was required.[23] Unlike Leong, Hughes coded the decisions as a whole, not claim by claim (Hughes, 2009, pp. 419–420).[24] And although Hughes was not focused on how often qualified immunity was denied, he reported denial rates of 42% in the 1988 time period, 26% in the 1995 time frame, and 46% in the 2005 time frame (Hughes, 2009, p. 422, table 1).

Like Leong and Hughes, Sobolski and Steinberg conducted a study aimed at understanding the implications of sequencing by examining 741 published circuit court decisions, randomly selected from between 1976 and 2008, but assigned to three separate time periods (Sobolski & Steinberg, 2010, p. 525).[25] Sobolski and Steinberg coded each claim separately if they involved separate constitutional questions; if a case presented identical claims against more than one defendant, they coded the case as a single claim unless the disposition differed among defendants (Sobolski & Steinberg, 2010, p. 540). Over the course of the three periods studied, the rate at which qualified immunity was denied varied over time from 31.9% (pre-*Siegert*) to 28.6% (pre-*Saucier*) to 36.5% (post-*Saucier*) (Sobolski & Steinberg, 2010, p. 545, table 1). Sobolski and Steinberg did not otherwise analyze overall outcomes on qualified immunity, focusing instead on the extent to which appellate courts expanded or restricted constitutional rights as a result of difference sequencing rules.

[21]I should note that because Leong was focused on whether judicial decisions differed based on how they sequenced decision-making in qualified immunity cases, and not on the overall outcome of qualified immunity grants or denials, her logistic regression analysis does not attempt to examine whether any of these differences are meaningful in terms of the area this paper examines.

[22]There are significant risks in drawing conclusions based solely on published opinions, as there is ample data suggesting that it introduces nonrandom variation into the dataset. See Berdejó (2013, p. 273, note 12) (summarizing studies).

[23]Hughes' dataset included 109 cases decided in 1988, 146 decided in 1995, and 159 cases decided in 2005. *Id.* at 419–420.

[24]Where decisions granted and denied qualified immunity in part, Hughes coded these separately, but did not disaggregate according to how many claims were dismissed on qualified immunity and how many were not dismissed (Hughes, 2009, p. 420, note 114).

[25]The time periods corresponded to those studied by Hughes and Leong—pre-*Siegert*, pre-*Saucier*, and post-*Saucier*. *Id.* at p. 545, table 1.

Healy (2005) also reported data collected pre-*Pearson*, culling data from all circuit court cases in the 2 years after *Saucier* that cited to the mandatory sequencing required by *Saucier*. Healy did not report specifically how many times qualified immunity was denied, but did report that a right was found to be clearly established in 60 out of 167 rights reviewed, and of those 60, there was only one case in which the court found that a right was clearly established but that the plaintiff did not establish a violation of the constitution (Healy, 2005, p. 937).[26] Thus, it appears that in Healy's dataset, qualified immunity was denied in 35% of the claims brought.

After *Pearson* was decided, scholars turned to study whether the shift to *Pearson*'s discretionary rule would make appellate courts less likely to announce the law than when *Saucier* was controlling.[27] By far the most comprehensive of the prior studies was reported by Nielson and Walker (2015, 2016), who culled data from approximately 800 published and unpublished circuit court decisions issued between 2009 and 2012, focusing on appellate judges' exercise of their discretion under *Pearson* to reach the question of whether a constitutional right was violated. Because Nielson and Walker were focused on the exercise of *Pearson* discretion, they only examined circuit court decisions issued after *Pearson* which also cited to *Pearson* (Nielson & Walker, 2015, p. 31). This excludes a significant proportion of the cases in which qualified immunity was raised on appeal,[28] and for the purposes of assessing how appellate courts resolved qualified immunity defenses, the sample is likely non-random.[29] And although Nielson and Walker report the percentage of claims for which qualified immunity was denied, an apt comparison cannot be made to the data reported here because I coded grants or denials according to an entire decision, while Nielson and Walker treated each claim addressed in each appellate decision separately.[30]

Nielson and Walker's work does provide ample evidence that qualified immunity is filtered to some degree by judicial ideology. They report that panels composed entirely of judges appointed by a Republican President were more likely to exercise *Pearson* discretion to reach constitutional questions and also

[26]These figures are based on my analysis of the appendix to Healy's paper.

[27]As discussed above, *Pearson v. Callahan* (2009) gave lower courts the option to decline to decide whether the plaintiff alleged a constitutional violation if they instead thought that any such right was not "clearly established" at the time of the alleged violation.

[28]Nielson and Walker do not report the breakdown of the cases they sampled by year of the appellate decision, but they analyzed 844 cases decided between 2009 and 2012 (Nielson & Walker, 2016, pp. 95–96). By contrast, there were almost 1200 decisions issued between 2010 and 2012 analyzed in this study. *Pearson* was decided on January 21, 2009, so assuming that there is a relatively even breakdown in the number of qualified immunity decisions issued between 2009 and 2012 (a reasonable assumption based on the data reported here), it is likely that Nielson and Walker's study captured about half of the total qualified immunity decisions issued during the relevant time frame.

[29]One might expect that courts that cite to *Pearson* are more likely to be exercising the discretion afforded under *Pearson*, which might reflect a higher rate of granting qualified immunity.

[30]As a result, Nielson and Walker were studying the resolution of qualified immunity for each of the 1460 claims addressed in the 844 decisions they analyzed (Nielson & Walker, 2015, pp. 30–31). Qualified immunity was denied for 27.7% of the claims (Nielson & Walker, 2015, p. 37, table 1).

more likely to find that no constitutional violation occurred, while panels composed entirely of judges appointed by a Democratic President were more likely to recognize a new constitutional right (Nielson & Walker, 2016, pp. 63–64). They observed no significant differences based on presumed judicial ideology when panels were mixed.[31] Finally, they found evidence that judges might behave strategically by announcing new constitutional rights or denying qualified immunity in unpublished decisions, and that Republican-appointed judges are more likely to deny qualified immunity in unpublished decisions (Nielson & Walker, 2016, p. 64).

Nielson and Walker's work also provides some evidence of intercircuit disparities in treatment of qualified immunity. For example, the Fifth, Sixth, and Ninth Circuits were significant outliers (in different directions) from the national average in terms of their exercise of *Pearson* discretion (Nielson & Walker, 2015, p. 40). Of more relevance to this paper, only the Sixth Circuit was more likely to deny qualified immunity (Nielson & Walker, 2015, p. 40).

Three studies other than Nielson and Walker's also sought to suss out *Pearson*'s impact on law giving. Utilizing the same methodology as Leong (2009), Rolfs (2011) analyzed 100 district and 100 circuit court decisions randomly selected from those decided between January 21, 2009, the day *Pearson* was decided, and September 7, 2009. Like Leong (2009), Nielson and Walker (2015, 2016), and Sobolski and Steinberg (2010), Rolfs (2011) generally coded by claim, not by decision, identifying 159 claims in the 100 circuit court cases he studied.[32] As with other scholars, Rolfs' focus was on how courts sequenced their qualified immunity decisions, not on whether qualified immunity was granted or denied, but he reported that qualified immunity was denied for 22.6% of the separate claims he identified (Rolfs, 2011).

Sampsell-Jones and Yauch (2011) conducted an analysis of examined every published court of appeals case that cited *Pearson* in 2009 and 2010—a total of 190 decisions. Coding outcomes in cases as a whole, they found that qualified immunity was denied 37.9% of the time (Sampsell-Jones & Yauch, 2011, p. 628, table 1). Panels with a majority of Republic-appointed judges denied qualified immunity 36.4% of the time, while panels with a majority of Democratic-appointed judges denied qualified immunity 42% of the time (Sampsell-Jones & Yauch, 2011, pp. 629–630, tables 3 and 5). But they declined to analyze denials any further because they were not relevant to the subject of their study (namely how courts of appeals exercised their *Pearson* discretion).

Tokson (2015) conducted a study using the same methodology as Nielson and Walker (2015, 2016) and Sobolski and Steinberg (2010), comparing the data

[31]That is, panels composed of one Democratic-appointed judge and two Republican-appointed judges did not appear to decide cases differently compared to panels composed of two Democratic-appointed judges and one Republican-appointed judge (Nielson & Walker, 2016, pp. 63–64).

[32]As with other scholars, if a claim was brought against multiple defendants, these were coded separately only if the outcome was different as to some of the defendants (Rolfs, 2011, p. 490).

from Sobolski and Steinberg with data culled from 200 randomly selected qualified immunity appeals decided in the 2 years after *Pearson*. Like the other prior studies, Tokson's focus was on the courts' exercise of *Pearson* discretion, not on the denial versus grant of qualified immunity, but he reported data showing that in his dataset, qualified immunity was denied for 30% of the claims (Tokson, 2015, p. 957, table 1).

Finally, two additional studies have been conducted over the past two decades that were not directed at the question of sequencing. Hassel (1999) examined an undisclosed number of appellate and district court decisions on summary judgment, by way of an undisclosed methodology, decided over a 2-year period. She reported that qualified immunity was denied in 20% of cases, excluding those where qualified immunity was denied because of a disputed issue of fact Hassel (1999, p. 145). And Nash (2016, p. 91) conducted a study of how courts of appeals review qualified immunity decisions on summary judgment, identifying 259 summary judgment appeals decided between June 1, 2014 and May 31, 2015. Nash found that courts of appeals were far more likely to reverse (in whole or in part) denials of summary judgment than to reverse grants of summary judgment (Nash, 2016, pp. 126–131).[33] Nash thus, like this paper, identified an asymmetric standard of review in qualified immunity cases.

Other than these academic studies, it bears mentioning that reporters with Reuters (2020a) conducted a qualified immunity study aimed at determining how courts adjudicated the defense in police excessive force cases. The news service analyzed 529 published appellate opinions decided between 2005 and 2019, focusing only on those that adjudicated police uses of force (Reuters, 2020b). Although Reuters did not provide results of statistical testing, they reported results in 3-year increments, and between 2005 and 2016, plaintiffs prevailed between about 52% and 57% of the time, with plaintiffs' success rate dropping to 43% between 2017 and 2019 (Reuters, 2020a).

Methodology of current study

The methodology used in this paper is different in important ways from the prior studies. Using Westlaw, research assistants identified all cases decided in the courts of appeals between January 1, 2004, and December 31, 2008, and January 1, 2010, and December 31, 2015, in which the term "qualified immunity" appeared. These dates were chosen so that the data could be analyzed to determine whether outcomes in the courts of appeals were different pre-*Pearson* and post-*Pearson*. Decisions issued in 2009 were not included to ensure a sufficient amount of time to pass after the Supreme Court's issuance of *Pearson*

[33]Decisions denying summary judgment were reversed in whole on appeal 36.0% of the time, while decisions granting summary judgment were reversed in whole 9.5% of the time (Nash, 2016, p. 128). Decisions denying summary judgment were reversed in part 43.2% of the time, compared to a 14.9% partial reversal rate for decisions granting summary judgment (Nash, 2016, pp. 128–129).

(at the beginning of 2009).[34] Only opinions in which the court actually resolved qualified immunity arguments made by the parties were included in the study.[35] Thus, unlike nearly every prior study, the dataset include all appellate decisions on qualified immunity, whether those opinions were published or unpublished, and whether those opinions cited to *Saucier* or *Pearson* or neither.[36] All told, 4145 decisions were identified and coded, but after excluding panel decisions that dismissed interlocutory appeals for lack of jurisdiction or remanded without making a qualified immunity determination, 4054 appellate opinions remained in the dataset.[37] By contrast, the largest prior study consisted of 800 appellate decisions.[38] Indeed, more decisions are covered by this study than all prior studies combined. Table 1 summarizes the difference between prior studies and this one.

Prior studies focused on whether appellate courts exercised their discretion to determine whether new law was announced in qualified immunity cases, but this study's central question was which party prevailed in the court of appeals and which variables were correlated with success. Most prior studies did not code for or analyze many of the variables one might hypothesize would interact with case outcome, such as whether the plaintiff was pro se or which geographic circuit issued the decision.[39] In this study, however, every decision was coded for additional variables other than who prevailed on appeal, including: circuit court of appeals; appellate decision date; pro se status of any party; district court outcome[40]; whether the

[34]Of course, one might assume that the day after *Pearson* was decided, courts and litigants would internalize its holding but that may be unrealistic. See, for example, Zambrano (2018, p. 198, notes 1–4) (summarizing literature identifying instances of judicial noncompliance with new law announced by Supreme Court or Congressional amendments of statutes).

[35]As one might expect, the substance of the defense was not addressed in every opinion in which the term "qualified immunity" appeared.

[36]Excluding Hassel (1999), which does not disclose its methodology, three of the prior studies evaluated only published opinions (Hughes, 2009; Sampsell-Jones & Yauch, 2011; Sobolski & Steinberg, 2010). Of the studies that examined both published and unpublished opinions, three selected a subset by random sampling (Leong, 2009, pp. 685–686; Rolfs, 2011, p. 489; Tokson, 2015, pp. 956–957); and two of the remainder only selected opinions that cited to a particular Supreme Court opinion (Healy, 2005, p. 937 [selecting opinions citing *Saucier*]; Nielson & Walker, 2015, p. 30 [selecting opinions citing to *Pearson*]). The final study involved only specific summary judgments appeals involving qualified immunity (Nash, 2016, p. 91).

[37]Thirty-two panel decisions remanded to the district court without resolving qualified immunity, and 59 dismissed a defendant's interlocutory appeal for lack of jurisdiction. In addition, if any panel decision was revised upon panel or en banc rehearing, only the decision on rehearing was included in the dataset.

[38]Nielson and Walker (2015, 2016) studied 800 appellate decisions and Sobolski and Steinberg (2010) studied 741 published appellate cases. Every other study included far fewer cases in the case cohort.

[39]Only two prior studies even coded for pro se status, and of those only one actually reported data regarding the difference between pro se and counseled outcomes (Leong, 2009, p. 688, note 97 [noting that author coded for whether plaintiffs in district court were pro se but stating that results were not analyzed]; Nash, 2016, p. 130, note 179 [noting that evidence of asymmetrical review was statistically significant for subset of 42 cases in which plaintiff was pro se on appeal]).

[40]District court decisions were coded based on how they presented qualified immunity issues on appeal. That is, if a district court denied qualified immunity for only some of the claims, and the defendant filed an interlocutory appeal, this was coded as a district court denial. Similarly, if issues other than qualified immunity were presented on appeal (e.g., absolute immunity, exhaustion of administrative, etc.), the district court's resolution of those outcomes was ignored for coding purposes. As discussed below, fewer than 1% of district court decisions on appeal were cross-appeals of qualified immunity—these district court decisions were coded as "mixed."

TABLE 1 Summary of relevant empirical studies

Author	Limitations on opinions analyzed	Date range	Total opinions analyzed
Hassel (1999)	Undisclosed selection of decisions on summary judgment	1997–1999	Undisclosed
Healy (2005)	All decisions citing to *Saucier*	2001–2003	167
Hughes (2009)	All published	1988, 1995, 2005	414
Leong (2009)	Randomly selected	1988–1990; 1998–2000; 2006–2007	300
Sobolski and Steinberg (2010)	Published, randomly selected	1976–2008	741
Rolfs (2011)	Randomly selected	January 21, 2009–September 7, 2009	100
Sampsell-Jones and Yauch (2011)	Published decisions citing to *Pearson*	2009–2010	190
Nielson and Walker (2015, 2016)	All decisions citing to *Pearson*	2009–2012	844
Tokson (2015)	Randomly selected	2009–2010	200
Nash (2016)	All decisions on summary judgment	June 1, 2014–May 31, 2015	259
Reuters (2020a)	Published decisions involving police excessive force	2005–2019	529
Reinert (2023)	All decisions	2004–2008; 2010–2015	4054

appellate opinion was published; procedural stage at which qualified immunity was raised; court of appeals outcome[41]; identity of district and appellate judges; race and gender of district court and appellate judges; nominating president of district and appellate judges; political party of nominating president; presence of separate opinions; type of claims (First Amendment, Fourth Amendment, Eighth Amendment, Due Process, and Other); and presence of amicus involvement. To study certiorari practice, additional coding was done regarding whether a petition for certiorari was filed, whether the petition was granted, and resolution of any granted petitions in the Supreme Court.

None of these variables was difficult to code, although as noted below, where an appeals court affirmed in part and reversed in part a decision on

[41]Whether the appellate court granted qualified immunity at either the first (was the plaintiff's constitutional right violated at all?) or the second step (was the right clearly established?), it was coded as a "grant."

qualified immunity, that decision was coded as a "mixed" outcome.[42] Moreover, unlike some prior studies, each decision was coded as a whole, rather than claim by claim. There is much to commend Nielson and Walker (2015, 2016) and others for analyzing qualified immunity outcomes claim by claim. Indeed, in other work I have conducted similar kinds of analyses (Reinert, 2015, p. 2140). Whether such an approach makes sense will likely depend on a specific case context—in some circumstances, as a matter of litigation reality, a partial win for the plaintiff on qualified immunity may be essentially the same as surviving dismissal on all claims. Plaintiffs often, for example, sue more than one defendant for injuries arising out of the same transaction or occurrence. The plaintiff's recovery is unlikely to be diminished if they can proceed against only one defendant rather than all.[43] But in Nielson and Walker's and others' methodology, if the same claim were brought against multiple defendants, the claims were coded separately only if the court reached a different result for different defendants.[44] From the defendants' perspective, moreover, a principal value of qualified immunity is in terminating the litigation. Prevailing on qualified immunity in part is a victory of sorts, but not nearly as significant as obtaining a dismissal in its entirety. Thus, for the purposes of this study, analysis was conducted on appellate outcomes in a case as a whole rather than claim by claim.

The end result is the most comprehensive study of appellate qualified immunity decisions to date, spanning a broader time period and thousands of more decisions than prior research. And this study, unlike all others, also sought to put appellate decisions in litigation context by taking into account district court resolution of the issues presented to the courts of appeals and certiorari practice after the courts of appeals' decisions. In so doing, this study provides for the first time an analysis of the dynamics of qualified immunity decision-making

[42]I conducted an independent review of each of these "mixed" outcomes to ensure that the coding accurately reflected the outcome. In addition, I conducted an independent review of every district court outcome coded as a "mixed" outcome.

[43]For reasons others have explained, even though qualified immunity only arises in cases seeking liability against individual defendants, those defendants hardly ever pay a judgment or settlement. Instead, the government that employs them indemnifies as a matter of course, so having multiple defendants in the case is unnecessary to assure adequate compensation for one's injuries (Schwartz, 2014, p. 890). There might be exceptions, of course, for claims that are brought against distinct defendants or for defendants who might otherwise be amenable to punitive damages. But see Schwartz (2014) (finding that defendants in police misconduct cases were fully indemnified for punitive damages). But the defendants who might be liable for punitive damages are the defendants least likely to have their qualified immunity defense granted, given that punitive damages are only available under Section 1983 when the defendant's conduct is "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others" (*Smith v. Wade*, 1983, p. 56).

[44]This treatment is not just inconsistent with litigation reality, but it also introduces the possibility that data will be skewed in ways that under- or over-state the overall treatment of qualified immunity defenses. Consider two different cases: one in which a plaintiff sued eight different officers for excessive force, with claims against all eight surviving a motion to dismiss on qualified immunity grounds; and the other in which the plaintiff sued only two officers for excessive force, with the claim against one officer dismissed based on qualified immunity and the claim against the other surviving. Nielson and Walker's coding convention would code the first as a denial of qualified immunity for one claim, even though eight different defendants were implicated, and would code the second as resulting in one denial and one grant of qualified immunity.

throughout all levels of federal court review. A detailed analysis of the results follows.

RESULTS

This part presents the most significant results from analysis of the dataset. It begins by describing the cohort of district court decisions as they came to the courts of appeals—the "input," so to speak, for the cohort of appellate decisions that was the focus of this study. Beginning here helps both to contextualize the results on appeal and, most importantly, to appreciate the presence of asymmetric standards of review (i.e., differences in appellate review of denials vs. grants of qualified immunity).[45] I then turn to a description of outcomes in the court of appeals. The data show that, overall, courts of appeals find that qualified immunity is appropriate far more often than they find that the defense should be denied. But there are several variables that appear related to the success of either party, most importantly circuit identity, whether the plaintiff was represented on appeal, and the ideological composition of the appellate panel. Thus, although the distribution of outcomes was relatively stable over time, there were wide variations in relative success depending on these variables.

Moreover, the data reflect strong and significant evidence of asymmetric review—district court decisions denying qualified immunity are reversed far more often than district court decisions granting qualified immunity.[46] And the asymmetric review correlates with each of the above-identified variables. For example, plaintiffs and defendants experience different levels of success in each circuit because there are different levels of asymmetric review in each circuit—in some circuits, district court decisions denying qualified immunity are reversed far more often than in other circuits. The ideological composition of each panel also is strongly correlated with existence of asymmetric standards of review.

This part then turns to what the data reveal about certiorari practice. Here, too, the results are significant and informative. They show that the Supreme Court treats defendants far more favorably than plaintiffs, both in granting petitions for certiorari and in resolving granted cases (even though plaintiffs are more likely to seek certiorari than defendants). And there is a significant relationship between presumed ideology in the courts of appeals and asymmetric review in the Supreme Court—decisions to deny qualified immunity issued by appellate panels composed of Democrat-appointed judges were reviewed more often by the Supreme Court than similar decisions by panels of Republican-appointed appellate judges. Moreover, there is significant intercircuit variation

[45]As discussed above, Nash (2016, pp. 126–131) found evidence of this asymmetry.

[46]For all two-way tables, significance testing was conducted using Pearson's chi-square testing and Stata 10.1 software, providing a two-tailed *p*-value. As a general matter, I report all *p*-values I calculated, whether they meet standard definitions of statistical significance or not.

in outcomes in the Supreme Court, both in terms of when petitions for certiorari are granted and how they are resolved.

At the same time, the data reveal tension between the courts of appeals and the Supreme Court. Even as the Court has grown increasingly hospitable to qualified immunity arguments by defendants, the courts of appeals have, overall, been relatively consistent over time in how they resolve appeals. Granted, there is evidence of a distinct bias in favor of defendants in the courts of appeals, but it is far more one-sided in the Supreme Court. Moreover, the Supreme Court has focused most of its attention in qualified immunity cases on Fourth Amendment cases, particularly police use of force cases. But the courts of appeals do not appear to treat those cases any differently from other areas of constitutional litigation. In short, the courts of appeals do not seem to be responding to whatever signaling the Supreme Court might be engaged in through its certiorari practice.

The input: District court decisions on appeal

An appellate court's docket is not representative of the universe of civil litigation filed in district courts. In the ordinary course, only final judgments can be appealed, which means that most pretrial decisions are only subject to appeal when they resolve a case against the plaintiff, terminating the litigation.[47] But decisions on qualified immunity are subject to interlocutory appeal, making possible the review of district court decisions denying dismissal motions made at the pleading or summary judgment stages. And one might expect the overall success rate of plaintiffs or defendants in the appellate courts to depend on the overall makeup of the cases being appealed. After all, if a district judge declined to find qualified immunity arguments meritorious, that might be a good indication that other judges would agree, and vice versa.

For all these reasons, understanding which decisions were appealed to the courts of appeals is critical to providing context for appellate outcomes. As Table 2 indicates, about 60% of the district court decisions in the cohort were appeals by plaintiffs seeking to a district court's decision dismissing their claims on qualified immunity grounds.[48] There was no difference in the makeup of

[47] *See* 28 U.S.C. § 1291.

[48] I have provided comprehensive data tables in Appendix A, and for the reader's ease have included only select data tables and figures in the body of this Article. For complete data regarding Table 1, see Table A1. As Table 1, shows, it was rare (less than 1% of the time) for both parties to cross-appeal on qualified immunity issues. This is because interlocutory jurisdiction is available for defendants seeking to appeal a partial denial of qualified immunity, but not for plaintiffs seeking to appeal a partial grant, unless those appeals were "inextricably intertwined" with the issues raised by the defendant's appeal (*LaTrieste Rest., & Cabaret, Inc. v. Vill. of Port Chester*, 1996, p. 599). Thus, the percentage of these cases on appeal understates the extent to which district courts may have granted and denied in part arguments for qualified immunity.

TABLE 2 District court outcomes on appeal

Outcome in district court	Pre-*Pearson* frequency (%)	Post-*Pearson* frequency (%)	All cases frequency (%)
Deny qualified immunity	674 (39.16%)	949 (38.94%)	1623 (39.16%)
Grant qualified immunity	1021 (59.78%)	1472 (60.40%)	2493 (60.14%)
Grant and Deny qualified immunity	13 (0.76%)	16 (0.66%)	29 (0.70%)
Total	1708	2437	4145

district court decisions during the pre- and post-*Pearson* time periods.[49] These data are consistent with the one prior study which directly assessed the makeup of district court decisions on appeal, which found that about 57% of the district court decisions on appeal on qualified immunity grounds involved a grant of qualified immunity.[50]

To be clear, these data do not reflect the overall success of invocations of the qualified immunity defense in the district court. They only reflect the makeup of the district court decisions that are appealed. And because available data are sparse, it is unclear whether district court decisions favoring the defendant are overrepresented on the appellate docket.[51] Accordingly, further study is necessary to determine whether the district court decisions that are appealed overstate the prevalence of denials or grants of motions to dismiss at the trial court level.

Although there is little difference in which party prevailed in district court when one looks at pre-*Pearson* and post-*Pearson* appeals, there is wide variety across the circuits, as Figure 1 demonstrates.[52] In only one circuit, the DC Circuit, did district court decisions denying qualified immunity represent the majority of appealed cases. In the Third, Fifth, and Ninth Circuits, appeals were heavily skewed toward ones in which defendants prevailed in the district court, with about 65% or more of the appeals in those circuits involving appeals of grants of qualified immunity. In the remainder of the circuits, between 50% and

[49]Whether a case falls into the pre- or post-*Pearson* period is determined by the date of the Court of Appeals decision, not the date of the District court decision.

[50]Nash (2016, appendix table A1). There are some differences between Nash's methodology and mine—Nash excluded cases in which qualified immunity was granted or denied based solely on purely factual disputes (Nash, 2016, p. 127). And Nash does not describe how he coded decisions that granted qualified immunity in part.

[51]Prior studies reflect a range of success rates for defendants in the district courts. Based on data reported by Schwartz, for example, district courts granted motions to dismiss or for summary judgment on qualified immunity grounds about 40% of the time, but this included only cases in which the district court found that the law was not clearly established (Schwartz, 2017, p. 36, table 6 [reporting 103 opinions in which immunity was granted and 165 opinions in which it was denied]). Leong found a grant rate of about 68 percent before *Saucier* and about 86 percent in 2006–2007 (Leong, 2009, p. 711, table 3). And although Rolfs did not report it directly, one can extrapolate from his reported data that the qualified immunity defense was granted in about 78 percent of the claims presented in the post-*Pearson* district court motions he analyzed (Rolfs, 2011, pp. 490, 497, table 2 [reporting that 187 out of 240 claims were dismissed on qualified immunity grounds]).

[52]The data for Figure 1 are reported in Table A3. I have omitted cases involving cross-appeals by the parties on qualified immunity.

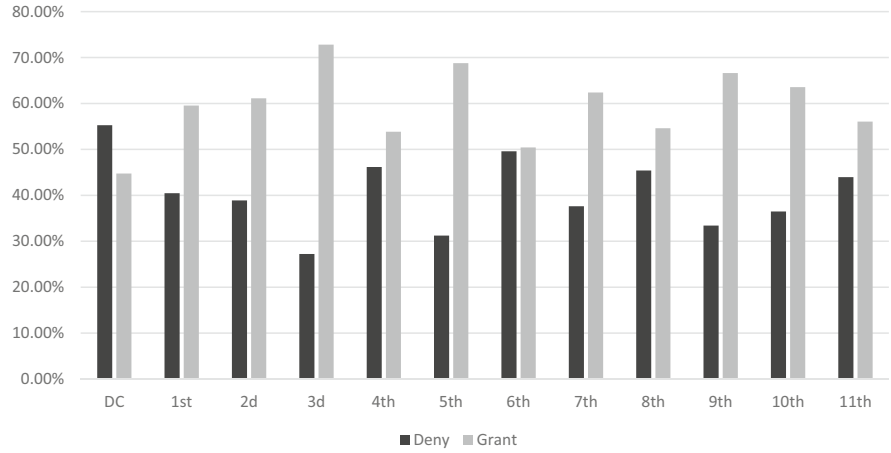

FIGURE 1 District court outcomes on appeal, by circuit

60% of the appeals involved cases in which the defendant prevailed on qualified immunity grounds.

There are several potential explanations for this difference. One possibility is that there were differences in the underlying rate at which district courts in each circuit granted qualified immunity. There are at least two reasons to question whether this is fully explanatory. First, the stakes at issue for the parties vary significantly. A plaintiff can only appeal a district court decision granting qualified immunity when it disposes entirely of the case, whereas a defendant can appeal denials of qualified immunity at multiple points in litigation.[53] Therefore, when the appeal is initiated by a plaintiff, it means they have lost the entire case; whereas even if a defendant loses on a motion to dismiss for qualified immunity at, say, the motion to dismiss stage, the defendant could forego an appeal and nonetheless raise the defense later in the proceedings.[54] Because of the comparative stakes, one would expect the appellate docket to over-represent

[53]The final judgment rule generally precludes plaintiffs from appealing adverse decisions unless they dispose of the entire case, but defendants may seek an interlocutory appeal of the denial of qualified immunity at both the motion to dismiss and summary judgment stages (*Behrens v. Pelletier*, 1996; *Mitchell v. Forsyth*, 1985). Plaintiffs may attempt to seek an interlocutory appeal of grants of qualified immunity through Rule 54(b) certification or by filing a cross-appeal, but these rights are limited. See 10 Fed. Prac. & Proc. Civ. § 2656 (4th ed.) ("Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions."). Further to this point, very few of the decisions on appeal involved cross-appeals in which both the defendants and plaintiffs sought review of a qualified immunity determination by the district court.

[54]There is some evidence that stake asymmetry is higher for plaintiffs in prisoner and civil rights cases than in other case types (Siegelman & Waldfogel, 1999, p. 127). Defendants may also hesitate to appeal a denial of a motion to dismiss because of the high bar for establishing an entitlement to dismissal at that stage (*McKenna v. Wright*, 2004, p. 436; *Watkins v. Healy*, 2021, p. 648).

appeals of grants of qualified immunity, even if plaintiffs and defendants each prevailed 50% of the time on qualified immunity issues in district court.

At the same time, differences in party resources might cut in the other direction. Appealing a case requires significant expenditures. Where individual defendants are represented by government attorneys (or by private attorneys contracted with the government to provide representation),[55] those resource barriers are reduced. Plaintiffs in the civil rights space are generally less well-resourced, and the attorneys who take such cases might decline to take appeals if they consider the prospect of success to be low (Albiston & Nielsen, 2007, p. 1095; Rudovsky, 2005, p. 1221, note 143; Tobias, 1994, pp. 190–191). Thus, even if plaintiffs lose more often than win on qualified immunity in the district court, asymmetric resources might skew appealed decisions toward cases in which the district court denied qualified immunity.

Related to the last point, parties may appeal differently based on their prediction of how the appeal will be resolved. Defense counsel may be more likely to file an interlocutory appeal in circuits in which they perceive qualified immunity arguments will be met receptively.[56] As repeat players, defense counsel in such cases may be better informed regarding circuit trends. They also may wish to be more strategic about whether to seek an interlocutory appeal, given their interest in developing or maintaining favorable circuit precedent.[57]

In sum, about 60% of the decisions on appeal in this dataset were ones in which the district court granted qualified immunity for the defendant. And although there was significant variation in which district court outcomes were appealed in each regional circuit, there were no significant differences based on time frame—that is, it does not appear that *Pearson*'s innovation, or the consistent grant of qualified immunity by the Supreme Court in other cases during this time period, changed the makeup of the district court decisions on appeal.

[55]It is the norm for defendants in civil rights litigation to be defended directly by government attorneys or to have their representation paid for by their employing agencies (Schwartz, 2014, pp. 915–916).

[56]This hypothesis is not necessarily supported by the data reported here, because the circuits with the highest percentages of appeals from district court grants of motions to dismiss or for summary judgment (the Third, Fifth, and Ninth) are not those in which plaintiffs tended to do better in terms of overall outcome. As discussed below, defendants tended to experience the greatest relative level of success in the First, Third, Fifth, and Eighth Circuits, with plaintiffs experiencing relatively more success in the DC, Fourth, and Ninth Circuits. See infra pp. 31–32. What is missing, however, is what percentage of overall grants or denials of qualified immunity by district courts were ultimately appealed.

[57]Hadfield (2005, p. 1281) (finding that organizational parties fared better than individuals in federal civil litigation); Schwab & Eisenberg (1988, pp. 750–752) (hypothesizing that plaintiffs in constitutional torts cases may bring weaker cases to trial because they are not repeat players). Of course, while civil rights plaintiffs are not repeat players, some members of the plaintiffs' bar are, and based on my experience, they communicate regularly across jurisdictions and engage in some strategic thinking regarding the development of law favorable to plaintiffs' civil rights claims. See, for example, https://www.nlg-npap.org/ (describing "members only listserv" for plaintiffs' attorneys engaged in police misconduct litigation).

TABLE 3 Outcomes in courts of appeals

Outcome	Pre-*Pearson* frequency (%)	Post-*Pearson* frequency (%)	Total (%)
Deny	533 (31.21%)	716 (29.38%)	1249 (30.13%)
Grant	1017 (59.54%)	1490 (61.14%)	2507 (60.48%)
Mixed	125 (7.32%)	173 (7.1%)	298 (7.19%)
Remand with no QI determination	15 (0.88%)	17 (0.7%)	32 (0.77%)
Dismissed for lack of jurisdiction	18 (1.05%)	41 (1.68%)	59 (1.42%)
Total	1708	2437	4145

Note: These differences were not statistically significant ($p = 0.259$). This table includes only appeals in which qualified immunity was resolved by the appellate court.

The output: Outcomes in the courts of appeals

Table 3 reports the outcomes in the 4145 opinions that addressed qualified immunity during the study period—the defense was denied entirely in approximately 30% of the decisions, granted in about 60% of the decisions, and denied in part and granted in part in approximately 7% of the cases.[58] In other words, although 39% of the district court decisions on appeal were of denials of qualified immunity (Table A1), that number was reduced to about 30% after decisions on appeal. The percentage of decisions in which qualified immunity was granted in full was essentially the same when one compares the district court decisions on appeal and the outcomes of those appeals. Thus, it appears that the shift in prevalence on appeal was not from complete denials of qualified immunity to complete grants, but to mixed outcomes in the courts of appeals.[59]

The upshot is that defendants are far more successful than plaintiffs when litigating qualified immunity issues in the courts of appeals. Prior empirical research of appellate decisions, though not focused on this specific question, has reported similar results.[60] But these top-level numbers are not fully informative. Most importantly, on their own they do not help us to understand what drives the different rates of success for plaintiffs and

[58]In the remainder of cases, the court of appeals either remanded without making a qualified immunity determination or dismissed for lack of interlocutory jurisdiction.
[59]As Table A4 shows, only about half of the district court decisions in which qualified immunity was denied in full were affirmed on appeal, while more than 75% of the district court decisions in which qualified immunity was granted in full were affirmed. District court decisions denying qualified immunity in full were slightly more likely to result in mixed outcomes on appeal, as compared to decisions granting qualified immunity. And decisions denying and granting qualified immunity in part were about twice as likely to result in a grant on appeal as in a denial. I discuss this asymmetric standard of review in greater detail below. Infra pp. 25–29.
[60]Supra pp. 9–14.

defendants on appeal. The next few sections will explore what might account for these differences.

Assessing the correlates of appellate outcomes: Time, party identity, and representation

One might hypothesize several reasons for defendants' relative success at the appellate level. Most obviously, the law of qualified immunity increasingly favors defendants, and one would expect appellate decision-making to reflect that.[61] The impact of changes in the law, primarily the shift from *Saucier* to *Pearson*, has been the focus of the vast majority of prior empirical work on qualified immunity in the courts of appeals. I evaluate it here, finding no evidence of any significant change over time in defendants' success rates. Prior empirical work has paid almost no attention, however, to representation by counsel and the identity of the party seeking appeal. The data presented here indicate that both of these variables are significantly associated with the relative success of plaintiffs and defendants on appeal (Tables 4 & 5).

Appellate outcomes over time

Many prior studies have focused on whether the Supreme Court's decision in *Pearson* has had any impact on the law-announcing function of appellate courts. In general, one might also expect that, as the Supreme Court has strengthened the qualified immunity defense, appellate outcomes also would shift. After, all, consider that in 2002, only 2 years before the study period began for this article, the Supreme Court issued a pro-plaintiff decision suggesting that qualified immunity could be denied where a constitutional violation was "obvious," even if no prior case law addressed a similar factual circumstance (*Hope v. Pelzer*, 2002). By 2015, the last year of decisions covered by this study, the composition of the Court had changed and it had issued multiple defendant-friendly decisions significantly increasing the hurdles for plaintiffs facing a qualified immunity decision (Baude, 2018, p. 82). Accordingly, I report here data related both to *Pearson*-specific effects and to more granular changes in the resolution of qualified immunity appeals over time. Notably, as with the district court decisions, Table 3 shows that there is no significant difference between appellate outcomes pre-*Pearson* and post-*Pearson*.

Matters appear slightly different when one considers appellate decisions year by year. After excluding cases in which qualified immunity was not resolved, during the pre-*Pearson* time period, the rate at which qualified immunity was

[61]See supra pp. 7–9 (discussing evolution of qualified immunity jurisprudence).

denied in full or in part appeared to increase slowly over time, with the rate at which qualified immunity was granted in full declining from a high of about 65% in 2004 to 57% in 2008. Between 2010 and 2015, however, the rate at which qualified immunity was granted or denied, in full or in part, did not reveal a trend in any particular direction. Figures 2 and 3 reflect this dynamic.[62]

Although inconclusive, these data suggest that *Pearson* might have had a subtle effect on decision-making in the courts of appeals. The data from the pre-*Pearson* period seem to indicate that, over time, plaintiffs were slowly increasing their success rate on appeal, but after *Pearson*, plaintiffs remained at an essentially static success rate from year to year. As discussed below, this appears to be a function of asymmetric review of district court decisions.

I should note that these findings are in some tension with prior empirical research. Some prior studies had found that the ways in which qualified immunity was resolved by courts of appeals shifted after *Pearson*,[63] and Reuters (2020a) found that between 2017 and 2019, plaintiffs fared worse in police excessive force cases than in the years between 2005 and 2016. But almost all of the prior studies examined only published opinions, only opinions containing cites to specific cases, only opinions addressing specific subject areas or decided at certain procedural stages, or some combination of the above. This may help to explain some of the differences in the results reported here.[64]

Appellate outcomes and party identity

One reason top-level appellate outcomes may not adequately capture real differences between plaintiff and defendant success is because they do not account for the decision being appealed. As previously discussed, Nash has reported data indicating that courts of appeals engage in asymmetric review of district court decisions involving qualified immunity—Nash (2016, pp. 126–131) showed that district court decisions denying qualified immunity on summary judgment were more likely to be reversed on appeal than district court decisions granting summary judgment on appeal. The data reported here are consistent with Nash's research but go further by analyzing asymmetric review according to circuit court identity and the presumed ideology of the appellate panel. For the cases in the dataset, district court decisions denying qualified immunity were far more

[62]The underlying data for these figures are found at Tables A5 and A6.

[63]See supra pp. 7–9.

[64]I separately analyzed published and unpublished case reports to determine whether there were differences in each subset in the pre- and post-*Pearson* periods. Unpublished opinions contained more appellate decisions granting qualified immunity, which means that examining only published opinions likely overstates the success experienced by plaintiffs on appeal. But within each published and unpublished subset the rate of grants and denials was essentially identical pre- and post-*Pearson*.

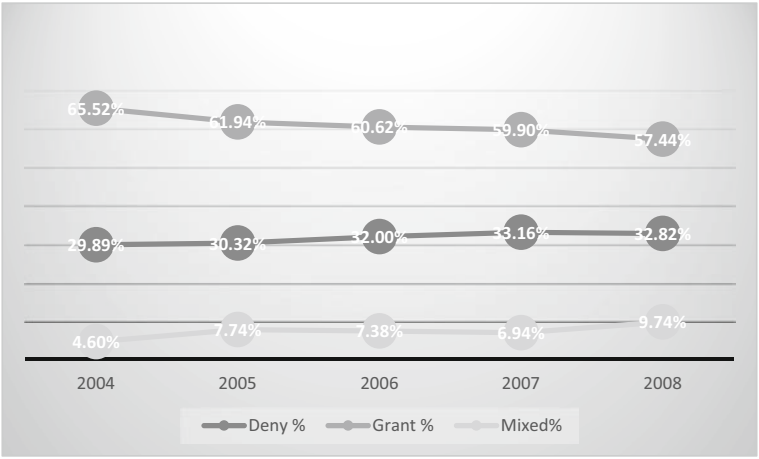

FIGURE 2 Appellate outcomes, 2004–2008

likely to be reversed compared to decisions granting the defense.[65] As Table 4 shows, district court decisions denying qualified immunity were reversed twice as often—almost 46% of the time—compared to district court decisions granting qualified immunity—about 22% of the time.[66] This pattern held true both before and after *Pearson*—in both time periods the difference between the reversal rates was statistically significant.

Figure 4 illustrates the overall dynamic by showing how each category of district court decisions (denying qualified immunity in whole, granting qualified immunity in whole, and granting/denying in part) was resolved on appeal.[67]

Even though the difference in reversal rates was statistically significant in both the pre-*Pearson* and post-*Pearson* time periods, there was substantial variation in reversal rates according to year. Tables A7 and A8 show that during both time periods studied, the difference in in appellate treatment of appeals by

[65]Calculating reversal rates was straightforward where the appeals court either granted or denied qualified immunity. Where appellate courts granted and denied in part, reversal rates were calculated based on the nature of the district court decision on appeal. If an appeal of a district court decision denying qualified immunity resulted in a grant and denial in part on appeal, it was coded as a reversal on the reasoning that the defendant had prevailed at least in part. Similarly, if an appeal of a district court decision granting qualified immunity resulted in a mixed decision on appeal, it was coded as a reversal because in that circumstance it could be said that the plaintiff prevailed in part. The 26 cross appeals, in which both a grant and denial of qualified immunity were presented on appeal, were excluded from the analysis because the focus in this section is on asymmetric analysis of outcomes based on the identity of the party who prevailed in the district court. This excluded only 26 cases from the dataset.

[66]Not included in this table are 26 cases in which the parties took a cross-appeal from the district court decision because in those cases describing the appellate opinions as affirmance or reversal is ambiguous with respect to the appellate court's resolution of qualified immunity arguments.

[67]The data underlying Figure 4 are reported at Table A4.

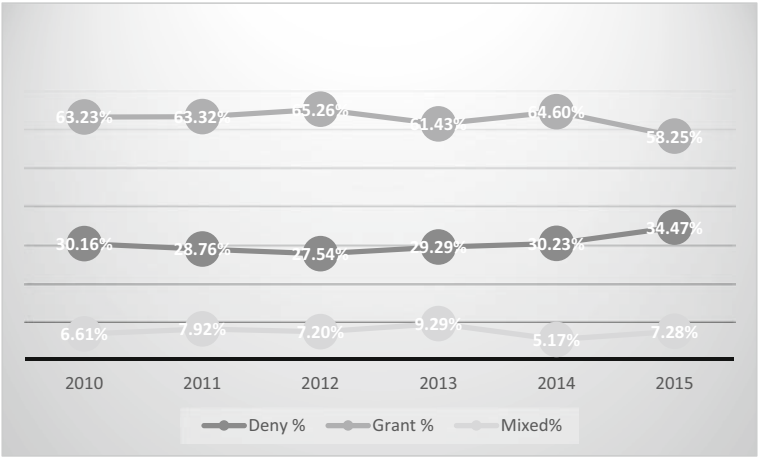

FIGURE 3 Appellate outcomes, 2010–2015

plaintiffs and defendants was statistically significant in every year, even as the relative divergence in treatment varied—there was more volatility from year to year in the 2010–2015 time period, which reported both the highest reversal rate for denials of qualified immunity and the lowest reversal rate for grants of qualified immunity (Tables A7 and A8).

These data suggest, then, that some of the difference in party success in the courts of appeals reflect different treatment of appeals by defendants and plaintiffs. Not only is this consistent with the qualified immunity data previously reported by Nash, but it is consistent with broader data in civil rights litigation. The work of Clermont and Schwab (2004, 2009) has consistently shown, for example, that plaintiffs in employment discrimination generally fare much worse than defendants on appeal. Similar data have been reported in the context of other civil rights claims (Hashimoto, 2016, p. 1035, note 168; Lahav & Siegelman, 2019, p. 1380, note 22).

As the foregoing data analysis will show, the asymmetrical treatment of qualified immunity depending on the outcome in district court is persistent—notwithstanding other variables that appear relevant to overall outcomes in the courts of appeals, asymmetrical treatment of district court decisions granting or denying qualified immunity is ever-present. This is surprising. Given that the availability of qualified immunity at the motion to dismiss or summary judgment stage is a legal determination,[68] district court decisions are reviewed de novo (*Elder v. Holloway*, 1994, p. 516). And even if one believes that as a practical matter greater deference might be given to a district court's summary

[68]Qualified immunity at trial is more complex (Reinert, 2018). But only 133 decisions involved appeals from qualified immunity issues presented at trial.

TABLE 4 Courts of appeals ("CTA") outcome, by district court ("DCT") outcome, pre- and post-*Pearson*

	DCT outcome (pre-*Pearson*)		DCT outcome (post-*Pearson*)		DCT outcome, all	
CTA outcome	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	349 (53.78%)	771 (76.04%)	494 (54.77%)	1154 (78.88%)	843 (54.35%)	1925 (77.71%)
Reverse	300 (46.22%)	243 (23.96%)	408 (45.23%)	309 (21.12%)	708 (45.65%)	552 (22.29%)
Total	649	1014	902	1463	1551	2477

Note: The difference in reversal rates was statistically significant for every time period ($p < 0.001$).

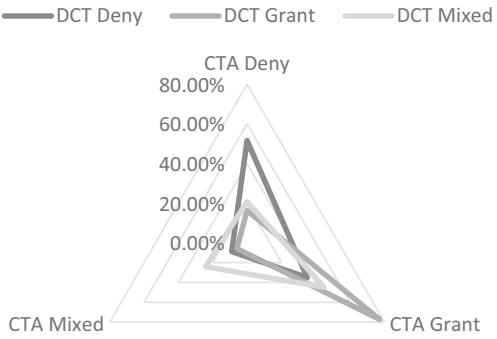

FIGURE 4 Outcomes in courts of appeals, by district court outcomes

judgment determination, the data suggest that the asymmetry in review is present at all procedural stages.[69] All else being equal, assuming that district and appellate courts are applying the same law to the problem of qualified immunity, one should not expect appellate treatment of district court decisions to depend on which party prevailed in the first instance.

For reasons I have discussed previously (see supra pp. 19–22), however, there are reasons one might not expect all else to be equal. Plaintiffs might appeal their losses at different rates than defendants and might appeal weaker (or stronger) cases (Eisenberg, 2004, pp. 670–678 [discussing appeal rates and relevant variables]). This study could not control for these potential selection effects, but if plaintiffs tend to appeal relatively weaker cases than defendants, it could help to explain their different rates of success on appeal. It would not explain, however, the evidence that asymmetrical review is influenced by judicial ideology, discussed below.

Appellate outcomes and representation by counsel

It is notable that almost none of the prior empirical studies of qualified immunity and appellate decision-making even coded for whether the plaintiffs were represented.[70] Given the importance of representation by counsel established in other studies of litigation outcomes (Reinert, 2015, pp. 2143–2144; Steinberg, 2015,

[69]District court decisions favoring plaintiffs were more likely to be reversed, at basically the same rate. whether those decisions were made at the summary judgment or motion to dismiss stage (Table A43). In the few cases on appeal from post-trial motions in which the affirmance/reversal rates were similar regardless of who prevailed—decisions favoring defendants were reversed 22% of the time while decisions favoring plaintiffs were reversed 31% of the time, but the differences were not statistically significant. *Id.*

[70]Two of the prior studies coded for whether the plaintiff was represented, and only one of those provided minimal data analysis, in a solitary footnote. See supra note 39.

TABLE 5 Appellate outcomes, by district court (DCT) outcomes and plaintiffs' representation

	DCT outcome (represented plaintiffs)		DCT outcome (pro se plaintiffs)	
CTA outcome	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	778 (53.95%)	1389 (74.92%)	65 (59.63%)	536 (86.04%
Reverse	664 (46.05%)	465 (25.08%)	44 (40.37%)	87 (13.96%)
Total	1442	1854	623	109

pp. 756–758), one would expect a difference in qualified immunity outcomes as well. At least on the surface the data gathered here are consistent with that expectation. As Table A9 shows, where plaintiffs in the courts of appeals were represented by counsel, they were about twice as successful as pro se plaintiffs.[71]

But when one accounts for which party prevailed in the district court, the potential impact of representation is more complex. As Table 5 shows, in cases in which qualified immunity was denied, counseled plaintiffs were slightly less successful than pro se plaintiffs in securing an affirmance in district court ($p = 0.251$). But counseled plaintiffs were far more successful than pro se plaintiffs in obtaining a reversal of district court decisions granting qualified immunity ($p < 0.001$). In other words, these data suggest that attorneys are no better than pro se plaintiffs in defending district court wins on appeal, but are better at reversing losses. Notably, for both represented and pro se plaintiffs, the difference in reversal rate between cases in which the defendant prevailed in district court and cases in which the plaintiff prevailed in district court was also statistically significant ($p < 0.001$).

There are several reasons that these data are surprising. First, even if one assumes that pro se and represented plaintiffs bring cases that are equally meritorious, one expects the presence of counsel to result in greater success on appeal. Schwartz (2020a, p. 1558–59) reports data consistent with the intuition that civil rights plaintiffs fare better when represented by attorneys in district court, and that more experienced civil rights attorneys have greater success than less experienced attorneys. Second, it is actually more likely that pro se plaintiffs on appeal have weaker cases than represented plaintiffs, particularly plaintiffs who prevailed in the district court. After all, plaintiffs who prevail in the district court and who are represented on appeal have met some criteria sufficient to satisfy an attorney to represent them. Additionally, although not every pro se plaintiff's case is weaker than cases brought by represented plaintiffs, one would still expect them to be weaker on average precisely because, even after prevailing in district court, they were unable to obtain the services of an

[71]When plaintiffs were represented by counsel, qualified immunity was denied in whole or in part in about 41% of cases, while in pro se cases the rate was about 21%. This difference was statistically significant at the $p < 0.001$ level. As with the rest of the data there were no significant differences in outcomes pre- and post-*Pearson*.

attorney. On the other hand, perhaps this suggests, at least when a plaintiff has prevailed in the district court, that the courts of appeals are holding true to the admonition that they should be solicitous toward pro se litigants (*Lopez v. Jet Blue Airways*, 2011). In any event, these data suggest avenues for future research on the effect of representation on appeal in qualified immunity cases.

Correlates of asymmetrical standards of review: Circuit court identity and judicial ideology

The data presented in the prior section suggested that one key to the differential success of plaintiffs and defendants in the litigation of qualified immunity is the suggestion that courts of appeals review qualified immunity grants differently from qualified immunity denials. But as other researchers have observed, evidence of asymmetric review in the courts of appeals could be explained by other factors rather than appellate courts disfavoring plaintiffs in qualified immunity cases (Eisenberg, 2004, p. 678). While estimating the impact of these variables is beyond the scope of this paper, it is possible to evaluate whether evidence of asymmetric review is correlated with other variables that one would reasonably hypothesize to be correlated with favorable treatment of one party or another in the resolution of qualified immunity. In this section, I show that asymmetric review varies according to circuit court, but that it is closely correlated with presumed judicial ideology. Taken together, these observations suggest that application of qualified immunity is affected both by circuit-specific caselaw and judicial ideology.

Asymmetric review and circuit court identity

One need not be a careful observer of appellate practice to know that different circuits are perceived as more or less welcoming to certain kinds of claims, including civil rights litigation. Prior empirical work has suggested that there is ample intercircuit variation in how cases are resolved (Broscheid, 2011, p. 188).[72] The data gathered here (confined only to counseled cases) reveal substantial variation among the circuits in terms of how qualified immunity was resolved on appeal. Qualified immunity was granted in full in more than 65% of appeals in the First, Third, Fifth, and Eighth Circuits (Table A10). In cases in the DC, Sixth, Seventh, and Ninth Circuits, the immunity was granted in full at a much lower rate, between 50% and 55% of the time (the Second, Fourth, and

[72]There is some evidence that circuits also differ in their decision-making norms, affecting the length of time to decide cases, likelihood of reversing cases in general, likelihood of publication, and likelihood of dissent (Berdejó (2013, p. 273, note 12); Lavie, 2016).

Eleventh were slightly higher, at around 56%, 57%, and 58%, respectively). The Tenth occupied a middle position, granting the defense in full in about 62% of cases (Table A10).[73]

The differences in overall success rates in the circuits are closely correlated with the extent of asymmetric review of district court decisions denying and granting qualified immunity. In the circuits with the highest overall grant rates (First, Third, Fifth, and Eighth), evidence of asymmetric review was significant both statistically and numerically—Eighth Circuit panels were more than four times as likely to reverse district court denials compare to district court grants, First and Fifth Circuit panels were three times as likely, and Third Circuit panels were more than twice as likely (Table A11, $p < 0.001$). In the DC, Fourth, and Ninth Circuits there were no statistically significant differences in the reversal rate of district court decisions granting or denying qualified immunity (Table A11). In the other circuits, reversal rates for denials were higher and statistically significant, but the differences were, in general, not as stark as in the First, Third, Fifth, and Eighth Circuits (Table A11). In other words, in circuits where plaintiffs achieved higher success rates overall, there were almost no statistically significant differences in the outcomes of appeals based on party identity.

These data tell a story of markedly different approaches in the circuits to qualified immunity appeals. In some of the circuits, plaintiffs and defendants are essentially equally successful in defending their wins in the district court. In other circuits, there is evidence of statistically significant, and numerically significant, differences in the treatment of appeals by plaintiffs versus appeals by defendants. In those circuits, plaintiffs are far less successful than defendants in defending a favorable district court decision. These data also cast doubt on whether the evidence of asymmetric review can be explained solely by defendants having a more strategic approach to taking appeals compared to plaintiffs. If that were the case, one would have to believe not only that the parties have different strategies as a matter of course, but that the strategic approaches vary markedly from circuit to circuit.

Asymmetric review and judicial ideology in the courts of appeals

Countless studies have suggested that judicial ideology matters in how appellate courts resolve cases.[74] It should be no surprise that similar evidence has been presented regarding the impact of ideology on resolution of qualified immunity

[73]When comparing each circuit individually to decisions in all other circuits, these differences were statistically significant in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits ($p = 0.605$ for DC Circuit; $p = 0.001$ for First Circuit; $p = 0.003$ for Second Circuit; $p = 0.001$ for Third Circuit; $p = 0.159$ for Fourth Circuit; $p < 0.001$ for Fifth Circuit; $p = 0.001$ for Sixth Circuit; $p = 0.095$ for Seventh Circuit; $p < 0.001$ for Eighth Circuit; $p = 0.732$ for Ninth Circuit; $p < 0.001$ for Tenth Circuit; $p < 0.001$ for Eleventh Circuit).
[74]See literature discussed in supra note 15.

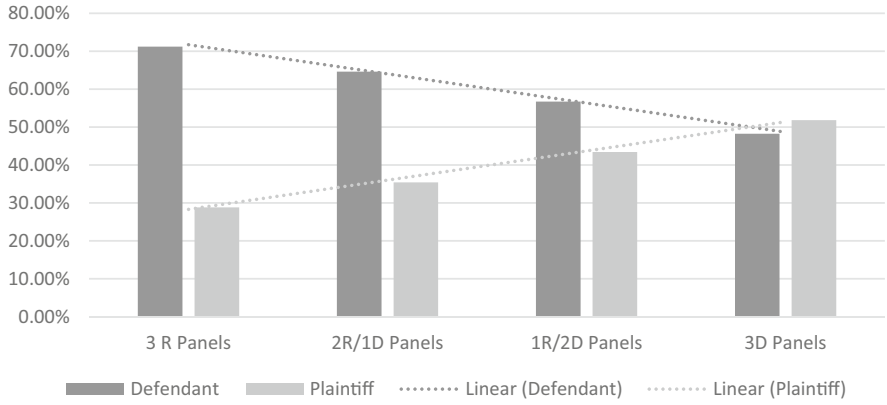

FIGURE 5 Party success rate by ideological makeup of panel

(Leong, 2009, pp. 698, 712, table 5; Nielson & Walker, 2015, pp. 63–64; Sampsell-Jones & Yauch, 2011, pp. 629–630, tables 3 and 5). The opinions analyzed in this dataset are consistent with that prior work, but add an additional layer of complexity when one considers how asymmetrical review of district court decisions might interact with judicial ideology. At the outset, measuring judicial ideology is complex and fraught, which has prompted researchers to use different measures (Yung, 2006). For the purposes of this study, I use the simplest measure—the political party of the president who appointed the judge (Sisk & Heise, 2012; Sunstein et al., 2004, p. 305).

As Figure 5 shows, in counseled cases, plaintiffs tended to prevail more often in the cohort of cases decided by panels with more judges appointed by a Democratic president.[75] Panels composed entirely of Republican-appointed judges issued decisions in which plaintiffs prevailed about 29% of the time, compared to panels composed entirely of Democrat-appointed judges, in which plaintiffs prevailed about 50% of the time, and the relationship appears linear. There was no apparent attitudinal effect in pro se cases, in which plaintiffs prevailed in the neighborhood of 20%–25% of the time regardless of the makeup of the panels (Table A13). Accordingly, the remainder of the analysis of ideological impact will focus on counseled cases.

Some have criticized studies of the impact of ideology because of the inability of researchers to distinguish extrinsic variables such as governing law (Edwards & Livermore, 2009, p. 1905). To account for that critique, I examined the relationship between the presumed ideology of appellate courts and any asymmetric review of district court decisions based on which party prevailed in

[75]The data reflected in the table can be found at Table A12. The few cases that were reheard en banc, or by two judge panels, are excluded from this analysis.

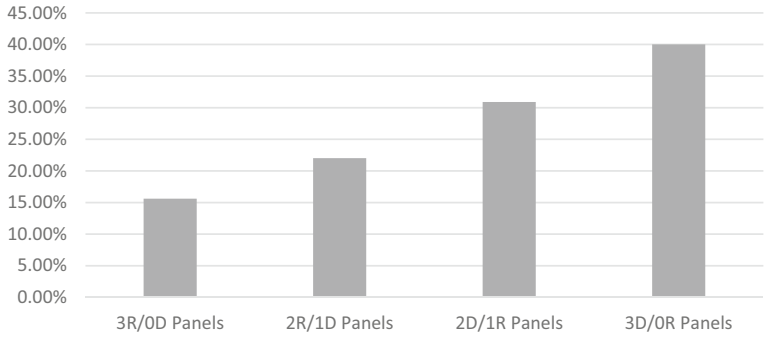

FIGURE 6 Reversal rate, appeals from district court grant of qualified immunity

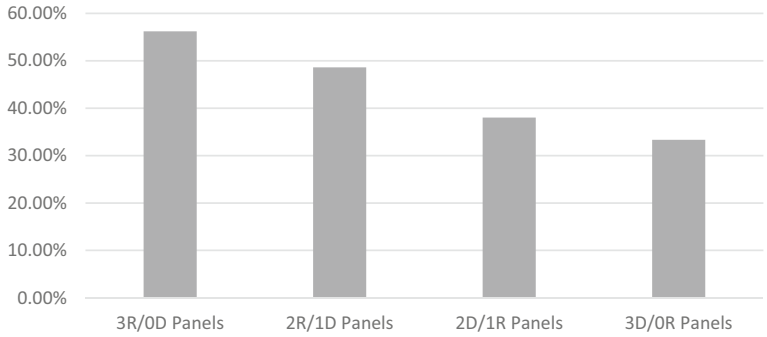

FIGURE 7 Reversal rate, appeals from district court denial of qualified immunity

district court. This has the virtue of accounting both for governing law, as well as differences between how defendants and plaintiffs might strategize their decisions to appeal. This analysis suggests that part of the explanation for the observed difference in treatment of qualified immunity appeals can be found in asymmetric review of district court decisions, but that asymmetric review, like overall outcome, appears closely connected to the ideological makeup of the appellate court. As noted above, within the entire dataset, it is evident that district court decisions in favor of plaintiffs were more likely to be reversed on appeal than district court decisions favoring defendants. This variance is even more stark when one takes account of the presumed judicial ideology of the panel as Figures 6 and 7 shows.[76] For all counseled decisions,[77] as one moves

[76]The data on which these Figures are based can be found at Table A14.

[77]There is little evidence that ideology has an impact on asymmetrical review of pro se decisions. District court decisions favoring plaintiffs were more likely to be reversed by about the same amount regardless of the composition of the appellate panels.

TABLE 6 Composition of panels by circuit, counseled cases

Panel makeup	DC	1st	2nd	3rd	4th	5th	6th
3R/0D	5 (15.6%)	19 (15.0%)	14 (5.0%)	27 (13.4%)	30 (17.1%)	91 (30.2%)	122 (21.7%)
2R/1D	14 (43.8%)	68 (54.0%)	103 (36.9%)	77 (38.3%)	81 (46.3%)	139 (46.2%)	250 (44.4%)
2D/1R	13 (40.6%)	36 (28.6%)	126 (45.2%)	81 (40.3%)	45 (25.7%)	66 (21.9%)	154 (27.3%)
3D	0 (0.0%)	3 (2.4%)	36 (12.9%)	16 (8.0%)	19 (10.9%)	5 (1.7%)	37 (6.6%)
Total	32	126	279	201	175	301	563

Panel makeup	7th	8th	9th	10th	11th	Total
3R/0D	61 (34.8%)	132 (45.4%)	36 (7.2%)	81 (21.9%)	58 (13.1%)	676 (19.6%)
2R/1D	99 (56.6%)	126 (43.3%)	137 (27.4%)	167 (45.3%)	177 (40.0%)	1438 (41.6%)
2D/1R	15 (8.6%)	33 (11.3%)	242 (48.4%)	100 (27.1%)	163 (36.9%)	1074 (31.1%)
3D	0 (0.0%)	0 (0.00%)	85 (17.0%)	21 (5.7%)	44 (10.0%)	266 (7.7%)
Total	175	291	500	369	442	3454

TABLE 7 Reversal rate

CTA decision	DCT denied QI	DCT granted QI
Republican-appointed district court judge		
Affirm	378 (57.8%)	748 (73.8%)
Reverse	276 (42.2%)	266 (26.2%)
Total	654	1014
Democrat-appointed district court judge		
Affirm	367 (51.0%)	560 (76.7%)
Reverse	353 (49.0%)	170 (23.3%)
Total	720	730
Magistrate judge decisions		
Affirm	33 (48.5%)	81 (73.6%)
Reverse	35 (51.5%)	29 (26.4%)
Total	68	110

from having zero Democrat-appointed judges to three, at each step of that iteration, the reversal rate of defendant wins increases and the reversal rate of plaintiff wins decreases. For almost every iteration of ideological makeup of the panels, the variation in reversal rates is statistically significant—panels with one, two, or three Republican appointees were more likely to reverse plaintiff wins than defendant wins, with statistically significant differences; panels with three Democratic appointees were more likely to reverse defendant wins than plaintiff wins, but the difference was not statistically significant ($p < 0.001$ for 3R/0D; $p < 0.001$ for 2R/1D; $p = 0.020$ for 1R/2D; $p = 0.277$ for 0R/3D).

Given that the data show that asymmetrical reversal rates differ by circuit and by the makeup of appellate panels, it is worthwhile to explore the relationship between circuit identity and ideology. The data suggest that the effect of ideology may vary by circuit, but one should be cautious in drawing conclusions because for many circuits, the n is not large enough once decisions are divided according to the balance of a panel. Nonetheless, a few observations stood out. First, in two of the circuits in which there is strong and significant evidence of asymmetrical review in favor of defendants (the Fifth and the Eighth Circuits), the difference in treatment of plaintiffs and defendants does not appear related to presumed ideology—plaintiffs fare poorly regardless of the makeup of a panel. By contrast, in the Sixth and Ninth Circuits, two of the circuits where, relatively speaking, plaintiffs were more successful overall, there was strong and significant evidence of a relationship between the makeup of a panel and asymmetrical review in favor of plaintiffs (Tables A15–A21). These data suggest that in some circuits, governing law might be doing more work overall than the

ideological makeup of appellate panels, in terms of explaining asymmetric review of district court decisions on qualified immunity.

Nonetheless, as noted, for many circuits there were simply not enough decisions to find statistically significant differences based on the makeup of the panels. Another way to consider the possibility that ideology plays some role in the different treatment of plaintiffs and defendants across circuits is to compare the prevalence of different composition of panels in each circuit. Table 6 provides these data, and a few observations stand out. First, in general, the makeup of the entire cohort skews toward panels with Republican appointees—more than 60% of the decisions were issued by panels with two or three Republican-appointed judges. Second, in the circuits where plaintiffs did relatively better (the DC, Second, Fourth, Sixth, and Ninth Circuits), panels with two or three Democratic appointees were overrepresented in only the Second and Ninth. Finally, of the circuits in which defendants experienced relatively greater success (First, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh), panels with two or three Republican-appointed judges were overrepresented in all but the Third and the Eleventh.

If resolution of qualified immunity at the appellate stage is influenced by ideology, one might also expect the presumed ideology of the district court to play a role in how appeals are resolved. For example, one might expect the tendency of appellate courts to reverse district court decisions to depend in part on the presumed ideology of the district court judge. In addition, this tendency may be influenced by the makeup of the appellate panel. The data tell a complex story, as shown in Table 7. First, there is some evidence that there is greater asymmetry in appellate review when the district court decision was made by a Democrat-nominated president or a magistrate judge. Appeals courts reversed about 49% of the pro-plaintiff decisions made by Democrat-appointed judges and reversed only 23% of the pro-defendant decisions made by Democrat-appointed judges. By contrast, appeals courts reversed about 42% of the pro-plaintiff decisions made by Republican-appointed district court decisions, compared to about 26% of the pro-defendant decisions made by those judges. The pattern for magistrate judges was more like that of Democrat-appointed judges.[78]

A different but related question is whether asymmetric review of district court decisions varies by the presumed ideology of the district court and the appellate panel. To test that hypothesis, I analyzed reversal rates for district court decisions disaggregated by the ideological breakdown of the panel and who prevailed in district court. If one would predict that ideology is relevant to review of district court decisions, then appellate judges would review district court decisions differently based on their own ideology, the district court's presumed ideology, and the outcome in the district court. The data are consistent with this hypothesis. Notably, extremely high and low reversal rates were observed in the circumstances in which one would expect, if ideology were a

[78]The difference for each category of judge was significant at the $p < 0.001$ level.

significant predictor of appellate outcomes. Among appellate decisions reviewing district court grants of qualified immunity, panels of three Republican-appointed judges reversed Democrat-appointed district judges at the lowest rate (only 8.5%).[79] Among appellate decisions reviewing denials of qualified immunity, the highest reversal rate was observed when three Republican-appointed appellate judges reviewed a Democrat-appointed district court decision (62.8%). When three Democrat-appointed appellate judges heard appeals, the range in reversal rates was narrower, but the highest reversal rate was found when Republican-appointed district judges granted qualified immunity (47.9%) and the lowest reversal rate was found when Democrat-appointed judges denied qualified immunity (28.0%).

Importantly, these data cannot be explained away as simply a function of Republican- and Democrat-appointed judges (whether on district or appeals courts) having different views on the merits of qualified immunity defenses. If that were the case, then appellate panels dominated by Republican-appointed judges would be more likely to affirm decisions issued by Republican-appointed district judges, regardless of whether the decision denied or granted qualified immunity. The reversal rates suggest instead that Republican-appointed appellate judges were most deferential to Democrat-appointed district judges who granted qualified immunity and most skeptical of Democrat-appointed district judges who denied qualified immunity. Similarly, these data suggest that Democrat-appointed appellate judges were most skeptical of Republican-appointed district judges who granted qualified immunity and deferential to Democrat-appointed district judges who denied qualified immunity. Nor are the data consistent with asymmetric review being a product of strategic advantages that defendants have over plaintiffs, for when a party chooses to appeal they cannot predict what panel will hear the appeal. The variance in asymmetric review among appellate panels based on presumed judicial ideology is independent of any potential strategic advantage that one party has over another.

Appellate outcomes by case subject matter and amicus participation

Might some of the observations made to this point be related to variables other than party identity, the circuit court rendering the appellate decision, and judicial ideology? There is ample reason to think that qualified immunity is more effective when deployed against certain kinds of claims. Fourth Amendment jurisprudence, as one example, is fact-intensive, resulting in a case-by-case evolution of "clearly established" law (*Mullenix v. Luna*, 2015, p. 22). One might therefore expect different qualified immunity outcomes to vary based on subject matter. After all, the Supreme Court Court's qualified immunity docket has

[79]These data are provided at Tables A22 and A23.

been almost entirely Fourth Amendment claims, and the substantive law might have some impact on resolution of qualified immunity disputes.

Decisions in the courts of appeals suggest the possibility, but only weakly, that substantive law might impact the application of qualified immunity. As Tables A24–A27 show, plaintiffs bringing Fourth Amendment claims tended to have a higher success rate on appeal, while plaintiffs bringing due process claims tended to have a lower success rate. Compared to all other cases, the reversal rate in Fourth Amendment claims was higher when appeal was taken from a district court decision granting qualified immunity and lower when appeal was taken from a decision denying qualified immunity. In cases including due process claims, by contrast, the reversal rate was higher for district court decisions denying qualified immunity and lower for decisions granting qualified immunity. But other than for due process cases, these differences were modest in absolute terms.

Studies have also attempted to examine the influence of amicus curiae, primarily at the Supreme Court level (Kearney & Merrill, 2000, pp. 749–750). These have generally suggested a potential impact for amicus in whether certiorari is granted and the ultimate resolution of the case (Frost, 2009, p. 465; Kearney & Merrill, 2000). There have been far fewer studies of the role of amicus in the courts of appeals (Harrington, 2005; Simard, 2008). In the dataset of qualified immunity cases, it is first noteworthy how rare it is for amicus to appear. As Table A28 shows, only 79 amicus appeared in approximately 4100 total cases.[80] Overall, these were evenly divided between cases in which the defendant was appealing a judgment in favor of the plaintiff and in which the plaintiff was appealing a judgment in favor of the defendant (Table A29). In counseled cases, amicus appeared in a slightly lower percentage of cases on appeal from a decision denying qualified immunity.[81]

Amicus briefs tended to be filed in support of the plaintiffs alone, or in support of both parties, rather than in support only of the defendant. In 17 out of the 79 total cases in which amicus appeared, they appeared only on behalf of the defendants; in 44 they appeared only on behalf of the plaintiff, and in 18 they appeared on behalf of both parties (Table A28). On the surface, there is little evidence that amicus make a difference. When amicus appeared solely on behalf of a plaintiff, plaintiffs tended to do worse on appeal than when amicus appeared solely supporting the defendant or both parties, but most of the differences were not statistically significant (Tables A30 and A31).[82] There is some

[80]In cases in which amicus appeared, 40 involved appeals from decisions favoring defendants and 40 involved appeals from decisions favoring plaintiffs. In cases in which amicus did not appear, the appeals were from decisions favoring defendants 59% of the time ($p = 0.095$). This does not include circumstances under which the appellate court appointed amicus to argue for pro se litigants.

[81]About 45% of the 73 counseled cases in which amicus appeared were in cases in which the plaintiff had prevailed in the district court. See Table A29.

[82]The only statistically significant difference was in cases in which amicus appeared solely on behalf of the defendant—in those cases, defendants prevailed more than 80% of the time on appeal, compared to 62% success rate in cases in which no amicus appeared.

evidence, however, that asymmetric review is less significant in cases in which an amicus appears for the plaintiff and more significant in cases in which an amicus appears on behalf of the defendant (Table A32 and A33).

There also is variation in appearance by amicus according to substantive case type. Amicus appear in about the same number of cases involving due process, first amendment, and fourth amendment claims (Table A34). But it was very rare for amicus to appear in cases presenting Eighth Amendment claims (Table A34). The appearance of amicus was correlated with the greatest plaintiff-favoring effect in the First Amendment context, a set of cases in which plaintiffs prevailed in 60% of the cases in which amicus appeared and 46% of cases in which amicus did not appear ($p = 0.090$). But given how rare it was for amicus to participate in appellate cases, their participation cannot be considered a significant driver of the different success rates observed according to party identity (Table A44).

Certiorari practice

Data from the 4000-odd courts of appeals cases suggest that qualified immunity is a significant, but not insuperable barrier, for plaintiffs to overcome in civil rights cases. But defendants fare better in the courts of appeals, both in terms of absolute success rate and the asymmetrical review of district court decisions. Moreover, the evidence from the courts of appeals suggests that both circuit court identity and judicial ideology are significantly correlated with party success on appeal.

The evidence from certiorari practice in qualified immunity cases reveals more of the same. Defendants were far more successful in obtaining grants of certiorari and in prevailing in the Supreme Court. Moreover, both appellate ideology and circuit court identity appeared to be significant factors in the Court's certiorari practice.

Who sought certiorari? It might be surprising to learn that plaintiffs sought certiorari more than defendants, both in absolute and proportional terms. Over the course of the study, plaintiffs sought certiorari in slightly more than 300 cases (or 16.3% of the cases in which they had lost on appeal), while defendants sought review in almost 180 cases (or 12.8% of the cases in which they had lost on appeal).[83] At the same time, certiorari was granted far more often when defendants filed a petition seeking review of an adverse decision—over the course of the study period, as Table 8 shows, petitions for certiorari by defendants seeking to invoke qualified immunity were granted at a rate nearly six times that of petitions filed by plaintiffs (18% vs. 3%, $p < 0.001$).

[83]Table A35. $p = 0.032$. This might reflect the increased stakes for plaintiffs in these cases. After all, a grant of qualified immunity ends the matter for plaintiffs, whereas a denial of qualified immunity, particularly at a pre-discovery stage, is not as significant for defendants. Thus, even if the prospect of success is dim, not seeking certiorari is guaranteed failure for the plaintiff.

TABLE 8 Grant of certiorari by party identity

Certiorari granted	Defendant seeking certiorari	Plaintiff seeking certiorari	Total
No	149 (81.9%)	309 (96.9%)	458 (91.4%)
Yes	32 (18.1%)	10 (3.1%)	
Total	181	319	456

TABLE 9 Certiorari grant rate, interaction of presence of a dissent and party identity.

	Grant rate, no dissenting opinion	Grant rate, dissenting opinion
CTA grant of QI	2.54%	5.41%
CTA denial of QI	13.51%	24.24%

The likelihood that certiorari would be filed and granted also appeared related to whether an appellate judge dissented. In counseled cases, a petition for certiorari was filed in about 14% of the cases in which there was no dissent, and 30% of the cases in which a judge dissented (Table A37, $p < 0.001$). And certiorari was twice as likely to be granted to review appellate decisions including a dissent (certiorari was granted in 7.5% of cases in which no dissent was filed and 14.5% of cases in which a dissent was filed) (Table A38, $p = 0.046$). Because a dissent was more likely to be filed in appellate decisions in which a plaintiff prevailed (Table A36), I evaluated whether the correlation of dissents with certiorari grants was an artifact of the correlation between grants of certiorari and a plaintiff prevailing in the courts of appeals. Table 9 shows that both presence of a dissent and a plaintiff's win independently increased the likelihood that certiorari would be granted.

Perhaps most notably, the evidence of asymmetric review that characterized appellate decision-making also was present in certiorari practice. First, as Table 10 shows, the Supreme Court was more likely to grant certiorari to review decisions issued by appellate panels with more Democrat-appointed judges. Second, as Tables 11 and 12 show, this effect was amplified in cases in which the plaintiffs prevailed in the appellate court. When defendants sought certiorari, they were far more successful when seeking review of appellate decisions issued by panels with two or three Democrat-appointed judges on the panel.

When the data are viewed according to the circuit of origin of the court of appeals decision, they reveal disparity at multiple levels. First, there was intercircuit variation, some of it statistically significant, in the rate at which certiorari was sought. Overall, certiorari was sought in about 15% of all counseled cases. As Table A39 reveals, litigants were significantly less likely to seek certiorari from Second Circuit and Eleventh Circuit decisions (about 10% and 12%, respectively) and significantly more likely to seek certiorari from Fourth, Seventh, and Ninth Circuits (about 22%, 20%, and 18%, respectively).

TABLE 10 Grant of certiorari by ideological composition of appellate panels, counseled cases

Certiorari granted	3R/0D	2R/1D	1R/2D	0R/3D
No	87 (94.6%)	211 (92.1%)	141 (89.8%)	31 (83.4%)
Yes	5 (5.4%)	17 (7.4%)	16 (10.2%)	6 (16.2%)
Total	92	228	157	37

TABLE 11 Grant of certiorari when sought by plaintiff, by ideological composition of appellate panels, counseled cases

Certiorari granted	3R/0D	2R/1D	1R/2D	0R/3D
No	66 (94.3%)	138 (99.3%)	85 (97.7%)	13 (100%)
Yes	4 (5.7%)	1 (0.7%)	2 (2.3%)	0 (0.0%)
Total	70	139	87	13

TABLE 12 Grant of certiorari when sought by defendant, by ideological composition of appellate panels, counseled cases

Certiorari granted	3R/0D	2R/1D	1R/2D	0R/3D
No	21 (95.5%)	74 (82.2%)	56 (80.0%)	18 (75.0%)
Yes	1 (4.5%)	16 (17.8%)	14 (20.0%)	6 (25.0%)
Total	22	90	80	24

As with the overall pattern in certiorari process, there also was variance in whether plaintiffs or defendants seek certiorari within each circuit (Table A40). In the DC, Second, and Ninth circuits, defendants were more likely to seek certiorari than plaintiffs (Table A40).[84] In every other circuit, the plaintiff was more likely to seek certiorari, with some discrepancies quite striking—in the Fifth Circuit, for example, plaintiffs sought certiorari in 21% of cases, compared to defendants seeking certiorari only 9% of the time, a difference that was statistically significant ($p = 0.020$).

Importantly, there were striking and substantial differences among the circuits in terms of the rate at which petitions for certiorari were granted (Table A41). Overall, certiorari was granted in about 8.5% of cases, a figure significant on its own given that just about 1% of all petitions are granted in modern times (Feldman & Kappner, 2016). But among the circuits the grant

[84]The difference was most stark in the Second Circuit, where defendants sought certiorari in 12% of cases and plaintiffs sought certiorari in about 7.5%.

TABLE 13 Petitions for certiorari filed, by case type and party seeking certiorari

	4A claims present		8A claims present		1A claims present		DP claims present	
Certiorari sought	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**
No	877 (84.9%)	750 (86.1%)	153 (84.1%)	170 (91.9%)	301 (79.0%)	293 (87.2%)	641 (82.2%)	458 (83.0%)
Yes	156 (15.1%)	121 (13.9%)	29 (15.9%)	15 (8.1%)	80 (21.0%)	43 (12.8%)	139 (17.8%)	94 (17.0%)
Total	1033	871	182	185	381	336	780	552

Note: $p = 0.456$ for 4A Claims; $p = 0.021$ for 8A Claims; $p = 0.004$ for 1A Claims; $p = 0.708$ for DP Claims.

TABLE 14 Petitions for certiorari granted, by case type and party seeking certiorari

	4A claims present		8A claims present		1A claims present		DP claims present	
Certiorari granted	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**	**Plaintiff seeks certiorari**	**Defendant seeks certiorari**
No	152 (97.4%)	95 (78.5%)	28 (96.6%)	11 (73.3%)	77 (96.3%)	32 (74.4%)	135 (97.1%)	80 (85.1%)
Yes	4 (2.6%)	26 (21.5%)	1 (3.4%)	4 (26.7%)	3 (3.7%)	11 (23.6%)	4 (2.9%)	14 (14.9%)
Total	156	121	29	15	80	43	139	94

Note: The differences in grant rates were statistically significant for each substantive category of claims ($p < 0.001$ for 4A claims; $p = 0.021$ for 8A claims; $p < 0.001$ for 1A claims; $p = 0.002$ for DP claims).

rate was wide-ranging. Circuits with substantially higher grant rates included the DC Circuit (50% of the petitions were granted, but there were only four such petitions) and the Ninth Circuit (where about 16.5% of a total of 91 petitions resulted in a grant) ($p = 0.012$ for the DC Circuit and 0.011 for the Ninth Circuit). Circuits with significantly lower grant rates included the First Circuit (where none of the petitions resulted in a grant of certiorari), the Fourth Circuit (with one out of 36 petitions granted, for a rate of about 2.8%), the Seventh Circuit (with one out of 35 petitions granted, for a rate of about 2.9%), and the Eighth Circuit (with two out of 48 petitions granted for about 4% grant rate).[85]

There also was significant variation in the grant of certiorari from various circuits depending on which party sought review (Table A42). Plaintiffs were successful in obtaining review of decisions from only four circuits—the DC Circuit, the Fifth Circuit, the Sixth Circuit, and the Tenth Circuit. In every circuit but the First (which had no petitions for certiorari granted in the study cohort), defendants were uniformly more successful in obtaining a grant of certiorari.[86] Perhaps most stark was the variation in the Fifth Circuit, where defendants were five times more successful at obtaining the Court's review, and in the Tenth, where they were eight times more successful.[87] Some of these differences were statistically significant ($p = 0.049$ for Third Circuit; $p = 0.019$ for Fifth Circuit; $p < 0.001$ for Ninth Circuit; $p = 0.015$ for Tenth Circuit; $p = 0.014$ for Eleventh Circuit).

As has been documented by others, once certiorari was granted, defendants were far more likely to prevail. In all cases in which certiorari was granted, the defendant prevailed in almost 80% of the Supreme Court cases, with the plaintiff prevailing about 13% of the time (the remainder involved dispositions that could not be clearly determined as favoring one party or the other).[88] In cases in which a full Supreme Court hearing was had, defendants prevailed in 24 out of 27 cases (or almost 89% of the time).[89] Most of the cases in which a full Supreme Court hearing was held on qualified immunity involved a Fourth Amendment claim of some kind (21 out of 27), and 13 cases involved only Fourth Amendment issues (Table A44).

Despite the evidence that a writ of certiorari was much more likely to be granted when seeking to review a decision favoring the plaintiff, and despite the

[85]Not all of these differences were statistically significant ($p < 0.001$ for First Circuit; 0.419 for Fourth Circuit, 0.461 for the Seventh Circuit, and 0.492 for the Eighth Circuit).

[86]In the Second, Third, Eighth, Ninth, and Eleventh Circuits, the Court granted none of the petitions filed by plaintiffs, and between 12% and 30% of the petitions filed by defendants.

[87]In the Fifth Circuit, certiorari was granted in 37.5% of the petitions filed by defendants, and only 7.5% of plaintiffs' petitions. In the Tenth, certiorari was granted in 26% of the petitions filed by defendants, and only 3% of plaintiffs' petitions.

[88]These figures include cases in which there was a full Supreme Court hearing and cases that were summarily reversed; cases that resulted in a grant, vacate, and remand; and cases that were dismissed as improvidently granted. There were 45 total cases, with defendants prevailing in 35, plaintiffs prevailing in 6, and 4 outcomes in which neither party could be said to have prevailed.

[89]There were three cases in which the plaintiff prevailed after a full hearing.

evidence that, when granted, defendants almost always prevailed in the Supreme Court, particularly in Fourth Amendment cases, the data also suggest that plaintiffs seek certiorari more often in all categories of cases. Plaintiffs sought certiorari more often in cases presenting Forth Amendment claims, Eighth Amendment claims, First Amendment claims, and Due Process claim, although the difference was significant (both in a statistical sense and numerically) in only the Eighth and First Amendment context, as Table 13 shows. There was large variation in the rates at which defendants sought certiorari, depending on the case type. At the low end, defendants rarely sought certiorari in cases presenting Eighth Amendment claims (about 8% of the time). At the high end, defendants sought certiorari about 17% of the time in due process cases. Perhaps the variation in certiorari practice reflects strategic thinking about which cases are likely to result in success in the Supreme Court.[90] But just as with the overall grant rates, for every category of case, petitions for writ of certiorari were far more likely to be granted when seeking to reverse a decision favoring the plaintiff. This is reflected in Table 14.

In, sum, the evidence from the Supreme Court's certiorari practice mirrors much of what was revealed in the data from the courts of appeals. Evidence of asymmetric review was strong: defendants were more successful at obtaining review of, and ultimately obtaining relief from, unfavorable appellate decisions. And judicial ideology appeared relevant to the Supreme Court's resolution of qualified immunity: the Court exercised its jurisdiction to review decisions more often from appellate panels comprised of Democrat-appointed judges when those panels issued plaintiff-friendly opinions on qualified immunity.

IMPLICATIONS

Prior empirical research regarding the resolution of qualified immunity in the courts of appeals had focused almost entirely on the sequencing of qualified immunity decisions and the implications for the development of constitutional law. Those studies suggested that the Supreme Court's decision in *Pearson* had an impact on rights-making by courts of appeals, and that some of these effects were filtered by circuit court identity and presumed judicial ideology. But prior studies did not focus on top-level outcomes in the courts of appeals, and many were methodologically limited compared to this study. The results reported here, then, provide a new understanding of the resolution of qualified immunity in the courts of appeals and the Supreme Court.

[90]Whereas plaintiffs' counsel have informal networks by which they might communicate and strategize about certiorari practice, defense counsel are more organized, with state attorneys general offices and municipal officers and organizations in communication, presumably about litigation strategy. And to the extent the cases involve federal officers, there is a central command structure that would determine whether to support certiorari practice.

In sum, the data presented here show that qualified immunity is a potent defense when presented on appeal, appearing to result in asymmetric treatment of district court decisions, based on whether the district court denied or granted the defense in the first instance. But the Supreme Court's decision in *Pearson* does not appear to have been a significant driver of those outcomes. Instead, what appeared correlated with appellate resolution of qualified immunity was the ideological composition of appellate panels, the regional circuit in which the appeal was heard, and whether the plaintiff was represented or proceeded pro se. The resolution of certiorari petitions was correlated with similar variables—in particular, who prevailed in the appellate court, whether a dissent from the appellate decision was filed, and the ideological composition of the appellate panel.

Taken at face value, then, the data suggest that district courts are consistently making legal errors in ways that, from the perspective of appellate courts, are not favorable enough to defendants. Drilling down, however, the detection of legal errors appears to have an ideological tilt—judges appointed by Republican presidents are more likely to find legal errors when the district court judge denies qualified immunity and when that judge was appointed by a Democratic president. Judges appointed by Democratic presidents are less likely to find legal errors with regard to who prevailed in the district court, or the ideological identity of the district court judge. And the Supreme Court, similarly, appears more likely to discern legal errors in the decisions of Democrat-appointed appellate panels that find qualified immunity unavailable to defendants. There are many implications that follow.

First, for those who have argued for revisiting or eliminating qualified immunity, these data offer additional evidence that, when raised, the immunity is a powerful defense. Overall, defendants experienced far greater success than plaintiffs in the courts of appeals, both in terms of overall outcomes and their success in defending successful outcomes on appeal. Qualified immunity was granted at a higher rate than it was denied, and both the courts of appeals and the Supreme Court were more likely to reverse denial of qualified immunity than to reverse a grant of qualified immunity.

Moreover, these data undermine qualified immunity's presumption that "clearly established" law has an objectively verifiable content. Rather, the data suggest that perceptions of when law is so clear that it is obvious to any reasonable officer are filtered to a significant degree by ideological priors. While legal realists will not be surprised by this outcome, the data expose the possibility that qualified immunity serves as a means to obscure the role that judicial ideology plays in adjudicating civil rights litigation. This may offer further reasons to restrict or eliminate access to the defense.

Second, more broadly, these data cast doubt on whether the Supreme Court is exercising its certiorari jurisdiction in qualified immunity cases to achieve uniformity in the application of federal law. One of the principal justifications for

the exercise of certiorari jurisdiction is to ensure that federal law is uniformly applied in federal and state litigation. Other than cases involving the death penalty (Berman, 2008, pp, 875–876), the exercise of certiorari jurisdiction is not thought to be used for error correction. In a different context and time, Hart argued that the Court's appetite for error correction in a limited subset of civil cases involving the Federal Employers' Liability Act was inconsistent with the Court's institutional role, statutory policy regarding certiorari jurisdiction, and "a misuse of power, involving not only a denial of equal justice to litigants whose cases are not heard but also a grievous frittering away of the judicial resources of the nation" (Hart, 1959, p. 98) The data gathered here suggest that there is persistent disuniformity in the application of qualified immunity, despite the Court's consistent attention to the doctrine over the past two decades. There is considerable variation between circuits and based on panel composition within each circuit, to name just two variables.

Perhaps one explanation for the Court's failure to secure more uniform application of qualified immunity lies in the evolution of the doctrine itself. As summarized above (see supra pp. 7–9), the Court has made the doctrine more powerful by narrowing what counts as clearly established law and by providing mechanisms whereby courts never answer the predicate question of what rights exist, as opposed to whether a right is "clearly established." Scholars have worried about the implication of this dynamic for recognizing new rights. But if whether a right is "clearly established" is as fact-intensive as the Court has suggested, it also means decisions holding that a particular right was not "clearly established" have less relevance for the next qualified immunity case. The Court may have laid the groundwork for an essentially lawless qualified immunity jurisprudence. Alternatively, and relatedly, perhaps courts of appeals perceive the Court as engaging in error correction, muting any signal the Court may intend to be sending.

The analysis presented here also presents a model for attempting to counter some of the criticisms that have been raised regarding studies of the impact of ideology on appellate decision-making. No prior study had evaluated appellate outcomes according to both who prevailed in the district court and the identity of the district judge making that decision. When the evidence indicates that decisions denying or granting qualified immunity are resolved differently depending on whether a Democratic or Republican president appointed the district court and appellate judges, it is harder to maintain that variables other than ideology are contributing to the observed differences. After all, if appellate decisions are being made solely by reference to governing law, decisions denying qualified immunity should be treated similarly without regard to which judge issued them or which judge is reviewing them. Similarly, the analysis undertaken here helps to eliminate variables such as strategic differences between plaintiff and defense counsel in taking appeals. Even if those differences exist, they can hardly explain why appellate panels would review denials or grants of qualified immunity differently based on the ideological composition of the appellate panels.

Finally, these data offer avenues for further research into both the resolution of qualified immunity and the litigation of the issue by attorneys. As with any empirical study, the analysis raises as many questions as it answers. The data suggest, but cannot evaluate, the possibility that the plaintiffs' and defense bar undertake different strategic considerations when deciding whether to appeal or seek certiorari. Nor can they evaluate whether the plaintiffs' or defendants' bar is better at assessing the likelihood of success on appeal or certiorari. The data suggest, but cannot evaluate, how important the assistance of counsel is to obtaining a favorable decision on qualified immunity. The data suggest, but cannot evaluate, that the participation of amicus moderates the overall anti-plaintiff tendency of appellate resolution of qualified immunity. These are just a few of the additional research questions that are prompted by this study.

And while the data suggest that the Supreme Court's gradual strengthening of the power of qualified immunity has not had an impact on the resolution of the defense in the courts of appeals, further research is necessary to confirm that conclusion. It is possible, after all, that as the Court has raised the bar for plaintiffs in civil rights cases, counsel have shifted their strategies in qualified immunity cases, with plaintiffs selecting different cases and defendants attempting to invoke the defense in more marginal cases. If this were the case, even as the Court changes the legal landscape, the relative success of plaintiffs and defendants may remain unchanged. Studying the impact of legal change in other areas, such as pleading doctrine or *Chevron* deference, has raised similar concerns (Reinert, 2015, p. 2134, note 92; Walker, 2014). Additional research may help in confirming or calling into doubt the preliminary conclusions reached here.

CONCLUSION

Qualified immunity is considered to be one of the most significant barriers to civil rights enforcement, and it is currently under assault from multiple perspectives. The Supreme Court has made clear that it views qualified immunity as an increasingly important tool in protecting defendants from damages liability. The evidence suggests that district courts are less sanguine on the doctrine, using it far less often to resolve civil rights cases.

This study unlocks one key to understanding the disjunction between district courts and the Supreme Court. Qualified immunity is a powerful defense when deployed in the courts of appeals, but if the Supreme Court means to be sending a signal that appellate courts should be strengthening the defense, this study suggests that it is muddled. At the same time, however, this study suggests that resolution of qualified immunity appears to be linked in a significant way to variables that undermine one of the core premises of the immunity defense: that "clearly established" constitutional law is ascertainable to the reasonable government official.

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APPENDIX A

This appendix contains data tables referred to in the body of the article. Where statistical testing was conducted, all *p*-values are reported.

TABLE A1 District court decisions on appeal

Outcome in district court	Pre-*Pearson* frequency (%)	Post-*Pearson* frequency (%)	All cases frequency (%)
Deny QI	674 (39.16%)	949 (38.94%)	1623 (39.16%)
Grant QI	1021 (59.78%)	1472 (60.40%)	2493 (60.14%)
Mixed	13 (0.76%)	16 (0.66%)	29 (0.70%)
Total	1708	2437	4145

TABLE A2 District court outcomes on appeal, by year

DCT outcome on appeal	2004	2005	2006	2007	2008
Deny (%)	96 (36.78%)	119 (38.14%)	124 (37.80%)	161 (39.95%)	174 (43.07%)
Grant (%)	163 (62.45%)	188 (60.26%)	201 (61.28%)	240 (59.55%)	229 (56.68%)
Mixed (%)	2 (0.77%)	5 (1.60%)	3 (0.91%)	2 (0.50%)	1 (0.25%)
Total	261	312	328	403	404
DCT outcome on appeal	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Deny (%)	156 (40.10%)	149 (38.40%)	152 (36.80%)	172 (40.19%)	152 (38.0%)	168 (40.10%)
Grant (%)	230 (59.13%)	236 (60.82%)	260 (62.95%)	251 (61.75%)	247 (61.75%)	248 (59.19%)
Mixed (%)	3 (0.77%)	3 (0.77%)	1 (0.24%)	5 (1.17%)	1 (0.25%)	3 (0.72%)
Total	389	388	413	428	400	419

TABLE A3 District court outcomes on appeal, by circuit

DCT outcome	DC (%)	1st (%)	2nd (%)	3rd (%)	4th (%)	5th (%)
Deny (%)	21 (55.26%)	53 (40.15%)	126 (38.18%)	74 (26.91%)	90 (45.45%)	138 (31.08%)
Grant (%)	17 (44.74%)	78 (59.09%)	198 (60.0%)	198 (72.0%)	105 (53.03%)	304 (58.47%)
Mixed (%)	0	1 (0.76%)	6 (1.82%)	3 (1.09%)	3 (1.52%)	2 (0.45%)
Total	38	132	330	275	198	444
DCT outcome	**6th (%)**	**7th (%)**	**8th (%)**	**9th (%)**	**10th (%)**	**11th (%)**
Deny (%)	296 (48.17%)	79 (37.44%)	143 (45.4%)	200 (33.17%)	163 (36.22%)	240 (43.88%)
Grant (%)	301 (50.0%)	131 (62.09%)	172 (54.6%)	399 (66.17%)	284 (63.11%)	306 (55.94%)
Mixed (%)	5 (0.33%)	1 (0.47%)	0	4 (0.66%)	3 (0.67%)	1 (0.18%)
Total	602	211	315	603	450	547

TABLE A4 Court of appeals outcomes by district court outcomes

	District court outcomes			
CTA outcome	**Deny**	**Grant**	**Mixed**	**Total**
Deny (%)	837 (51.57%)	406 (16.29%)	6 (20.69%)	1249 (30.13%)
Grant (%)	569 (35.06%)	1925 (77.22%)	13 (44.83%)	2507 (60.48%)
Mixed (%)	145 (8.93%)	146 (5.86%)	7 (24.14%)	298 (7.19%)
Remand with no QI determination (%)	16 (0.99%)	15 (0.60%)	1 (3.45%)	32 (0.77%)
Dismissed for lack of jurisdiction (%)	56 (3.45%)	1 (0.04%)	2 (6.90%)	59 (1.42%)
Total	1623	2493	29	4145

TABLE A5 Appellate outcomes by year, 2004–2008

CTA outcome	**2004**	**2005**	**2006**	**2007**	**2008**	**Total**
Deny (%)	78 (29.9%)	94 (30.3%)	104 (32.0%)	129 (33.2%)	128 (32.8%)	533 (31.8%)
Grant (%)	171 (65.5%)	192 (61.9%)	197 (60.6%)	233 (59.9%)	224 (57.4%)	1017 (60.7%)
Mixed (%)	12 (4.6%)	24 (7.7%)	24 (7.4%)	27 (6.9%)	38 (9.7%)	125 (7.5%)
Total	261	310	325	389	390	1675

TABLE A6 Appellate outcomes by year, 2010–2015

CTA outcome	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**Total**
Deny (%)	114 (30.2%)	109 (28.8%)	111 (27.5%)	123 (29.3%)	117 (30.2%)	142 (34.5%)	716 (30.1%)
Grant (%)	239 (63.2%)	240 (63.3%)	263 (65.3%)	258 (61.4%)	250 (64.6%)	240 (58.2%)	1490 (62.6%)
Mixed (%)	25 (6.6%)	30 (7.9%)	29 (7.2%)	39 (9.3%)	20 (5.2%)	30 (7.3%)	173 (7.3%)
Total	378	379	403	420	387	412	2379

TABLE A7 Appellate outcomes, by year and district court outcomes, pre-*Saucier*

	DCT outcome (2004)		2005		2006		2007		2008	
CTA decision	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**
Affirm	130	52	141	61	154	65	174	81	172	90
Affirm %	79.75	54.17	75.40	51.69	76.62	53.72	73.42	53.64	76.11	55.21
Reverse	33	44	46	57	47	56	63	70	54	73
Reverse %	20.25	45.83	24.60	38.31	23.38	46.28	26.58	46.36	23.89	44.79
Total	163	96	187	118	201	121	237	151	226	163

Note: Results of significance testing suggest that the differences in outcomes were statistically significant in every year ($p < 0.001$ for each year). Although I do not report the separate data here, even if court of appeals decisions denying and granting in part are excluded from the analysis, the results are nearly identical.

TABLE A8 Appellate outcomes, by year and district court outcomes, post-*Saucier*

	DCT outcome (2010)		2011		2012	
CTA decision	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**
Affirm	182	82	180	69	211	75
Affirm %	79.48	56.16	76.92	48.25	81.47	52.45
Reverse	47	64	54	74	48	68
Reverse %	20.52	43.84	23.08	51.75	18.53	47.55
Total	229	146	234	143	259	143
	DCT outcome (2013)		**2014**		**2015**	
CTA decision	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**
Affirm	199	86	196	83	186	99
Affirm %	79.6	52.12	80.66	58.04	75.00	61.11
Reverse	51	79	47	60	62	63
Reverse %	20.4	47.88	19.34	41.96	25.00	38.89
Total	250	165	243	143	248	162

Note: As with the time period between 2004 and 2008, results of significance testing are consistent ($p < 0.001$ for every year except for 2015, where $p = 0.003$). As with Table A8, even if court of appeals decisions denying and granting in part are excluded from the analysis, the results are nearly identical.

TABLE A9 Appellate outcomes, by representation of plaintiff

CTA outcome	**Plaintiff represented**	**Pro se plaintiff**	**Total**
Grant	1918	576	2494
Grant %	58.19	78.69	61.92
Deny	1116	127	1243
Deny %	33.86	17.35	30.86
Mixed	262	29	291
Mixed %	7.95	3.96	7.22
Total	3296	732	4028

Note: $p < 0.001$.

TABLE A10 CTA outcome, by circuit of origin (only counseled cases)

CTA outcome	DC	1st	2nd	3rd	4th	5th
Grant	16	80	143	121	87	195
Grant %	53.33	67.80	57.89	66.48	56.13	68.66
Deny	13	33	86	54	60	66
Deny %	43.33	27.97	34.82	29.67	38.71	23.24
Mixed	1	5	18	7	8	23
Mixed %	3.33	4.24	7.29	3.85	5.16	8.10
Total	30	118	247	182	155	284
CTA outcome	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**
Grant	280	93	192	235	226	250
Grant %	50.63	54.07	66.44	50.00	62.26	57.74
Deny	212	70	75	188	107	152
Deny %	38.34	40.70	25.95	40.00	29.48	35.10
Mixed	61	9	22	47	30	31
Mixed %	11.03	5.23	7.61	10.00	8.26	7.16
Total	553	172	289	470	363	433

TABLE A11 CTA affirmance rate, by circuit of origin and DCT outcome (counseled cases only)

	DC		1st		2nd		3rd	
CTA outcome	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	10	10	27	62	49	101	31	96
%	62.50	71.43	58.70	86.11	49.49	68.24	53.45	77.42
Reverse	6	4	19	10	50	47	27	28
%	37.50	28.57	41.30	13.89	50.51	31.76	46.55	22.58
Total	16	14	46	72	99	148	58	124
	4th		**5th**		**6th**		**7th**	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	42	63	49	148	160	190	42	65
%	61.76	72.41	43.75	86.05	56.54	70.37	55.26	67.71
Reverse	26	24	63	24	123	80	34	31
%	38.24	27.59	56.25	13.95	43.46	29.63	44.74	32.29
Total	68	87	112	172	283	270	76	96
	8th		**9th**		**10th**		**11th**	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	57	129	107	177	81	169	123	179
%	41.01	86.00	59.44	61.03	53.64	79.72	57.48	81.74
Reverse	82	21						
%	58.99	14.00	73	113	70	43	91	40
			40.56	38.97	46.36	20.28	42.52	18.26
Total	139	150	180	290	151	212	214	219

Note: $p = 0.605$ for DC Circuit; $p = 0.001$ for First Circuit; $p = 0.003$ for Second Circuit; $p = 0.001$ for Third Circuit; $p = 0.159$ for Fourth Circuit; $p < 0.001$ for Fifth Circuit; $p = 0.001$ for Sixth Circuit; $p = 0.095$ for Seventh Circuit; $p < 0.001$ for Eighth Circuit; $p = 0.732$ for Ninth Circuit; $p < 0.001$ for Tenth Circuit; $p < 0.001$ for Eleventh Circuit.

TABLE A12 Outcomes on appeal, counseled cases, by partisan composition of appellate panel (excluding mixed outcomes on DCT and CTA)

CTA Outcome	**3R panels**	**2R/1D panels**	**1R/2D panels**	**3D panels**
Defendant	462 (71.2%)	897 (64.6%)	571 (56.7%)	121 (48.2%)
Plaintiff	187 (28.8%)	491 (35.4%)	437 (43.4%)	130 (51.8%)
Total	649	1388	1008	251

TABLE A13 Outcomes on appeal, pro se cases, by partisan composition of appellate panel

CTA Prevailing Party	3R panels	2R/1D panels	1R/2D panels	3D panels
Defendant	108 (79.4%)	263 (80.7%)	165 (78.9%)	44 (72.1%)
Plaintiff	28 (20.6%)	63 (19.3%)	44 (21.1%)	17 (27.9%)
Total	136	326	209	61

TABLE A14 Counseled cases, CTA outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	133 (43.8%)	291 (84.4%)	321 (51.4%)	596 (78.0%)	250 (62.0%)	418 (69.1%)	74 (66.7%)	84 (60.0%)
Reverse	171 (56.2%)	54 (15.6%)	303 (48.6%)	168 (22.0%)	153 (38.0%)	187 (30.9%)	37 (33.3%)	56 (40.0%)
Total	308	345	624	764	403	605	111	140

Note: $p < 0.001$ for 3R/0D, $p < 0.001$ for 2R/1D; $p = 0.020$ for 1R/2D; $p = 0.277$ for 0R/3D.

TABLE A15 Counseled cases, Fifth Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	12 (40.0%)	48 (85.71%)	21 (38.2%)	67 (87.0%)	14 (58.3%)	31 (83.8%)	2 (66.7%)	2 (100.0%)
Reverse	18 (60.0%)	8 (14.3%)	34 (61.8%)	10 (13.0%)	10 (41.7%)	6 (16.2%)	1 (33.3%)	0 (0.0%)
Total	30	56	55	77	24	37	3	2

Note: $p < 0.001$ for 3R; $p < 0.001$ for 2R/1D; $p = 0.027$ for 1R/2D; $p = 0.361$ 3D.

TABLE A16 Counseled cases, Sixth Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	31 (51.7%)	46 (79.3%)	64 (57.8%)	87 (75.7%)	51 (72.9%)	49 (61.3%)	14 (73.7%)	8 (47.1%)
Reverse	29 (48.3%)	12 (20.7%	70 (52.2%)	28 (24.3%)	19 (27.1%)	31 (38.7%)	5 (26.3%)	9 (52.9%)
Total	60	58	134	115	70	80	19	17

Note: $p = 0.002$ for 3R; $p < 0.001$ for 2 R/1D; $p = 0.132$ for 1R/2D; $p = 0.102$ for 3D.

TABLE A17 Counseled cases, Seventh Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	13 (46.4%)	24 (75.0%)	25 (62.5%)	38 (66.7%)	4 (50.0%)	3 (42.9%)	NA	NA
Reverse	15 (53.6%)	8 (25.0%)	15 (37.5%)	19 (33.3%)	4 (50.0%)	4 (57.1%)	NA	NA
Total	28	32	40	57	8	7		

Note: $p = 0.023$ for 3R panels; $p = 0.672$ for 2R/1D panels; $p = 0.782$ for 1R/2D panels.

TABLE A18 Counseled cases, Eighth Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	25 (36.2%	56 (88.9%)	25 (44.6%)	61 (89.7%)	7 (50.0%)	12 (63.2%)	NA	NA
Reverse	44 (63.8%)	7 (11.1%)	31 (55.4%)	7 (10.3%)	7 (50.0%)	19 (36.8%)	NA	NA
Total	69	63	56	68	14	21	NA	NA

Note: $p < 0.001$ for 3R panels; $p < 0.001$ for 2R/1D panels; $p = 0.450$ FOR 1R/2D panels.

TABLE A19 Counseled cases, Ninth Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	7 (46.7%)	15 (88.2%)	30 (56.6%)	51 (65.0%)	52 (61.9%)	86 (59.7%)	18 (64.3%)	24 (49.0%)
Reverse	8 (53.3%)	2 (11.8%)	23 (43.4%)	28 (35.0%)	32 (38.1%)	58 (40.3%)	10 (35.7%)	25 (51.0%)
Total	15	17	53	80	84	144	28	49

Note: $p = 0.011$ for 3R panels; $p = 0.330$ for 2R/1D panels; $p = 0.745$ for 1R/2D panels; $p = 0.194$ for 3 D panels.

TABLE A20 Counseled cases, Tenth Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	12 (36.4%)	42 (91.3%)	41 (54.7%)	67 (74.4%)	23 (67.7%)	51 (79.7%)	5 (55.6%)	9 (75.0%)
Reverse	21 (63.6%)	4 (8.7%)	34 (45.3%)	23 (25.6%)	11 (32.3%)	13 (20.3%)	4 (44.4%)	3 (25.0%)
Total	33	46	75	90	34	64	9	12

Note: $p < 0.001$ for 3R panels; $p = 0.008$ for 2R/1D panels; $p = 0.187$ for 1R/2D panels; $p = 0.350$ for 3D panels.

TABLE A21 Counseled cases, Eleventh Circuit outcomes by partisan composition of panels and DCT prevailing party

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	12 (40.0%)	22 (78.6%)	52 (55.3%)	68 (84.0%)	43 (64.2%)	77 (84.6%)	16 (69.6%)	12 (63.2%)
Reverse	18 (60.0%)	6 (21.4%)	42 (44.7%)	13 (16.0%)	24 (35.8%)	14 (15.4%)	7 (30.4%)	7 (36.8%)
Total	30	28	94	81	67	91	23	19

Note: $p = 0.003$ for 3R panels; $p < 0.001$ for 2R/1D panels; $p = 0.003$ for 1R/2D panels; $p = 0.661$ for 3D panels.

TABLE A22 Appellate review of republican-appointed district judges

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	65 (53.3%)	165 (79.7%)	161 (55.9%)	328 (78.5%)	120 (62.2%)	218 (68.5%)	32 (62.7%)	37 (52.1%)
Reverse	57 (46.7%)	42 (20.3%)	127 (44.1%)	90 (21.5%)	73 (37.8%)	100 (31.5%)	19 (37.3%)	34 (47.9%)
Total	122	207	288	418	193	318	51	71

Note: $p < 0.001$ for 3 R panels; $p < 0.001$ for 2R/1D panels; $p = 0.140$ for 1R/2D panels; $p = 0.243$ for 3D panels.

TABLE A23 Appellate review of democrat-appointed district judges

	3R/0D panels		2R/1D panels		2D/1R panels		3D/0R panels	
CTA Result	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**	**DCT Deny**	**DCT Grant**
Affirm	61 (37.2%)	107 (91.5%)	143 (47.3%)	232 (78.1%)	122 (61.9%)	180 (70.0%)	41 (71.9%)	41 (69.5%)
Reverse	103 (62.8%)	10 (8.5%)	159 (52.7%)	65 (21.9%)	75 (38.1%)	77 (30.0%)	16 (28.0%)	18 (30.5%)
Total	164	117	302	297	197	257	57	59

Note: $p < 0.001$ for 3 R panels; $p < 0.001$ for 2R/1D panels; $p = 0.070$ for 1R/2D panels; $p = 0.773$ for 3D panels.

TABLE A24 Reversal rate in fourth amendment cases, by DCT outcome and plaintiff representation

	DCT outcome (4A cases)		DCT outcome (non-4A cases)	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**
Counseled cases[a]				
Affirm	423 (56.4%)	788 (71.8%)	355 (51.3%)	601 (79.4%)
Reverse	327 (43.6%)	309 (28.2%)	337 (48.7%)	156 (20.6%)
Total	750	1097	692	757
Pro se cases[b]				
Affirm	27 (64.3%)	180 (87.6%)	37 (56.1%)	366 (85.3%)
Reverse	15 (35.7%)	24 (12.4%)	29 (43.9%)	63 (14.7%)
Total	42	194	431	71

[a]$p < 0.001$ for non-4A cases; $p < 0.001$ for 4A cases.
[b]$p < 0.001$ for non-4A cases and 4A cases.

TABLE A25 Reversal rate in eighth amendment cases, by DCT outcome and plaintiff representation

	DCT outcome (8A cases)		DCT outcome (non-8A cases)	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**
Counseled cases[a]				
Affirm	100 (51.3%)	114 (69.9%)	677 (54.3%)	1275 (75.4%)
Reverse	95 (48.7%)	49 (30.1%)	569 (45.7%)	416 (24.6%)
Total	195	163	1246	1691
Pro se[b]				
Affirm	24 (60.0%)	146 (81.1%)	40 (58.8%)	390 (88.0%)
Reverse	16 (40.0%)	34 (18.9%)	28 (41.2%)	53 (12.0%)
Total	40	180	68	443

[a]$p < 0.001$ for 8A cases and non-8a cases.
[b]$p < 0.001$ for non-8A cases; $p = 0.004$ for 8A cases.

TABLE A26 Reversal rate in first amendment cases, by DCT outcome and plaintiff representation

	DCT outcome (1A cases)		DCT outcome (non-1A cases)	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**
Counseled[a]				
Affirm	156 (55.5%)	303 (75.4%)	622 (53.6%)	1086 (74.8%)
Reverse	125 (44.5%)	99 (24.6%)	539 (46.4%)	366 (25.2%)
Total	281	402	1452	1161
Pro se[b]				
Affirm	12 (54.6%)	133 (85.8%)	52 (60.5%)	402 (86.1%)
Reverse	10 (45.4%)	22 (14.2%)	34 (49.5%)	65 (13.9%)
Total	22	155	86	467

[a] $p < 0.001$ for 1A and non-1A cases.
[b] $p < 0.001$ for 1A and non-1A cases.

TABLE A27 Reversal rate in due process cases, by DCT outcome and plaintiff representation

Counseled[a]

	DCT outcome (DP cases)		DCT outcome (non-DP cases)	
CTA decision	Deny	Grant	Deny	Grant
Affirm	249 (46.4%)	580 (78.3%)	529 (58.5%)	809 (72.7%)
Reverse	288 (53.6%)	161 (21.7%)	376 (41.5%)	304 (27.3%)
Total	537	741	905	1113

Pro se[b]

	DCT prevailing party (DP cases)		DCT prevailing party (non-DP cases)	
CTA decision	Deny	Grant	Deny	Grant
Affirm	10 (35.7%)	200 (91.3%)	54 (67.5%)	335 (83.1%)
Reverse	18 (64.3%)	19 (8.7%)	26 (32.5%)	68 (16.9%)
Total	28	219	80	403

[a] $p < 0.001$ for DP and non-DP cases.
[b] $p = 0.001$ for non-DP cases; $p < 001$ for DP cases.

TABLE A28 Amicus participation in courts of appeals

Cases in which amicus briefs were filed	79 (1.91%)
• Amicus filed supporting plaintiff only	• 44 (1.06%)
• Amicus filed supporting defendant only	• 17 (0.41%)
• Amicus filed supporting both parties	• 18 (0.43%)
Cases in which no amicus briefs were filed	4066 (98.09%)
Total cases	4145

Note: This table includes all cases (including ones in which QI was not resolved).

TABLE A29 Amicus participation in courts of appeals, by outcome on appeal

	DCT outcome on appeal			
Amicus appearance	**Deny**	**Grant**	**Mixed**	**Total**
No	1586	2454	26	4066
Yes	37 (33 counseled, 4 pro se)	39 (37 counseled, 2 pro se)	3	79
Total	1623	2493	29	4145

Note: This table includes all cases (including ones in which QI was not resolved).

TABLE A30 Amicus, counseled cases, outcome by support for plaintiff

Prevailing party CTA	**Amicus supporting plaintiff only**		**Amicus supporting plaintiff (including where amicus support both parties)**		**Amicus supporting both parties**	
	No	**Yes**	**No**	**Yes**	**No**	**Yes**
Defendant	2029	22	2022	29	2044	7
%	62.26	59.46	62.33	55.77	62.30	46.67
Plaintiff	1230	15	1222	23	1237	8
%	37.74	40.54	37.67	44.23	37.70	53.33
Total	3259	37	3244	52	3281	15

Note: $p = 0.727$ for amicus supporting plaintiffs only; p=; 0.333 for plaintiffs; $p = 0.213$ for both parties.

TABLE A31 Amicus, counseled cases, outcome by support for defendant

Prevailing party CTA	Amicus supporting defendant alone		Amicus supporting defendant (including where amicus support both parties)		Amicus supporting both parties	
	No	Yes	No	Yes	No	Yes
Defendant	2037	14	2030	21	2044	7
%	62.12	82.35	62.19	65.63	62.30	46.67
Plaintiff	1242	3	1234	11	1237	8
%	37.88	17.65	37.81	34.38	37.70	53.33
Total	3279	17	3264	32	3281	15

Note: $p = 0.086$ for defendants alone; $p = 0.690$ for defendants; $p = 0.152$ for both parties.

TABLE A32 Asymmetric review, amicus supporting only one party

	DCT outcome (amicus supporting plaintiff alone)		(DCT outcome (amicus supporting defendant alone)		DCT outcome (no amicus filed)	
CTA decision	Deny	Grant	Deny	Grant	Deny	Grant
Affirm	7 (38.9%)	11 (57.89%)	1 (14.3%)	8 (80.0%)	766 (54.3%)	1366 (75.2%)
Reverse	11 (61.11%)	8 (42.11%)	6 (85.71%)	2 (20.0%)	644 (45.7%)	451 (24.8%)
Total	18	19	7	10	1410	1817

Note: $p = 0.248$ for plaintiffs alone; $p = 0.008$ for defendant alone; $p < 0.001$ for all cases without amicus.

TABLE A33 Asymmetric review, amicus supporting each party (including amicus supporting both parties)

	DCT prevailing party (amicus supporting plaintiff)		DCT prevailing party (amicus supporting defendant)	
CTA decision	Deny	Grant	Deny	Grant
Affirm	11 (44.0%)	15 (55.6%)	5 (35.7%)	12 (66.7%)
Reverse	14 (56.0%)	12 (44.4%)	9 (64.3%)	6 (33.3%)
Total	25	27	14	18

Note: $p = 0.405$ for plaintiffs; $p = 0.082$ for defendants.

TABLE A34 Amicus, counseled cases, by types of claims presented

Prevailing party CTA	4A claims		8A claims		1A claims		DP claims	
	No Amicus	Yes Amicus	No Amicus	Yes Amicus	No Amicus	Yes Amicus	No Amicus	Yes Amicus
Defendant	1090	23	207	2	409	19	842	25
%	60.15	65.71	58.81	33.33	63.12	54.29	67.68	73.53
Plaintiff	722	12	145	4	239	16	402	9
%	39.85	34.29	41.19	66.67	36.88	45.71	32.32	26.47
Total	1812	35	352	6	648	35	1244	34

Note: $p = 0.506$ for 4A claims; $0 = 0.209$ for 8A claims; $p = 0.293$ for 1A claims; $p = 0.472$ for DP claim.

TABLE A35 Petitions for certiorari filed, by CTA outcome, counseled cases

	CTA outcome			
Certiorari sought	**Deny**	**Grant**	**Mixed**	**Total**
No	973 (87.2%)	1605 (83.7%)	224 (85.5%)	2802 (85.0%)
Yes	143 (12.8%)	313 (16.3%)	38 (14.5%)	494 (15.0%)
Total	1116	1918	262	3296

Note: $p = 0.032$.

TABLE A36 Dissents, counseled cases (excluding jurisdictional decisions)

Prevailing party CTA	**No dissent**	**Dissent**
Defendant	1919 (62.8%)	132 (55.5%)
Plaintiff	1139 (37.2%)	106 (44.5%)
Total	3058	238

Note: $p = 0.025$.

TABLE A37 Petitions for certiorari filed, by presence of dissent, counseled cases

Certiorari sought	**No dissent**	**Dissent**	**Total**
No	2718 (86.1%)	176 (69.8%)	2894 (84.9%)
Yes	438 (13.9%)	76 (30.2%)	514 (15.1%)
Total	3156	252	3408

Note: $p < 0.001$.

TABLE A38 Certiorari granted

Certiorari granted	**No dissent**	**Dissent**	**Total**
No	405 (92.5)	65 (85.5%)	470 (91.4%)
Yes	33 (7.5%)	11 (14.5%)	44 (8.6%)
%	7.53	14.47	8.56
Total	438	76	514

Note: $p = 0.046$.

TABLE A39 Certiorari sought by circuit of origin, counseled cases, no jurisdictional dismissals, only where plaintiff or defendant prevailed at CTA

Certiorari sought	DC	1st	2nd	3rd	4th	5th
No	26	105	222	153	121	236
%	86.67	88.98	89.88	84.07	78.06	83.10
Yes	4	13	25	29	34	48
%	13.33	11.02	10.12	15.93	21.94	16.90
Total	30	118	247	182	155	284
Certiorari sought	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**
No	479	138	242	386	313	381
%	86.62	80.23	83.74	82.13	86.23	87.99
Yes	74	34	47	84	50	52
%	13.38	19.77	16.26	17.87	13.77	12.01
Total	553	172	289	470	363	433

Note: $p = 0.799$ for DC Circuit; 0.218 for First Circuit; 0.026 for Second Circuit; 0.713 for Third Circuit, 0.013 for Fourth Circuit; 0.345 for Fifth Circuit; 0.246 for Sixth Circuit; 0.071 for Seventh Circuit; 0.525 for Eighth Circuit; 0.058 for Ninth Circuit; 0.492 for Tenth Circuit; 0.062 for Eleventh Circuit.

TABLE A40 Certiorari sought by circuit of origin & CTA outcome

Certiorari sought	DC			1st			2nd		
	Deny	Grant	Mixed	Deny	Grant	Mixed	Deny	Grant	Mixed
No	11	14	1	28	72	5	76	132	14
%	84.62	87.50	100	84.85	90.00	100	88.37	92.31	77.78
Yes	2	2	0	5	8	0	10	11	4
%	15.38	12.50	0	15.15	15.28	0	11.63	7.69	22.22
Total	13	16	1	72	52	5	86	143	18
Certiorari sought	**3rd**			**4th**			**5th**		
	Deny	Grant	Mixed	Deny	Grant	Mixed	Deny	Grant	Mixed
No	46	102	5	50	64	7	60	154	22
%	85.19	84.30	71.43	83.33	73.56	87.50	90.91	78.97	95.65
Yes	8	19	2	10	23	1	6	41	1
%	14.81	15.70	28.57	16.67	26.44	12.50	9.09	21.03	4.35
Total	113	80	75	60	87	8	66	195	23
Certiorari sought	**6th**			**7th**			**8th**		
	Deny	Grant	Mixed	Deny	Grant	Mixed	Deny	Grant	Mixed
No	189	233	57	56	73	9	68	155	19
%	89.15	83.21	93.44	80.00	78.49	100.00	90.67	80.73	86.36
Yes	23	47	4	14	20	0	7	37	3
%	10.85	16.79	6.56	20.00	21.51	0	9.33	19.27	13.64
Total	212	280	61	70	93	9	75	192	22

Certiorari sought	9th			10th			11th		
	Deny	Grant	Mixed	Deny	Grant	Mixed	Deny	Grant	Mixed
No	153	198	35	96	192	25	140	216	25
%	81.38	84.26	74.47	89.72	84.96	83.33	92.11	86.40	80.65
Yes	35	37	12	11	34	5	12	34	6
%	18.62	15.74	25.53	10.28	15.04	16.67	7.89	13.60	19.35
Total	188	235	47	107	226	30	152	250	31

Note: $p = 0.900$ for DC Circuit; $p = 0.528$ for First Circuit; $p = 0.133$ for Second Circuit; $p = 0.641$ for Third Circuit; $p = 0.298$ for Fourth Circuit; $p = 0.020$ for Fifth Circuit; $p = 0.040$ for Sixth Circuit; $p = 0.133$ for Seventh Circuit; $p = 0.076$ for Eighth Circuit; $p = 0.263$ for Ninth Circuit; $p = 0.445$ for Tenth Circuit; $p = 0.099$ for Eleventh Circuit.

TABLE A41 Certiorari granted by circuit of origin

Certiorari granted	DC	1st	2nd	3rd	4th	5th
No	2	14	24	29	35	42
%	50	87.5	92.31	93.55	97.22	87.50
Yes	2	0	2	2	1	6
%	50	0.00	7.69	6.45	2.78	12.50
Total	4	15	26	31	36	48
Certiorari granted	**6th**	**7th**	**8th**	**9th**	**10th**	**11th**
No	72	34	46	76	44	52
%	94.74	97.14	95.83	83.52	88.00	94.55
Yes	4	1	2	15	6	3
%	5.26	2.86	4.17	16.48	12.00	5.45
Total	76	35	48	91	50	55

Note: $p = 0.012$ for DC Circuit; $p < 0.001$ for First Circuit; 0.960 for Second Circuit; 0.880 for Third Circuit; 0.419 for Fourth Circuit; 0.564 for Fifth Circuit; 0.490 for Sixth Circuit; 0.461 for Seventh Circuit; 0.492 for Eighth Circuit; 0.011 for Ninth Circuit; 0.626 for Tenth Circuit; 0.642 for Eleventh Circuit.

TABLE A42 Certiorari granted by circuit of origin & CTA prevailing party

Certiorari granted	DC		1st		2nd		3rd	
	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
No	1	1	7	7	10	14	20	9
%	50	50	100.0	100.0	100.00	87.50	100.0	81.82
Yes	1	1	0	0	0	2	0	2
%	50	50	0.00	0.00	0	12.50	0.00	18.18
Total	2	2	7	7	10	16	20	11
Certiorari granted	**4th**		**5th**		**6th**		**7th**	
	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
No	18	17	37	5	45	27	20	14
%	100.0	94.44	92.50	62.50	95.74	93.10	100.00	93.33
Yes	0	1	3	3	2	2	0	1
%	0.00	5.56	7.50	37.50	4.26	6.90	0.00	6.67
Total	18	17	40	8	47	29	20	15
Certiorari granted	**8th**		**9th**		**10th**		**11th**	
	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
No	37	9	41	35	30	14	36	16
%	100.00	81.82	100.00	70.00	96.77	73.68	100.00	84.21
Yes	0	2	0	15	1	5	0	3
%	0.00	18.18	0.00	30.00	3.23	26.32	0.00	15.79
Total	37	11	41	50	31	19	36	19

Note: $p = 1.00$ for DC Circuit; $p = 0.33$ for First Circuit; $p = 0.245$ for Second Circuit; $p = 0.049$ for Third Circuit; $p = 0.310$ for Fourth Circuit; $p = 0.019$ for Fifth Circuit; $p = 0.616$ for Sixth Circuit; $p = 0.241$ for Seventh Circuit; $p = 0.008$ for Eighth Circuit; $p < 0.001$ for Ninth Circuit; $p = 0.015$ for Tenth Circuit; $p = 0.014$ for Eleventh Circuit.

TABLE A43 Asymmetrical review by procedural stage

	DCT prevailing party (motion to dismiss stage)		DCT prevailing party (summary judgment stage)		DCT prevailing party (trial stage)	
CTA decision	**Deny**	**Grant**	**Deny**	**Grant**	**Deny**	**Grant**
Affirm	133 (53.0%)	373 (80.7%)	650 (53.5%)	1461 (76.8%)	47 (69.1%)	51 (78.5%)
Reverse	118 (47.0%)	89 (19.3%)	565 (46.5%)	442 (23.2%)	21 (30.9%)	14 (21.5%)
Total	251	462	1215	1903	68	65

Note: $p < 0.001$ for MTD and SJ; $p = 0.221$ for Trials.

TABLE A44 Supreme Court outcomes by substantive case type, full Supreme Court hearings

SCT prevailing party	**4A claim**	**8A claim**	**1A claim**	**DP claim**	**DP only**	**1A only**	**8A only**	**4A only**
Defendant	18 (85.7%)	2 (100%)	8 (88.9%)	5 (71.4%)	2 (100%)	3 (100%)	1 (100%)	12 (92.3%)
Plaintiff	3 (14.3%)	0 (0%)	1 (11.1%)	2 (28.6%)	0 (0%)	0 (0%)	0 (0%)	1 (7.7%)
Total	21	2	9	7	2	3	1	13