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EXAMINING CIVIL RIGHTS LITIGATION REFORM, PART 1: QUALIFIED IMMUNITY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

THURSDAY, MARCH 31, 2022

Serial No. 117–61

Printed for the use of the Committee on the Judiciary



Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
48–302 WASHINGTON : 2022

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EXAMINING CIVIL RIGHTS LITIGATION REFORM, PART 1: QUALIFIED IMMUNITY

Thursday, March 31, 2022

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

Members present: Representatives Nadler, Cohen, Raskin, Ross, Johnson of Georgia, Garcia, Bush, Jackson Lee, Jordan, Johnson of Louisiana, McClintock, Roy, Fischbach, and Owens.

Staff present: John Doty, Senior Advisor and Deputy Staff Director; David Greengrass, Senior Counsel; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Chief Clerk; Gabriel Barnett, Staff Assistant; Merrick Nelson, Digital Director; James Park, Chief Counsel for Constitution; Agbeko Petty, Counsel for Constitution; Will Emmons, Professional Staff Member/Legislative Aide for Constitution; Keenan Keller, Chief Counsel for Crime; Ella Yates, Minority Member Services Director; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Senior Counsel; James Lesinski, Minority Senior Counsel; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. Good morning. The Committee of the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time or do just about anything that I want with the exception of the Ranking Member making me think about it.

I welcome everyone to today's hearing on Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity. Before we continue, I would like to remind Members we have established an email address distribution list dedicated to Members for circulating exhibits, motions, or other written materials Members might want to offer to the hearing. If you would like to submit those, you know how to do it.

All Members and Witnesses, both those in person and those appearing remotely, we would ask you to mute your microphones

when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself when you seek recognition.

I will now recognize myself for an opening statement. Today's hearing is the first in a series of hearings that this Subcommittee will hold to examine potential reforms to Federal civil rights litigation. Future hearing topics may include examinations of proposals to impose vicarious liability on States and municipalities, respondeat superior, and the possibility of replacing Bivens liability with the Federal statutory analog of 42.1983.

We begin this series, however, by focusing on the entirely judicially created doctrine of qualified immunity. This doctrine shields defendants in constitutional tort cases from liability even when they have violated a person's constitutional rights if a court finds that a conduct, though unconstitutional, does not violate clearly established law. Clearly established law is created by the courts and the courts can do that although my Senator says if it is not written in the Constitution, it must not be a right and something we have to pay attention to. My Senator is not on the Supreme Court.

My hope is that this hearing will serve as an educational function, teaching Members and the general public about what the law actually is in qualified immunity in the face of much disinformation about this doctrine, also if we use this hearing to consider reasonable critiques of the doctrine, as well as potential responses by Congress, because we can amend it.

To fully appreciate the implications of qualified immunity doctrine in civil rights cases, generally, at least misconduct cases, in particular, which is where we hear most about it, that makes up a significant portion of the cases in the Federal courts, it is important to step back and understand the genesis of the central idea underlying the statutes at issue in 42.1983.

Section 1983 provides a Federal cause of action for a person to seek monetary relief from State or local officials who acting under the color of State law violate that person's constitutional or other Federal right. Congress passed the measure as part of the Ku Klux Klan Act of 1871, three years after the 14th Amendment's ratification, and six years after the South laid down its guns and said olly olly oxen free, we are finished.

It did so out of concern and notwithstanding the 14th Amendment's guarantee of equal protection laws for all Americans, State and local government officials including police officers at the time, not only acquiesced then, but participated and perpetrated racial violence and other forms of racial discrimination against Black Americans. This conduct eventually continued under Jim Crow laws, less virulent, but just as present in other forms.

By providing a cause of action, Congress intended for victims to receive some measure of justice for the violation of Federal rights by State and local government officers. As the Constitution Accountability Center noted in its written submission to the Subcommittee, Congress also intended for private litigation to be a means of deterring constitutional violations by imposing financial liability on the offenders, sanctions so to speak. The qualified immunity defense as applied over the last several decades, subverts Congress' intent at passing section 1983 by effectively making it

impossible in all but a handful of cases for victims of constitutional or civil rights violations to obtain a remedy or even just have their day in court. This is so because courts have persistently narrowed the scope of the clearly established standards over the course of decades. In effect, to defeat a qualified immunity defense, a civil rights plaintiff would have to show that there was precedent existing at the time of the alleged civil rights violation that was precedent, that was almost identical, identical to the plaintiff's case, not only legally, but factually, through an eye of a needle. This can have terrible consequences from legal policy and moral perspectives. More importantly, victims are left with no remedy or even the chance to develop the facts in their cases and face a dismissal of their lawsuits based on qualified immunity, the defense that can be raised at any stage of litigation.

In addition, egregious misconduct that could amount to unconstitutional actions by police or other officials can go unpunished and undeterred in the future. This threatens to undermine the remedial and deterrent purposes of 1983.

Also, by allowing courts to avoid merits decisions on whether particular challenged conduct is unconstitutional, allowing them instead to simply answer the question of whether the defendant's conduct violated clearly established law of the qualified immunity doctrine, stymies the development of case law interpreting and defining the contours of constitutional law. This does a disservice to police officers, other government officials, and all other citizens.

These consequences are particularly tragic when weighed against the minimal benefits of qualified immunity in the policing context. For example, other areas of substantive and procedural law already account for good faith conduct by officers acting under exigent circumstances, but the harm seems to outweigh the good when it comes to qualified immunity in police misconduct cases.

In light of the forgoing, I hope we will hear thoughtful solutions to the problems with qualified immunity doctrine. The solutions could range from full elimination of qualified immunity in section 1983 cases or more targeted curtailment of the defense and other potential measures.

Both last Congress and this Congress, I joined Full Committee Chair Nadler, Representative Bass, and other colleagues in cosponsoring the George Floyd Justice in Policing Act. It certainly seems like an oxymoron, doesn't it? George Floyd Justice in Policing Act which among other things would have eliminated qualified immunity for law enforcement officers.

Last Congress, I also introduced H.R. 1489, the Civil Rights Enhancement Law Enforcement Accountability Act of 2021. This legislation will make the employers of any law enforcement officer vicariously liable under 1983 for the officer's violations of a person's rights, while also preserving individual officer's liability.

To be clear, I do not intend this proposal to be alternative to address qualified immunity, but rather to be a complement in doing so, although it could be an alternative because it still would have the ability of the government if they are liable for the damages, they will make sure that the officers are taught, taught, and taught, and reinforced to do the right thing and what the right thing is.

I am a proponent and knowledgeable in government and society over the years of police and law enforcement enforcing and continuing to be a positive force and an underpinning of the rule of law which is what makes our country so great, and society has to have rules of law to continue and to prosper and protect its citizens. So, we want to, as the President's budget will, fund the police. We don't want police to be used as piñatas in courts, but we do want police to do the right thing. If they don't do the right thing, there needs to be a source of—a remedial source to remind them of the right thing and to make sure it undermines. Respondeat superior could do as well.

I thank our distinguished panel of experts for being here and I look forward to hearing their testimony which promises to be a substantive and meaningful debate on a topic of great national importance.

I would now like to recognize the Ranking Member of the Subcommittee, the gentleman from Louisiana, Mr. Johnson, who will save me from doing anything beyond calling recesses, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. I thank our witnesses for being here this morning and I also want to take just a moment to honor the great men and women in law enforcement and recognize the essential role they play in keeping our country safe. You have an ally in me and my colleagues, certainly on this side of the aisle.

At this hearing, we are going to discuss policing in America and whether the doctrine of qualified immunity should remain intact. For anybody who is not aware, there are some people who watch these proceedings at home, qualified immunity is the doctrine that protects law enforcement officers from civil liability for honest mistakes they make, while serving in one of the most high-pressure jobs in the world.

The vast majority of police officers in this country are self-sacrificing public servants. They put their lives at risk every single day when they put on that badge. I know this from my own experience. I grew up at the Fire and Police Training Academy in my hometown of Shreveport, Louisiana where my dad was a training officer and assistant chief before he was critically injured and permanently disabled in the line of duty.

If we are going to ask our officers to potentially make the ultimate sacrifice for the safety of others, we have to provide them with legal protections that qualified immunity affords, period, full stop.

However, despite the sacrificial service and bravery of law enforcement, there are some Democrats in Congress who continue to push the false and outrageous narrative that police are actually somehow to be regarded as the enemy. We all saw this over the last couple of years and as we all know, there are some on the progressive left, some elected Members of Congress, who have gone as far as to call for the full-scale abolition of police, if you can imagine that. It is insanity.

My Republican colleagues and I are here to tell you that they are wrong, stating the obvious. We need police officers, and we must maintain law and order. Nothing makes this more apparent than

the spike in violent crime and homicide that we have seen in Democrat-led cities that have defunded their police departments. In 2021, the homicide rate rose by five percent from the previous year. If you think that number is unacceptable, wait until you hear the next one. In 2020, the homicide rate rose by 29 percent over the previous year. Yet, even in the face of this madness, police officers wake up every single day. They kiss their loved ones goodbye and they show up for work.

Meanwhile, the defund the police movement, the pandemic, and COVID vaccine mandates have gutted police recruitment and retention efforts across the country. I know many of you have experienced that. At a time when departments are struggling just to fill open positions and make our communities safer, we still have Democrats here determined to expose our officers to civil liability for simply doing their jobs.

There are very real common-sense reforms that all of us acknowledge that we can make to policing in America. We have had thoughtful discussion about that. That is why I joined the large majority of my Republican colleagues in supporting the Justice Act this last Congress. The Democrats in charge made sure that that bill was dead on arrival. They squandered what we saw as a crucial opportunity to make positive change and build better relationships in our increasingly divided communities. This just shows the radical left calls for reform and nothing more than political talking points sadly.

So, what should we be talking about today instead of eliminating qualified immunity, we should discuss ways that we can further support our police officers. We should encourage them to continue building stronger relationships with their communities. We should give law enforcement the tools and training they need to maintain law and order. Their role is critical. This is a critical part of the fabric of our nation and as we all know, that fabric is being frayed right now in unprecedented ways.

We are the greatest nation in the history of the world and the only way that we will continue that, maintain that, is if we back the blue. It really is that simple to us. Qualified immunity is a big part of this.

So, I look forward to the discussion day and hearing from our Witnesses. I know some of you have done some very important work in this arena and I yield back.

Mr. COHEN. Thank you. Before I recognize Mr. Nadler, I am just going to take a little privilege to the Chair. I cringe, Mr. Johnson, when our Members talk about defunding the police. I was a police legal advisor. Worked in the police department in Memphis for three and a half years. My cringes are no different than your cringes when your Members suggest that Members of Congress, and particularly on your side the implied suggestion is, are engaged in sex orgies and cocaine doing. So, we got them on both sides.

Mr. Nadler, you are recognized. You haven't been to any orgies lately, have you?

Chair NADLER. Not lately. Thank you, Mr. Chair. Of course, we need the police and of course, we need the police to do their jobs

and of course, we need the police to do their jobs legally. That is what we are here to talk about today.

More than a century and a half ago, Congress passed one of the earliest civil rights laws in our nation's history, the Ku Klux Klan Act of 1871. Section 1 of that law now codified at 42 U.S.C. 1983 empowers individuals to sue State and local government officials who violate their Federal rights under color of State law. This private right of action is a critical means of holding government officials accountable.

To fully appreciate Congress' intent in passing the statute, we must understand the historical backdrop against which it created section 1983's right to sue. Section 1983 originated from the unwillingness of State officials to protect and enforce the constitutional rights of African Americans after the Civil War. During this period, the Ku Klux Klan and its allies used racial violence and terror to undue the gains of Reconstruction. Under the cover of darkness and cloaked in hoods to conceal their identity, Klan members roamed the South with impunity, mutilating and murdering African Americans in bloody massacres. This barbarity often went unpunished, as former Confederate States did little to stop the violence. In fact, law enforcement frequently took part in the acts themselves.

The complicity of these local governments left victims with no recourse, until Congress responded with section 1983. In drafting this statute, Congress sought accountability from State and local officials by arming victims of State-sponsored abuse with a Federal court remedy. Unfortunately, the accountability that Congress sought to achieve remains largely unrealized. This is in large part because of court decisions applying and expanding legal precedents for defendants through the doctrine of qualified immunity, which shields State and local officials from liability unless they violate "clearly established" law.

Notably, the text of section 1983 says nothing about qualified immunity, nor is it written in the Constitution. The doctrine is purely a creation of the Supreme Court. As you will hear from some of our Witnesses today, this standard imposes a substantial obstacle to recovery for people whose civil rights have been violated.

Since the Supreme Court first announced the current qualified immunity standard, it has found that a government official violated clearly established law in only three instances. This number says it all. This constitutional scholar and litigator, David Ganz, aptly stated, the Supreme Court "converted a statute designed to open the courthouse doors to those aggrieved by official abuse of power into a statute that both the courthouse doors firmly shut immunizing wrongdoers rather than holding them accountable."

Indeed, qualified immunity subverts the very purpose of section 1983 and denies justice to victims of State-sponsored abuse. We have seen how the doctrine absolved police officers of the most egregious conduct. We have Witnessed Black and Brown lives be devalued as certain officers Act with impunity. This is precisely why I joined Congresswoman Karen Bass in introducing the George Floyd Justice in Policing Act which would, among other things, eliminate the defense of qualified immunity for Federal, State, and local law enforcement officers.

As Chief Justice John Marshall noted, "We are a nation that has been emphatically termed a government of laws and not of men." He also warned, however, that "It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

If we are to heed this warning, State and local government officials who infringe on the constitutional rights of their citizens must be held accountable. The doctrine of qualified immunity currently stands in the way. It is imperative, therefore, that we address this issue so that all Americans can enjoy equal protection of the laws as Congress intended in 1871.

I want to welcome our Witnesses. I look forward to their testimony of this important topic and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler. Mr. Jordan is not present, and I don't think he was going to give a statement, so we will proceed with our Witnesses. I thank each of you participating in today's hearing, both virtual and in person.

I will introduce each Witness, and after the introduction will recognize him or her for their oral testimony. For those who are present here, there is a red light that says you are finished. A green light says you are on. Yellow light says you have got a minute. Get it together.

Your statements that you have will be entered in the record in their entirety and you have five minutes. To help you stay within that time you have got your lights. For Witnesses testifying remotely, there is a timer in the Zoom view that should be visible somewhere in your screen. I think you have to do the character that allows you to see everybody and then you have got something up there on the right-hand side.

Before proceeding with testimony, I remind all the Witnesses, that if you say anything that is not true, Mueller will push the buzzer and you will be subject possibly to penalties under law, section 1001, title 18.

Our first Witness is the Honorable John Newman who is coming to us through the miracle of Zoom. Judge Newman serves on the United States Court of Appeals for the Second Circuit. He was appointed to the Second Circuit in 1979, served as its Chief Judge from 1993–1997, and assumed senior status in 1997.

He previously was a District Court Judge for the District of Connecticut, the home of Rosa DeLauro and others. He was appointed to that position in 1971.

From 1964–1969, Judge Newman served as United States Attorney for the District of Connecticut and I guess he is cheering for Connecticut in the basketball game, the women tomorrow night. I will be, too.

Prior to that, he worked for Senator Abraham Ribicoff of Connecticut, a great United States Senator. He was his Administrative Assistant and he worked for Mr. Ribicoff at HEW where he was a secretary. Before that, he was Governor of Connecticut.

Judge Newman served as a Senior Law Clerk to Chief Justice Earl Warren of the United States Supreme Court, was a Law Clerk of Judge George T. Washington, United States Court of Appeals for the District of Columbia. Served in the U.S. Army Reserve from

1954–1962. I presume he got to know Toby Moffett who was a Congressman back in the day from Connecticut.

Judge Newman received his LLB from Yale Law School and his B.A. from Princeton University. Not shabby.

Judge Newman, you are recognized for five minutes.

STATEMENT OF THE HONORABLE JON O. NEWMAN

Judge NEWMAN. Thank you very much, Chair Nadler, Chair of the Subcommittee Cohen, Vice Chair Ross, and Ranking Member Johnson. I appreciate the Subcommittee's invitation to testify on a topic that has interested me ever since I started writing about it 44 years ago.

As a District Judge, I became familiar with the topic, having conducted 30 police misconduct trials under section 1983. As a matter of fact, I testified on this topic before this very Committee 30 years ago at the invitation of then-Chair Don Edwards. I understand the topic today focuses primarily on qualified immunity.

I have two suggestions to make to the Committee which perhaps anticipate what you are going to do with in the future, but with your permission, I will present them today because they have a distinct bearing and relationship to the qualified immunity issue.

The two proposals are one, to establish employer liability for the constitutional violation by an employee. The second is to permit the United States to bring suit on behalf of a victim whenever there is a constitutional violation by a municipal employee.

First, as to employer liability, cities today are liable for the torts on all their employees with one notable exception. For example, if the driver of a garbage truck injures a pedestrian, the city is liable. The city is the defendant. The city is liable and if there is a recovery, the city pays.

Ironically, the only tort for which a city is not liable is the constitutional violation of a victim's rights. That seems to be a very odd set of circumstances. Now, I understand there is the*Monell* case which says a city can be liable, but as everyone understands who is familiar with it, that is a very limited doctrine. There has to be proof of a policy of promoting misconduct and plaintiffs hardly ever succeed in that.

I also understand there is an indemnity in many cities, either by labor contract or by State law or by custom, but the indemnity is not a substitute for holding the city liable for this reason. In the first place, in the trials I ran, the city, there was indemnity if there ever was a recovery by the victim, the city paid it, but the jury didn't know that. The city was not a defendant in the courtroom. So, the jury was often reluctant to impose liability on a police officer, unaware that the city, in fact, would pay.

Now, if you create employer liability, admissible liability, as we do for all other torts, it will have a profound effect on the conduct of police misconduct trials. Number one, you wouldn't even need qualified immunity because the victim would sue the city. There would be no point in suing the police officer. In fact, if you establish employer liability, you don't even need liability of the police officer. You could do it the way the Federal government does it, the Tort Claims Act. If you sue in court—if an employee of the Federal government commits a tort, the U.S. government comes in as the

defendant. There is no suit against the employee at all. You could do the same with police officers.

Let me turn quickly in my remaining time to letting the U.S. sue. Right now, the plaintiff is the victim. Often someone with one or two felony convictions. Not the most attractive plaintiff in the suit. You ought to consider letting the United States sue to remedy the misconduct by a police officer or any other public official. There is plenty of precedence of that. The United States can sue. The remedy violation of the voting rights, public accommodation rights, employment rights. There is no reason at all not to authorize the United States to come in and be the proponent of a lawsuit where the allegation is that the Constitution of the United States was violated.

The 1983 remedy, if strengthened properly, should accomplish three purposes. It should deter misconduct. It should compensate the victim and it should through the voice of the jury condemn the misconduct by creating municipal liability and letting the U.S. sue, you can diffuse the whole controversy overqualified immunity. You can eliminate it if you wish. You can even eliminate the liability of the police officer and the net results would be a far stronger 1983 remedy of a violation of constitutional rights.

I look forward to answering your questions at the appropriate time. Thank you.

[The statement of Mr. Newman follows:]

Testimony of Judge Jon O. Newman
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the Committee on the Judiciary of the United States House of Representatives
"Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity"
March 31, 2022

My name is Jon O. Newman. I am a senior judge of the United States Court of Appeals for the Second Circuit. I have served as a federal judge for 50 years, nearly 8 years on the District Court for the District of Connecticut and more than 42 years on the Court of Appeals, of which I was Chief Judge for five years. Previously I was the United States Attorney for the District of Connecticut for five years.

I appreciate the Committee's invitation to testify on the subject of qualified immunity and the broader topic of civil rights litigation reform. These subjects have been a major interest of mine for 44 years, ever since I first wrote about them in 1978,[1] and continued to be of interest while I presided at the trial of more than 30 police misconduct cases as a District Judge. I testified on these subjects before this very Subcommittee on May 5, 1992, at the invitation of then Chairman Don Edwards.[2]

My testimony today makes two suggestions for strengthening section 1983 of Title 42, the basic statute authorizing civil lawsuits for actions taken under color of law that violate the Constitution. My suggestions are : (1) create liability of an employer, usually a

[1] *See* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Action*, 87 YALE L. J. 447 (1978).

[2] *See* Testimony of Judge Jon O. Newman, Hearings, "Federal Response for Police Misconduct," Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U.S. House of Representatives at 14 (May 5, 19920).

city, for the action of a public employee, such as a police officer, that denies any person a constitutionally protected right, and (2) authorize the United States, acting by the local United States Attorney, to initiate a civil suit under section 1983, or intervene in an existing suit, to remedy the denial of a person's constitutional rights.

I start with a few words about the defense of qualified immunity for police officers. This defense has been a contentious issue for decades. The defense is not contained in the Constitution, in section 1983, or in any federal statute. The phrase "qualified immunity" was first used by the Supreme Court in 1974 in *Scheuer v. Rhodes*,[3] a rather late development, considering that the predecessor of section 1983 entered federal statutory law in the Civil Rights Act of 1871.[4] *Scheuer* concerned a suit seeking damages from a governor and other state officials for the 1970 shooting deaths at Kent State University. *See id.* at 234. Interestingly, the Court articulated the defense, not to give the defendants protection, but to make sure they were not insulated from liability by the absolute immunity available to judges and legislators.[5]

The Supreme Court's first decision providing police officers with the defense that it had called "qualified immunity" in *Scheuer* was the 1967 case *Pierson v. Ray*.[6] The Court relied on the availability of the defense at common law in actions for false arrest, together with the statement in *Monroe v. Pape*[7] that section 1983 "should be read against the

[3] 416 U.S. 232, 247 (1974).
[4] Act of April 20, 1871, ch. 22, 42d Cong, 1st Sess. § 1, 17 Stat. 13.
[5] *See* 416 U.S. at 248.
[6] 386 U.S. 547 (1967).
[7] 365 U.S. 167 (1961).

background of tort liability that makes a man responsible for the natural consequences of his actions."[8] Although *Monroe* had drawn from the common law a basis to *impose* liability on a public official, *Pierson* drew from the common law a *defense* to liability. In *Pierson*, the Court, following the common law, said that the defense to a section 1983 claim would be available where a police office had probable cause for an arrest and acted in good faith.[9]

One problem with the defense of qualified immunity is that it is difficult for a jury to understand. After presiding at several police misconduct trials, I sent a questionnaire to jurors who had served in a number of such cases. Their responses (and the response rate was high for this sort of inquiry) revealed that the jurors had little, if any, understanding of the qualified immunity defense at all.[10]

Critics of the qualified immunity defense contend that it permits many violations of constitutional rights to go unremedied in lawsuits against police officers. Proponents of the defense contend that it is necessary to protect police officers from personal liability for making on-the-spot decisions that later appear to have violated a person's constitutional rights. There is force to both arguments.

I suggest that the arguments about qualified immunity could be defused and section 1983 could be made an effective remedy for police misconduct by making two changes to the statute.

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[8] *Id.* at 187.

[9] 386 U.S. at 557. For a more detailed account of the history and evolution of the defense of qualified immunity, *see* Jon O. Newman, *On Reasonableness: The Many Meanings of Law's Most Ubiquitous Concept*, THE JOURNAL OF APPELLATE PRACTICE AND PROCESS 47-57, *available at* https://journals.librarypublishing.arizona.edu/appellate/article/id/2208.

[10] *See* Note, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979).

1. The first needed change is to create liability of an employer, usually a city, for the action of a public employee, such as a police officer, that denies any person a constitutionally protected right, and (2) authorize the United States, acting by the local United States Attorney, to initiate a civil suit under section 1983, or intervene in an existing suit, to remedy the denial of a person's constitutional rights.

Congress has authority to authorize such employer liability under its power to enforce the Fourteenth Amendment,[11] because that amendment makes the provisions of the Fourth Amendment, which prohibits unreasonable arrests, unreasonable searches, and uses of excessive force, enforceable against the States through the Due Process Clause of the Fourteenth Amendment.[12]

There would be nothing novel about making municipal employers liable for the constitutional torts committed by police officers they employ. Cities are liable today under the ancient doctrine of *respondeat superior* for all sorts of torts committed by their employees. A city is liable, for example, when the driver of a garbage truck negligently injures a pedestrian. The irony is that the constitutional tort of violating a person's constitutional rights is the only tort, committed by a municipal employee, for which a municipal employer is *not* liable.

I recognize that in some cities, a contract between a city and a police union provides that the city will indemnify a police officer found liable in a lawsuit under section 1983. However, the jury in these cases does not know about that contract and will frequently find

[11] *See* Const. amend XIV, § 5.
[12] *See Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

the officer not liable to avoid what they think will be the imposition of liability for damages on the officer. Creating municipal liability would make the police officer's municipal employer a defendant in the section 1983 suit, and inform the jury that the employer would be liable for any damages awarded.

I also recognize that under current section 1983 law, a city can be found liable for the constitutional torts of its employees in one extremely limited circumstance. Such municipal liability is now available only under the highly restrictive standard established by the Supreme Court in *Monell v. Department of Social Services.*[13] The Court ruled that a city could be found liable for an employee's denial of a constitutional right if "action pursuant to official municipal policy of some nature caused a constitutional tort."[14] So, to take a well known recent case, if a police officer uses the excessive force of a prolonged chokehold that results in the death of a person whom the officer has arrested, the officer's municipal employer is liable under *Monell* only if using a chokehold that causes death is an official municipal policy. Such a policy is highly unlikely ever to be proved. The restrictive *Monell* standard should be replaced by ordinary municipal liability. The municipal employer should be liable for a police officer's unconstitutional action taken under color of law simply because it employed the officer, just as that employer is liable today for ever other tort its employees commit in the course of their employment.

If employer liability is established for the constitutional torts of public employees such as police officers, the issue would then arise as to the status of the defense of qualified

[13] 436 U.S. 658 (2018).
[14] *Id.* at 691.

immunity. One point would be clear. The defense would not be available to the employee's employer, whether local, city, or state. The Supreme Court ruled in *Owen v. City of Independence*,[15] that the employer of an employee entitled to qualified immunity is not itself entitled to that defense.[16]

With employer liability established, the status of qualified immunity with respect to the employee would be subject to several possibilities:

The defense could be retained in its present form with the victim relying primarily on a lawsuit against the employer.

Or the defense could be somewhat narrowed by eliminating the component of good faith and making the defense available to the officer only where the officer's conduct was not clearly beyond constitutional limits. Such a narrowing would be similar to the statutory limitation on a federal court's authority to issue a writ of habeas corpus to a prisoner challenging a state court conviction. The habeas corpus statute provides that the writ may not be granted unless the state court's decision was "an unreasonable application of clearly established Federal law,"[17] and the Supreme Court has ruled in *Lockyer v. Andrade*[18] that the state court's decision must be not only erroneous and not only clearly erroneous, but even more unreasonable than that.[19]

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[15] 445 U.S. 622 (1980).
[16] *Id.* at 638.
[17] 28 U.S.C. § 2254(d)(1).
[18] 538 U.S. 63 (2003).
[19] *Id.* at 75.

Or the defense could be eliminated because the plaintiff would recover from the employer and have no need to seek recovery from the employee.

Or the liability of the employee itself could be eliminated, leaving the victim to rely solely on a lawsuit against the employer.

There is ample precedent in federal law for precluding a lawsuit against a public employee when a public employer is liable for a tort committed by a public employee. The Federal Tort Claims Act authorizes suit against the United States and precludes a suit against an employee of the United States.[20] The United States displaces the employee as a defendant in the lawsuit.

I take no position on any of these options. My first suggestion is to urge amendment of section 1983 by creating employer liability for constitutional torts committed by public employees.

2. A second needed change to section 1983 would be authorizing the United States, acting by the local United States Attorney, to have the discretion to bring a section 1983 suit on behalf of a victim of police misconduct or to intervene in a suit that the victim has already initiated. The United States Attorney would not be required to bring such a suit, or to intervene in an existing suit, but would simply have the discretion to do so in appropriate

[20] *See* 28 U.S.C. § 2679(b)(1) (A lawsuit against the United States for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee who act or omission gave rise to the claim," and "[a]ny other civil action or proceeding for money damages arising or relating to the same subject matter against the employee or the employee's estate is precluded.").

circumstances. Again, the enforcement clause of the Fourteenth Amendment provides authority for Congress to make this change.

And, as with employer liability, there would be nothing novel about permitting the United States to bring a suit alleging denial of a person's protected rights. The United States can now bring a lawsuit to prevent denial on account of race or color of a person's right to vote,[21] to prevent a discriminatory test for voting,[22] to implement the 26th Amendment,[23] to remedy discrimination in employment,[24] and to remedy discrimination in public accommodations.[25]

Permitting the United States Attorney to initiate, or intervene in, a lawsuit under section 1983 to remedy the violations of a person's constitutional rights resulting from police misconduct would have a significant benefit. The victim of police misconduct is sometimes a person with one or more felony convictions and for that reason is subject to substantial impeachment when testifying as the plaintiff. If the United States Attorney brought the lawsuit, the victim would still be a witness, subject to impeachment, but the prestige of the United States as plaintiff would substantially enhance the victim's credibility and increase the chances of a verdict finding a constitutional violation. The entire atmosphere of the trial would change dramatically. The investigatory resources of

[21] 52 U.S.C. § 10308(d) (action to prevent violation of 52 U.S.C. § 10301).
[22] 52 U.S.C. § 10504.
[23] 52 U.S.C. § 10701(a)(1).
[24] 42 U.S.C. § 2000e-5(f)(1).
[25] 42 U.S.C. § 2000a-5(a).

the United States Attorney's office would be available to develop the evidence. A federal agent would sit at counsel's table.

Creating employer liability for an employee's denial of constitutional rights and authorizing the United States Attorney to initiate, or intervene in, a section 1983 lawsuit to remedy such a denial would be important changes. With these two changes, section 1983 would be reinvigorated to help achieve the three objectives of police misconduct litigation. The first objective is helping to deter such misconduct before it occurs. Once employers such as cities know that they are liable for constitutional torts, they can be expected to enhance their training programs to reduce the number of occasions when they must pay money because their employees have acted unlawfully. The second objective is providing some compensation to the victims of police misconduct. The third objective is to have the community, speaking through the jury, express its condemnation of the unconstitutional action taken by a police officer.

I thank the Committee for this second opportunity to present these proposals.

Chair NADLER. Thank you, Judge Newman for your testimony and for your very distinguished service to our country.

Our next Witness is Alexander Reinert. He is the Max Freund Professor of Litigation and Advocacy and Director of the Center of Rights and Justice at the Benjamin N. Cardozo School of Law, Yeshiva University. He teachers and conducts research in the areas of civil procedure, con law, criminal law, Federal courts, and the law of prisons and jails.

He argued before the Supreme Court in *Ashcroft* v. *Iqbal* and has appeared on behalf of parties in amicus curiae and many significant civil rights cases.

Prior to his academic career, he was in private practice of law focusing on the rights of people confined to prisons and jails, employment discrimination, and disability rights.

He graduated magna cum laude from the NYU School of Law. After he graduated from law school, he served as law clerk for the Honorable Stephen Breyer, Associate Justice of the United States Supreme Court, and for the Honorable Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit. He received his A.B. from Brown University.

Professor Reinert, you are recognized for five minutes.

STATEMENT OF ALEXANDER A. REINERT

Mr. REINERT. Thank you so much, Chair Nadler, Subcommittee Chair Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of the Subcommittee. My name is Alex Reinert. I am the Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law. This semester I am the Visiting Professor of Law at Cornell Law School. Thank you for inviting me to testify today regarding civil rights litigation reform and qualified immunity. Today I speak in my personal capacity alone, not for either of the institutions with which I am currently affiliated.

As a law professor, I have researched, written, and taught about civil rights litigation and qualified immunity for many years. Over this time, I have been invited on multiple occasions to conduct workshops for Federal judges and their law clerks addressing civil rights litigation. As an attorney, I have litigated civil rights cases now for more than 20 years, arguing cases at every level of the Federal judicial system.

My perspective on qualified immunity is informed by all this experience. My written testimony has already been submitted. So, with the time allotted to me, I intend to highlight some of what I cover in that statement, albeit in not as much detail. I will begin with a broad sketch of qualified immunity—we have heard some of it already—before we drill down to some specifics.

So, what is it? It is a defense that government officials can raise when they are sued for damages for violating the Constitution. It protects them from liability, unless the law governing their conduct was clearly established. It applies in a wide range of contexts to conduct that all would agree is egregious in cases involving serious injury and even death. It can even apply, frankly, when the defendant intends to violate the Constitution.

It's a judicially created immunity that stems from the Supreme Court's erroneous interpretation of 42 USC 1983. It is not in the

statute or required by statute. To be clear, it is not required by the Constitution, and it is an anomaly. That is why, today, qualified immunity is being questioned on multiple grounds across the political spectrum. Indeed, probably one of the few things that brings Justice Clarence Thomas and Sonia Sotomayor together is their hostility to qualified immunity, albeit for different reasons.

The requirement that there be clearly established law is the most significant part of the doctrine. As the Supreme Court has described it, this means that a plaintiff has to show that prior case law from either the Supreme Court or the Court of Appeals has to have made the unlawfulness of the officer's conduct so obvious that only an incompetent officer would not see it. Many lower courts have interpreted this to mean that a plaintiff has to show a prior case that found a constitutional violation for the same right and on nearly identical facts.

I provided a few examples in my written testimony, as have other Witnesses at this hearing. They are just the tip of the iceberg. I expect some of the other panelists will discuss them, so I won't linger on them. What I think it is most important to take from them is that even if the officer violates the Constitution, they can obtain protection from qualified immunity simply because there was no prior case law finding a violation on exactly the same facts. Like Ranking Member Johnson, I think we should be a nation of laws. Qualified immunity interferes with enforcement of the highest law of the land, the Constitution. In so doing, it undermines fundamental rule of law principles.

Now, there are many flaws in this doctrine. First, who is left without a remedy? Americans whose rights have been violated. Make no mistake, qualified immunity means that the people who have been killed or seriously injured bear all the costs of constitutional violations. That is both wrong and unnecessary.

Of course, qualified immunity also makes it harder for the law to develop because courts routinely decide cases without ever addressing whether there is a constitutional violation in the first place. They just say it hasn't been clearly established, which means that clearly established law never develops for future cases.

It also creates long delays in the civil justice system because of the right of defendants to immediately appeal and ping-pong a case back and forth between a trial court and appeals court before there is ever a trial.

Of course, because we count on civil litigation to deter future constitutional violations, qualified immunity makes it more likely that officers and police departments will never learn from their mistakes. It blunts the power of civil litigation to incentivize systemic reform.

Now, as Federal lawmakers are discussing ending qualified immunity and State legislators around the country have also debated legislation like this, you will no doubt hear objections from some law enforcement groups that this will make it harder to be an officer because qualified immunity protects them from individual liability. I want to say this loud and clear. That is the most pernicious fiction that exists in the debate around this doctrine.

Law enforcement officers almost never pay judgments in civil rights cases. Municipalities and States already routinely indemnify

officers, even for egregious misconduct. There is also insurance available for officers. The substantive constitutional law already provides ample protection against second-guessing.

This is a doctrine that poses substantial barriers to relief. It prevents the enforcement of the highest land of our law. It leaves the cost of constitutional violations to be borne by the victims, an inexcusable consequence in a country that purports to be governed by the rule of law.

Thank you for the opportunity to testify. I welcome your questions.

[The statement of Mr. Reinert follows:]

Written Testimony of Alexander A. Reinert

Max Freund Professor of Litigation and Advocacy
Benjamin N. Cardozo School of Law

Visiting Professor of Law
Cornell Law School

Hearing on Examining Civil Rights Litigation Reform, Part I: Qualified Immunity

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

March 31, 2022

INTRODUCTION

Thank you for inviting me to testify today regarding the judge-made doctrine of qualified immunity. At the outset, I should make clear that I deliver these remarks in my personal capacity and based on my experience as a scholar of civil procedure, federal courts, and constitutional law, as well as a civil rights practitioner with over 20 years of experience litigating in the federal courts. My views are my own, not those of either the Benjamin N. Cardozo School of Law or Cornell Law School.

Qualified immunity is a substantial barrier to relief for people who have been injured by civil rights violations. It is flawed from the ground up, both in its inception, its application, and its logic. Eliminating qualified immunity will provide relief to victims of official misconduct, deter future constitutional violations, improve the administration of justice, and will help uphold the rule of law. And contrary to overheated rhetoric predicting the impact of its demise, qualified immunity is not necessary to protect officials from financial ruin because state and local actors are almost never required to contribute their own financial resources to settle or pay judgments in civil rights cases. Properly understood, eliminating qualified immunity will foster respect for law enforcement and will better enable state and local entities to build institutional mechanisms that will help prevent future civil rights violations

I. What is Qualified Immunity?

When civil rights litigants seek damages against state and local officials under 42 U.S.C. § 1983, a statute originally enacted in 1871 as part of the broad post-Civil War Reconstruction Acts, or against federal officials via *Bivens* actions,[1] there are many barriers to success.[2] Among the most closely scrutinized is the judge-made doctrine of qualified immunity.

Qualified immunity protects government from damages liability unless the law governing their conduct was "clearly established" such that a reasonable officer would have known that they were acting in violation of federal law. The requirement that there be "clearly established" law is the most significant part of qualified immunity. As the Supreme Court has described it, to overcome the defense a plaintiff must show that prior case law from either the Supreme Court or a federal appellate court made the unlawfulness of the officer's conduct so obvious that only an incompetent officer would not have seen it.[3] This almost always means that a plaintiff has to show a prior case that found a constitutional violation for the same right and on nearly identical facts. Courts applying this standard sometimes point to

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[1] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (implying a private cause of action against federal officials for violation of the Fourth Amendment).

[2] *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 329-34 (2020) (discussing barriers to success in Section 1983 litigation); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 842-44 (2010) (discussing barriers in the *Bivens* context).

[3] *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986).

minor and inconsequential factual distinctions between prior precedent and the plaintiff's factual allegations to avoid finding that "clearly established law" exists.[4]

When qualified immunity applies in litigation, it bars all compensation for victims of unconstitutional conduct, no matter how egregious or injurious. These cases run the gamut, from school officials who receive qualified immunity for subjecting teenage girls to invasive strip searches with no reasonable basis,[5] to police officers who receive immunity when they use deadly force against unarmed citizens,[6] to corrections officers who are aware that an incarcerated person is suicidal and watch without intervening as he wraps a phone cord around his neck and dies by suicide.[7] There is no shortage of concrete examples that illustrate its pernicious effects, and I am sure some of the other witnesses at this hearing will be able to offer similar examples, but here are just a few:

- In Jessop v. City of Fresno, police officers were sued for stealing more than $225,000 in cash and rare coins while executing a search warrant. , The Ninth Circuit held that while "the theft [of] personal property by police officers sworn to uphold the law" may be "morally wrong," the officers could not be sued for the theft because the court had never specifically decided "whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment."[8]

- In Corbitt v. Vickers, the Eleventh Circuit found that a deputy sheriff in Georgia who shot a ten-year-old child lying on the ground – while repeatedly attempting to shoot a pet dog that posed no threat – was entitled to qualified immunity because there was no case holding "that a temporarily seized person . . . suffers a violation of his Fourth Amendment rights when an officer shoots at a dog . . . and accidentally hits the person."[9]

- In Mullenix v. Luna, an officer killed a driver by firing six shots at him, seeking to disable the vehicle, even though he had received no training in shooting to disable a vehicle and had been ordered by his supervisor to stand down because the vehicle was approaching spike strips. The Supreme Court held that qualified immunity was appropriate because it was not "beyond debate" that the officer violated the Constitution.[10]

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[4] Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 197-202 (2008) (discussing cases in which courts relief on minor factual differences from prior cases to preclude liability).

[5] *See* Safford Unified School District v. Redding, 557 U.S. 364 (2009).

[6] *See* Salazar-Limon v. City of Houston, Tex., 137 S. Ct. 1277, 1278 (2017) (Sotomayor, J., dissenting from denial of cert.).

[7] Cope v. Cogdill, 3 F.4th 198, 206 (5th Cir. 2021).

[8] Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019).

[9] Corbitt v. Vickers, 929 F.3d 1304, 1318 (11th Cir. 2019).

[10] Mullenix v. Luna, 577 U.S. 7, 16 (2015).

These are just some of the many examples of how qualified immunity is applied in practice. And when the doctrine is deployed in Section 1983 cases, it means that state and local officers , the people we entrust with following and enforcing the law, receive neither the guidance nor the command of the highest law of the land, the federal constitution. In so doing, it undermines fundamental rule of law principles.

II. The Emergence of Modern Qualified Immunity Doctrine

One might fairly ask: How did we get here? The road is winding, but it is worth taking time to understand. The seeds of the qualified immunity defense were sown in Pierson v. Ray, a 1967 decision involving a Section 1983 action brought against three police officers, among other defendants.[11] The plaintiffs were Freedom Riders who were arrested while protesting segregated bus facilities in Jackson, Mississippi in September 1961.[12] The Supreme Court, looking to Mississippi State law, concluded that background principles of tort liability supported a good faith or probable cause defense in federal Section 1983 actions, at least "in the case of police officers making an arrest."[13]

Whether the *Pierson* Court had intended that its good faith immunity be limited or adjudicated on a case-by-case basis, it soon became clear that the immunity had a broad reach. First, it was applied across the board to state officials who exercised non-ministerial functions. In Scheuer v. Rhodes,[14] the Court relied on *Pierson* to find that Ohio's governor and other state officials, sued after the National Guard shot and killed four students during anti-war protests at Kent State University,[15] were all entitled to qualified immunity of varied scope.[16] And in Wood v. Strickland,[17] the Court relied on *Pierson*, *Scheuer*, and state common law to extend a good faith immunity to school board members sued for damages arising from student disciplinary proceedings.[18] In other words, whatever limitations the Supreme Court might have had in mind when it announced *Pierson*, immunity doctrine quickly came to have a broad application in Section 1983 suits.

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[11] 386 U.S. 547 (1967).

[12] Beginning in 1961, the Congress of Racial Equality organized a "Freedom Rides" campaign to challenge segregated transportation across the South. *See generally* Diane McWhorter, *The Enduring Courage of the Freedom Riders*, 61 J. BLACKS HIGHER EDUC. 66 (2008).

[13] *Pierson*, 386 U.S. at 556-57.

[14] 416 U.S. 232 (1974).

[15] The shootings at Kent State took place on May 4, 1970, during a demonstration opposing the expansion of American military presence into Cambodia and protesting the National Guard's presence on campus. *See* John Fitzgerald O'Hara, *Kent State/May 4 and Postwar Memory*, 58 AM. QUARTERLY 301, 302 (2006).

[16] 416 U.S. at 247 (noting that the scope of immunity would depend "upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.").

[17] 420 U.S. 308 (1975).

[18] *Id.* at 318.

Second and most consequentially, in Harlow v. Fitzgerald, decided in 1982, the Court rejected the "good-faith" version of qualified immunity adopted in *Pierson* and its progeny, choosing instead an objective test that focused on the reasonableness of the officer's behavior in light of "clearly established" law.[19] 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,[20] then they are immune from damages liability. Over time, even though *Harlow*'s basic standard has survived, the Court has slowly come to emphasize almost exclusively its concern with protecting defendants from suit.

As discussed above, the defendant-friendly trend in qualified immunity is most saliently reflected in the gradual narrowing of what constitutes "clearly established" law for the purposes of the defense. Over the years, the Supreme Court has insisted on more and more factual similarity between prior cases and the defendants' alleged conduct to overcome the immunity defense. Only a few decisions break this monotony, and those exceptions involve the rare case in which a constitutional violation is so obvious that one would not need a prior case to establish it with clarity.[21] But in the main, the Court has spent the past three decades progressively and forcefully emphasizing that that, for law to be "clearly established," prior cases must speak with such clarity that only a "plainly incompetent" official would fail to see the unlawfulness of their conduct.[22]

In addition to strengthening the substantive strength of the qualified immunity defense, the Supreme Court also has designed many procedural accommodations for defendants who raise the immunity defense. Qualified immunity can be invoked at any time: at the motion to dismiss stage, after limited or full discovery through summary judgment, and at trial.[23] The Court has directed lower court judges to resolve qualified immunity, if possible, prior to trial, for the value of the immunity is "effectively lost if a case is erroneously permitted to go to trial."[24] Defendants may seek protection from discovery until the threshold legal question of qualified

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[19] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986).

[20] Qualified immunity has been described as an affirmative defense, *see* Gomez v. Toledo, 446 U.S. 635, 640 (1980), but not every circuit consistently allocates to the defendant the burdens of establishing the defense. *See* Alexander A. Reinert, *Qualified immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071-72 (2018) (describing different approaches to allocating burdens).

[21] Hope v. Pelzer, 536 U.S. 730, 741-44 (2002) (holding that qualified immunity was inappropriate where plaintiff was tied to a hitching post for hours and denied access to water); *see also* Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (per curiam) (citing *Hope* and holding that qualified immunity was unavailable on "the particularly egregious facts of this case.").

[22] The "plainly incompetent" language originated more than three decades ago. *See Malley*, 475 U.S. at 341. But it echoes throughout the entirety of modern qualified immunity jurisprudence. *See*, *e.g.*, Kisela v. Hughes, 138 S. Ct. at 1148, 1152 (2018).

[23] *See* Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[24] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

immunity is resolved.[25] And defendants sued in federal court may seek interlocutory appeals when the defense is rejected – sometimes triggering multiple appeals in a single case -- of otherwise unappealable denials of motions to dismiss or summary judgment, so long as the appeal is confined to law-based qualified immunity arguments.[26] All told, these innovations delay justice many years, even when plaintiffs are actually able to overcome the defense.

Finally, one can see the Supreme Court's solicitude for defendants in its tinkering with the mechanism for how "clearly established" law develops over time. It is important to understand that 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. After much back and forth, the Supreme Court has now made clear that lower courts have the option of choosing only to resolve whether law is "clearly established," leaving courts free to decline to decide whether any right was in fact violated.[27] This raises the concern 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.[28] And if, as empirical evidence suggests,[29] courts grant qualified immunity without ruling on the merits of the constitutional claim, a court creates no new clearly established law. Rights become frozen, leaving citizens unprotected from future constitutional violations until a court chooses to rule on the constitutional question. Hindering the development of constitutional law in this manner not only harms the individual plaintiffs in these cases but also makes it more difficult for government agencies to craft policies and formulate training that comply with the law.

III. Qualified Immunity's Flaws

Qualified immunity has many significant and harmful impacts. First, as established above, the people who are most harmed by constitutional violations are left without a remedy for serious, sometimes, fatal, injuries. And they generally cannot find remedies for constitutional misconduct by suing state or local entities because the Supreme Court also has made it extremely difficult to sue municipalities for constitutional violations – and sovereign immunity protects states from suits for damages.

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[25] *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991).

[26] *See Behrens*, 516 U.S. 299, 307–09 (1996); *Mitchell*, 472 U.S. 511, 526–27 (1985). 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*, 472 U.S. at 526.

[27] *Pearson*, 555 U.S. at 234–36.

[28] *Id.* at 242-43.

[29] *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (finding that judicial avoidance decreased when courts were required to follow the two-step approach of *Saucier*); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 49 (2015) (finding that judges are less likely to decide constitutional questions when the rights at issue are not clearly established).

Second, a discussed above, qualified immunity makes it harder for the law to develop. Courts routinely decide cases on qualified immunity grounds – holding that the relevant law was not clearly established – and never address whether there was a constitutional violation in the first place. And it is a vicious feedback loop, because the Supreme Court has said that for law to be "clearly established," a plaintiff needs to show that there was a prior decision that involved nearly identical facts and claims in which an appeals court or the Supreme Court found a constitutional violation. But how can plaintiffs meet this threshold if courts never decide what the law is, choosing instead to only tell us that whatever the law is, it is not clearly established?

Third, although qualified immunity is supposed to be an objective test, there is evidence that it is applied subjectively. In a study I performed in which I analyzed more than 4,000 federal appellate decisions across the country, over the span of 10 years, I found not only that qualified immunity was granted to officials about 60 percent of the time, but also that the makeup of the appellate court appeared to have a significant impact on how often the immunity was granted.[30] Most troubling, the panel's decisions depended significantly on whether the judges who heard the appeal were appointed by Republican or Democratic presidents. I hope we can all agree that whether an injured American can receive a remedy for constitutional violations should not depend on these kinds of factors.\

Finally, because we count on civil litigation to deter future constitutional violations, qualified immunity makes it more likely that officers and police departments will never learn from their mistakes. Qualified immunity blunts the power of civil litigation to incentivize systemic reform.

Not only does qualified immunity have these negative impacts on the administration of justice, but the doctrine is of dubious validity from a legal perspective. Many scholars have shown that immunity doctrine is inconsistent with Section 1983's text and purpose.[31] Indeed, there are good reasons to think that the Reconstruction Congress that enacted Section 1983 would be flummoxed by the Court's judicially-created qualified immunity doctrine. After all, Section 1983 makes no reference to any defenses, good-faith or otherwise, and the Civil Rights Act enacted in 1871 specifically stated that liability would fall on constitutional tortfeasors notwithstanding any contrary state immunity law. Section 1983's purpose was to provide a federal forum for constitutional violations by state and local officials, free of any state encumbrances like the common-law good faith doctrine the Court applied in *Pierson*.

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[30] *See* Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3798024 (2021).

[31] Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57–70 (1989) (criticizing Court's interpretation of Section 1983 in light of its text); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 774, 794 (1987) (arguing that the Supreme Court obscures Reconstruction Congress's intent in order to hide its own policy preferences).

Constitutional theorists also question the gap it leaves between rights and remedies,[32] and empiricists, most notably Joanna Schwartz, have provided evidence that undermines the Court's assumption that qualified immunity is necessary to protect government officials from the threat of civil liability.[33] Most critically, Professor Schwartz has shown that qualified immunity is not necessary to protect individual officers from the financial consequences of civil rights liability, a matter I will discuss in more detail in Part IV of this testimony.

These critiques are shared by scholars and commentators from across the political spectrum. Many years ago, scholars observed both that the Court's original conception of qualified immunity was untethered from the common law of 1871,[34] and that even had the Court correctly described that common law when it first adopted the doctrine in *Pierson*, by the time the Court transformed the defense into an objective one based on "clearly established law," the Court had departed significantly from the common law roots. This criticism has come into sharper focus ever since Supreme Court Justice Clarence Thomas referred to it approvingly in a 2017 concurrence.[35]

In that opinion, Justice Thomas noted his "growing concern with our qualified immunity jurisprudence."[36] Justice Thomas honed in on *Harlow*'s transformation of qualified immunity

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[32] *See, e.g.*, David Achtenberg, *Immunity Under 42 U.S.C. S 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 499–500 (1992) (arguing that Section 1983 should be read to incorporate only those immunities consistent with protecting individual rights); Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 HUM. RTS. 5, 6-7 (2014) (describing barriers imposed by qualified immunity); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77 (1989) (arguing that qualified immunity doctrine "unnecessarily subordinates constitutional protections to interests of governmental efficiency.").

[33] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2 (2017); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 891 (2014).

[34] In one case from Maine, for example, a plaintiff brought suit after he had been held in solitary confinement in prison for longer than his original sentence. Gross v. Rice, 71 Me. 241 (1880). The Warden defended against the action by pointing to a statute which permitted prison officials to hold someone beyond their criminal sentence if they had been disciplined with solitary confinement for violating prison rules. *Id.* at 252. The Warden acknowledged that the statute had subsequently been declared unconstitutional, but argued that he had presumed it was valid when he applied it to the plaintiff, in effect raising what we would now call a qualified immunity defense. *Id.* The 1880 court rejected the Warden's argument with little trouble, based both on Maine jurisprudence and other authorities. Gross v. Rice, 71 Me. 241, 252 (1880). This was the dominant rule in both state and federal courts during the nineteenth century. *See* James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. rev. Online 148, 167-168 & n. 111 (collecting authority). Today's Supreme court, by contrast, would be far more friendly to defendants. In Heien v. North Carolina, 574 U.S. 54 (2014), for example, the Court held that no Fourth Amendment violation occurred when an officer made a reasonable mistake of law, including in cases in which the officer relied upon a law that was subsequently declared unconstitutional, and stated that the qualified immunity analysis is even more "forgiving" towards an officer. *Id.* at 64, 67.

[35] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment).

[36] *Id.*

from subjective good-faith to an objective reasonableness standard based on the content of "clearly established" law.[37] From Justice Thomas's perspective, this change was not a product of statutory interpretation but a "freewheeling policy choice" associated with federal common law.[38] By all appearances, Justice Thomas is prepared to overturn the Court's longstanding qualified immunity doctrine, but the Court has yet to grant certiorari in a case presenting that opportunity.

In sum, qualified immunity leaves the people who are most harmed by constitutional violations – regular Americans –without a remedy for serious, sometimes, fatal, injuries. At the same time, qualified immunity creates long delays in the civil justice system and interferes with the development of constitutional law. Finally, qualified immunity interferes with our ability to use civil litigation to deter unlawful conduct. This is a one-sided debate – as I detail below, the only defenses that can be raised in favor of retaining qualified immunity are founded on fictions.

IV. Ending Qualified Immunity Will Not Undermine Law Enforcement

As you have debated ending qualified immunity in these halls, you have no doubt heard objections from some groups and individuals that ending qualified immunity will make it harder to be a police officer because qualified immunity protects them from individual liability. This argument is a fiction. The myth that qualified immunity is necessary to protect individual defendants, particularly law enforcement officers, from paying damages in civil rights cases is one of the most pernicious fictions that has been deployed to maintain the status quo. Qualified immunity is not necessary to protect officers from financial ruin. Law enforcement officers almost never pay judgments in civil rights cases. As Professor Joanna Schwartz has shown in the largest study of its kind, municipalities and states already routinely indemnify officers, even for egregious misconduct. Professor Schwartz's study shows that governments paid approximately 99.98% of all dollars that civil rights plaintiffs recovered in lawsuits against police officers.[39] Eliminating qualified immunity would have no impact on the financial security of state and local officials.

Nor is qualified immunity necessary to protect officers from being subjected to second-guessing for their split-second decisions. The substantive constitutional law already provides ample protection against second-guessing. To prove a Fourth Amendment violation, plaintiffs already have to show that the officer behaved unreasonably under the totality of the circumstances, with much deference given for split-second decisions. The Supreme Court in Graham v. Connor,[40] made clear that the Fourth Amendment's "unreasonableness" standard must accommodate "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" and cannot be

[37] *Id.* at 1871.

[38] *Id.*

[39] Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014)

[40] 490 U.S. 386 (1989).

judged with "the 20/20 vision of hindsight."[41] There also are significant procedural barriers that must be overcome to bring constitutional claims against state and local officials, particularly against corrections officers. Qualified immunity offers all of these officials an extra layer of unwarranted and unnecessary protection, when they already have ample protection from substantive law and existing procedures.

Finally, there is no reason to think that it will become more difficult to recruit people for positions in state and local government, whether in law enforcement or otherwise, if qualified immunity is eliminated. To believe otherwise is to assume that state and local officials are looking for jobs where they are not guided or bound by the constitution. Many other professionals provide vital services in our society without requiring the extra layer of protection afforded by a doctrine like qualified immunity. We can and should expect the same of our state and local officials. Especially because eliminating qualified immunity will improve the provision of important public services by increasing the incentive for thoughtful policies, adequate training, and careful supervision.

CONCLUSION

Qualified immunity imposes a substantial barrier to relief for victims of egregious misconduct, who already face significant hurdles just to prove that a particular defendant violated the Constitution, let alone that the right which was violated was "clearly established." At base, qualified immunity prevents the highest law of the land, our Constitution, from being enforced, for no legitimate reason. And it leaves the cost of constitutional violations to be borne by the victims, an inexcusable consequence in a country that purports to be governed by the rule of law.

[41] *Id.* at 392.

Mr. COHEN. Thank you, sir.

Our next Witness is live and in person, Ms. Tiffany Wright. She is an adjunct faculty member at Howard School of Law, supervising attorney of its Human and Civil Rights Clinic. She was one of the lead attorneys on *Taylor* v. *Riojas*, a 2020 case in which the U.S. Supreme Court without even requiring oral argument summarily reversed a grant of qualified immunity for prison guards who subjected an inmate to inhumane conditions. The *Taylor* decision is one of only a handful of times when the Court has reversed a grant of qualified immunity.

Professor Wright received her J.D. magna cum laude from Georgetown Law Center where she was an editor of the Georgetown Law Journal and editor-in-chief of its Annual Review of Criminal Procedure. She served as law clerk to the Honorable Sonia Sotomayer, Associate Justice to the U.S. Supreme Court, and the Honorable David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit, and the Honorable Royce Lamberth of the U.S. District Court in the District of Columbia.

Professor Wright, you are recognized for five minutes.

STATEMENT OF TIFFANY R. WRIGHT

Ms. WRIGHT. Good morning, Chair Nadler, Chair Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of the Subcommittee. My name is Tiffany Wright. I direct the Civil Rights Clinic at the Howard University School of Law.

Two years ago, I represented a man named Trent Taylor. Mr. Taylor was incarcerated in a Texas prison when jail officials allege that he tried to take his own life. Mr. Taylor was transferred to a psychiatric prison facility ostensibly to receive mental health treatment. Instead, Mr. Taylor was stripped naked and placed in a cell covered in massive amount of feces. He could not eat for fear of contamination. He could not drink because even the water faucet was packed with feces.

After four days, the guards moved Mr. Taylor to a second cell, which in addition to being filthy, it had no furniture and was very cold. So, Mr. Taylor was forced, due to a clogged drain in the middle of the floor, as he was still naked, to sleep in the human waste of other people. This was intentional. Guards ignored Mr. Taylor's pleas for help, wished him a long weekend, and said that they hoped he would freeze.

The U.S. Court of Appeals for the Fifth Circuit granted qualified immunity to the guards. Although every Federal circuit, including the Fifth Circuit itself, has held that forced exposure to human waste violates the Constitution, the Fifth Circuit decided that because Mr. Taylor had only endured these conditions for just six days the prior precedent did not qualify as clearly established.

Thankfully, the Supreme Court intervened. The Court held that this was an especially obvious case, that the constitutional violation was so clear that no reasonable officers could have thought otherwise. Taylor is extraordinary because it is just the third time in history that the Supreme Court has intervened to reverse a grant of qualified immunity. It has done the opposite in more than 30 cases. Taylor is not extraordinary because of its facts. The Supreme Court routinely refuses to Act in cases with facts just as ab-

horrent as Taylor. People like Mr. Taylor are the people that I routinely represent. In three ways, qualified immunity makes it impossible for them to get any measure of justice or accountability.

First, many victims do not have the resources to obtain legal representation. I have met with many clients who tell of spending months and years to find a lawyer but are unable to do so because lawyers cannot risk the time it takes to litigate a case only to be shut down by qualified immunity.

Second, qualified immunity impedes access to information, because when the defense is raised in the early stages of a case, there is no discovery, and so victims can't even ask questions. I have represented the families of people killed who can't get basic information like autopsy reports, scene photographs, or investigative reports.

Finally, qualified immunity upends the normal legal process. Mr. Taylor suffered the inhumane treatment in 2013. It would be seven years before the Supreme Court intervened to deny the qualified immunity defense. For six and a half of those years, Mr. Taylor alone pro se fought the State of Texas, who defended the indefensible.

All this means that the harm of qualified immunity falls on the victims. I have had the unfortunate task of sitting with victims who have suffered grievous losses and harms to tell them that there was no justice under the law for them.

On the other side of the equation are police officers, who are almost always indemnified. When I appear with my clients, who are families suffering in the worst way, when I appear with them at settlement negotiations and court hearings, the people on the other side are not officers who are fearful of losing their livelihoods. They are insurance adjustors who are worried about an insurance loss, because even in the rare instances where qualified immunity fails, the cost is a matter of insurance loss not a matter of officers' loss of financial stability.

Thank you for the opportunity to testify. I welcome any questions.

[The statement of Ms. Wright follows:]

TESTIMONY OF TIFFANY R. WRIGHT
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity
March 31, 2022

Good morning, Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and members of the Subcommittee. My name is Tiffany R. Wright, and I co-direct the Civil Rights Clinic at Howard University School of Law. I previously served as a law clerk to Justice Sonia Sotomayor on the U.S. Supreme Court, Judge David S. Tatel on the U.S. Court of Appeals for the D.C. Circuit, and Judge Royce C. Lamberth on the U.S. District Court for the District of Columbia. In my current position, I regularly represent victims of law enforcement misconduct in cases involving qualified immunity.

Two years ago, I represented a man named Trent Taylor. Mr. Taylor was incarcerated in a Texas prison when jail officials alleged that he tried to take his own life. Mr. Taylor was transferred to a psychiatric prison facility ostensibly to receive mental health treatment. Instead, Mr. Taylor was stripped naked and placed in a cell covered in massive amounts of feces. He could not eat because he feared that the waste would contaminate his food. He could not drink water because even the water faucet was packed with feces. This treatment was intentional; guards largely ignored Mr. Taylor's pleas for help and said that he would have a "long weekend." After four days, guards moved Mr. Taylor to a new cell. The new cell, in addition to being covered with human waste, was extremely cold. Guards stated that they hoped Mr. Taylor would "f**king freeze." The cold cell had no furniture. The drain on the floor was clogged, leaving a standing puddle of human waste in which Mr. Taylor—still naked—was forced to sleep. Mr. Taylor endured these conditions for an additional two days.

The U.S. Court of Appeals for the Fifth Circuit granted qualified immunity to the jail guards who intentionally subjected Mr. Taylor to these inhumane conditions. Although every federal court of appeals—including the Fifth Circuit— has held that forced exposure to human waste violates the constitution,[1] the Fifth Circuit decided that because Mr. Taylor had been forced to live in those conditions for "only six days," the prior precedent did not qualify as "clearly established."[2] Thankfully, the Supreme

[1] See *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972); *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Hawkins v. Hall*, 644 F.2d 914, 918 (1st Cir. 1981); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Parrish v. Johnson*, 800 F.2d 600, 609 (6th Cir. 1986); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989); *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991); *Young v. Quinlan*, 960 F.2d 351, 365 (9th Cir. 1992); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013); *Brooks v. Warden*, 800 F.3d 1295, 1303 (11th Cir. 2015).

[2] *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019).

Court intervened. The Court held that this was an especially obvious case; that the constitutional violation was so apparent that no reasonable officer could have possibly thought otherwise.[3]

Taylor is extraordinary because it was just the third time in history that the Supreme Court has intervened to reverse a *grant* of qualified immunity.[4] It has done the opposite—reversed the *denial* of qualified immunity in favor of government officials—more than 30 times. But *Taylor* is not extraordinary because of its facts. Federal courts have granted qualified immunity in cases just as abhorrent as *Taylor*, including to officers who stole $276,380 in cash and rare coins after executing a search warrant;[5] a prison official who ignored or, in legal terms, exhibited deliberate indifference to significant evidence that an incarcerated woman was being sexually assaulted by guards under the official's supervision;[6] officers who unleashed dogs on a man who had surrendered with his hands raised in the air;[7] officers who tased a heavily pregnant woman in the thigh and neck for refusing to sign a speeding ticket;[8] and officers who threw a non-violent, non-threatening woman suspected of a misdemeanor to the ground with such force that it broke her shoulder and knocked her unconscious.[9] The people who suffered these abuses are the sorts of people I represent. They are generally working-class members of marginalized communities whose lives are torn apart by law enforcement misconduct.[10] In at least three ways, qualified immunity makes it nearly impossible for these victims to achieve any measure of justice or accountability.

First, many misconduct victims do not have the resources to retain legal representation. I have met with many families who tell stories of trying for months, and in some cases years, to find a lawyer willing to represent them. The lawyers are often solo or small-firm practitioners who work on a contingency basis and cannot risk spending significant time on a case that is ultimately blocked due to qualified immunity. Unless there is prior precedent that is materially identical to the case

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[3] *Taylor v. Riojas*, 141 S. Ct. 52 (2020).

[4] The others were *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Groh v. Ramirez*, 540 U.S. 551 (2004).

[5] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).

[6] *Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020).

[7] *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018).

[8] *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011).

[9] *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).

[10] *See, e.g.*, Francie Diep, *Police Are More Likely To Use Deadly Force In Poorer, More Highly Segregated Neighborhoods*, Pacific Standard (Jan. 24, 2019), https://tinyurl.com/5n6zae7n.

presented, securing legal representation can be nearly impossible. By contrast, the officers who commit these abuses almost always have experienced counsel paid for by their employers or unions. In my experience, state and local governments will provide legal representation even when the officer is no longer employed and even when there is significant evidence that the officer acted outside the law.

Second, qualified immunity impedes access to information. Qualified immunity is not just immunity from liability—it is immunity from having to engage with the legal process at all. When the defense is raised in the early stages of a case—*e.g.*, in a motion filed under Federal Rule of Civil Procedure 12(b)(6)—victims are denied any opportunity to gather information or ask questions about the alleged constitutional violation. I have worked on cases involving persons killed by police where families were denied access to the most basic information such as autopsy reports, on site photographs, or investigative records.

On this front, qualified immunity works in concert with other policies and local regulations that block public access to police misconduct records. I spent several months in 2020 and 2021 litigating against police unions in New York who sought to block access to police misconduct records following the repeal of a state law that had kept such records secret for decades.[11] Through that litigation, a troubling phenomenon became clear. In the aftermath of police violence, including the highly publicized killings of Eric Garner and Amadou Diallo, all negative information about the victims is immediately available. State law, however, kept nearly all information about the officers involved secret. So while the public discussed every aspect of the victims' background and debated whether the police were justified in killing them, there was no way for the families or the public to know that the officers involved had troubling histories of violent misconduct.[12]

The upshot is that a victim who suffers law enforcement abuse must contend with qualified immunity *and* other state laws that make it impossible to get answers and demand accountability. And the secrecy promoted by qualified immunity and other state and local regulations makes criminal prosecution unlikely. Recent experience demonstrates that it is often public demands for accountability—which is usually based on public evidence such as videos filmed by everyday citizens—that leads to prosecution.

Finally, qualified immunity upends the normal legal process. The inhumane treatment of Trent Taylor occurred in September 2013. It would be more than *seven*

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[11] *Uniformed Fire Officers Ass'n v. Blasio*, 846 F. App'x 25, 29 (2d Cir. 2021).

[12] *See, e.g.*, Stephanie Wyskstra, *The Fight For Transparency In Police Misconduct*, Vox (June 16, 2020), https://tinyurl.com/u8yuusku.

years before the Supreme Court issued a decision ending the prison officials' quest for qualified immunity. For six and a half of those years, Mr. Taylor fought alone against the State of Texas, which defended the guards' indefensible actions. Qualified immunity makes seeking accountability for officers like those who abused Trent Taylor a long and particularly arduous process. The doctrine permits appeals at every stage of litigation where qualified immunity is considered—e.g., following a motion to dismiss, summary judgment, and/or trial.[13] So even *if* a family or victim can find a lawyer to represent them, and even *if* they can manage to gather enough information to support their claims, they must contend with years of costly and time-consuming litigation.

All of this means that the harm of official misconduct falls unfairly on victims. For many, there is no legal recourse. I have had the unfortunate task of sitting with victims who have suffered grievous loses through no fault of their own and telling them that there is no justice under the law available to them. On the other side of the equation are officers who, even when their conduct is palpably unreasonable, enjoy near absolute immunity. Officers are almost never criminally prosecuted for their actions. Officers do not face the prospect of financial ruin; they are virtually always indemnified. State and local governments pay approximately 99.98% of the financial recoveries by plaintiffs in civil rights lawsuits—even when indemnification is prohibited by statute or policy and even when officers were disciplined, terminated, or criminally prosecuted for their unlawful conduct.[14] When I attend settlement negotiations on behalf of citizens who have suffered alleged constitutional violations, the people across the table are not officers terrified of losing their livelihood—they are insurance adjusters. Because even in the rare instances where qualified immunity fails, the cost is a matter of insurance loss, not officers' loss of financial stability.

Thank you for the opportunity to testify. I welcome any questions.

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[13] *See, e.g.*, Raffi Melkonian, *Suing Cops Takes Forever Because They Get Three Chances To Appeal*, USA Today (Nov. 23, 2021), https://tinyurl.com/mvyp3fy5.

[14] *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

Mr. COHEN. Thank you, Ms. Wright.

Our next Witness is Rafael Mangual. He is Senior Fellow and head of research for the Policing and Public Safety Initiative for the Manhattan Institute for Policy Research. He is also a contributing editor for City Journal. He has authored and co-authored a number of Manhattan Institute reports and op-eds on issues ranging from urban crime and jail violence to broader matters of criminal and juvenile civil justice reform. In 2020, he was appointed to serve a four-year term as a member of the New York State Advisory Committee on the U.S. Commission on Civil Rights.

He received his J.D. from DePaul University, where he was President of the Federalist Society and vice President of the Appellate Moot Court team. He received his B.A. from City University of New York's Baruch College.

You are recognized for five minutes, sir.

STATEMENT OF RAFAEL A. MANGUAL

Mr. MANGUAL. Thank you all so much for the honor and privilege to address this distinguished body on such an important issue.

I would like to begin by noting that I am not entirely against the idea of reform when it comes to qualified immunity. At the end of my remarks, I will offer what I think is a middle-ground reform proposal that falls between outright abolition and the status quo.

While reform is worth considering, some skepticism of the dominant narrative that has influenced both the discourse about qualified immunity and the proposals to address it is in order. That narrative is focused on the role that the defense has played in police litigation, particularly in suits related to uses of force. It posits that qualified immunity essentially functions as an unpierceable shield against liability for police officers, such that officers then internalize a sense of impunity that in turn leads them to misbehave in ways that they otherwise wouldn't if they had more financial skin in the game.

As such, the abolition of qualified immunity is often held up as a way to significantly reduce excessive uses of force and other types of police misconduct. While this narrative has succeeded in influencing both public opinion and various reform efforts, it is wrong for three reasons.

First, this narrative assumes without evidence that officers regularly and accurately assess their likelihood of successfully mounting a qualified immunity defense in light of the binding precedents in their respective jurisdictions when deciding whether, and if so how, to use force. A sizeable body of research has shown that in the context of situations involving the use of force, police officers overwhelmingly tend toward an intuitive decision-making process. The main reason for this tendency is that the encounters in which these decisions are generally made tend to be rapidly unfolding and volatile situations that simply don't lend themselves to the type of analysis that would go into an officer assessing his or her risk of personal liability based on the type and level of force used.

The second reason that the standard story about qualified immunity doesn't hold water is that the available data seem to undermine the claim that the defense accounts for a significant share of police litigation outcomes. For example, the Legal Aid Society

maintains a database of lawsuits filed against the New York City Police Department between January 2015 and June 2018. Now, if you filter those 2,400 cases by disposition, it produces just 74 cases result in favor of the police defendants. Even if all 74 were disposed of on qualified immunity grounds, we are still only talking about 3 percent of the cases in the database.

I would also like to point the Subcommittee to an empirical assessment of qualified immunity published in a 2017 issue of the Yale Law Journal by UCLA law professor and noted qualified immunity abolitionist Joanna Schwartz, which found that less than four percent of the more than 1,100 cases analysed resulted in whole or partial grants of dismissal or summary judgment on qualified immunity grounds.

As Professor Schwartz noted in the *Wall Street Journal* in response to this very argument less than two years, unsuccessful cases against police tend to fail because of other procedural and substantive infirmities, not qualified immunity. In that very same letter to the editor, Professor Schwartz went on to note that abolishing qualified immunity won't flood the courts with frivolous suits, which undermines any suggestion that the explanation for why qualified immunity does not account for a particularly large share of police litigation outcomes owes to some large number of cases that did not get filed in anticipation of being disposed upon immunity grounds.

The third major flaw in the dominant narrative about qualified immunity is that abolishing the defense, as has been noted already, won't actually result in police officers having more financial skin in the game because it is not actually the true source of financial protection for officers. That is because when individual officers are successfully sued, which is relatively often, their employers indemnify them against liability, that is, they pick up the tab. A 2014 study found that governments already pay approximately 99.98 percent of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.

Now, while the idea that qualified immunity reform will significantly reduce police uses of force is misguided, it is still worth considering ways to limit the number of cases in which constitutional harms go without redress. In 2001, in a case called *Saucier* v. *Katz*, the Supreme Court stated that qualified immunity analyses should first assess whether a right was violated before assessing whether the right was clearly established. Unfortunately, however, the Supreme Court reversed itself eight years later in *Pearson* v. *Callahan*, which gave judges the discretion to skip step one of this analysis.

So, the short version of my middle-ground proposal is to consider legislatively reestablishing the *Saucier* sequence, because requiring courts to confront the constitutional or statutory questions before them in 1983 cases would both promote the development of the law in the civil rights arena, and it would more quickly shrink the scope of not yet established rights.

Preventing courts from leaving these questions unanswered may not eliminate the potential for grants of immunity based on dubious factual distinctions from prior cases, but it will prevent situations in which multiple officers in the same jurisdictions get to

avail themselves of qualified immunity in cases involving the same conduct over a period of time simply because courts have continually punted the same question.

Another reason I think it is worth reconsidering the *Saucier* sequence is that it is often assumed that grants of immunity based on the clearly established prong of the analysis actually involve actual violations of constitutional or Federal civil rights. This is not obviously the case. Making it clear to the public that liability is denied because the conduct wasn't actually unconstitutional is an important end to pursue.

I hope this statement contributes to a better understanding of the realities of this important debate. I look forward to addressing any questions raised by these points as best I can. Thank you.

[The statement of Mr. Mangual follows:]

Statement to the U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity

Thursday, March 28th, 2022

Washington, DC

Understanding the Limited Role of Qualified Immunity in Police Litigation and a More Modest Approach to Reform

Rafael A. Mangual
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About the Author

Rafael Mangual is a senior fellow and head of research for the Policing and Public Safety Initiative at the Manhattan Institute for Policy Research** and a contributing editor of City Journal. His first book, Criminal (In)Justice, will be available in July 2022. He has authored and coauthored a number of MI reports and op-eds on issues ranging from urban crime and jail violence to broader matters of criminal and civil justice reform. His work has been featured and mentioned in a wide array of publications, including the Wall Street Journal, The Atlantic, New York Post, The New York Times, The Washington Post, Philadelphia Inquirer and City Journal. Mangual also regularly appears on Fox News and has made a number of national and local television and radio appearances on outlets such as C-SPAN and Bloomberg Radio. In 2020, he was appointed to serve a four-year term as a member of the New York State Advisory Committee of the U.S. Commission on Civil Rights.

Rafael holds a B.A. from the City University of New York's Baruch College, and a J.D. from DePaul University's College of Law.

***The Manhattan Institute for Policy Research does not take institutional positions on legislation, rules, or regulations. Although my comments draw upon my research and writing about criminal justice issues as an Institute scholar, my statement to the Subcommittee is solely my own, not my employer's.*

Statement

I'd like to thank the subcommittee for the invitation to testify. It is always an honor and a privilege to address members of Congress on important policy issues, such as the one being discussed today.

I'd like to begin by noting that I am not entirely against the idea of reform when it comes to qualified immunity—which I think is best understood as a defense against *ex post facto* liability.[1] At the end of my remarks, I will offer what I think is a middle ground reform that falls between outright abolition and the status quo.

While reform is worth considering, some skepticism of the dominant narrative that has influenced the discourse about qualified immunity is in order. That narrative has focused on the role the defense has played in police litigation—particularly suits related to uses-of-force—and it posits that qualified immunity essentially functions as an unpierceable shield against liability for police officers, such that officers internalize a sense of impunity that in turn leads them to misbehave in ways they otherwise wouldn't if they had more financial skin in the game.[2] As such, the abolition of qualified immunity is often held up as a way to significantly reduce excessive uses-of-force.

While this narrative has succeeded in influencing both public opinion and various reform efforts, it is wrong for three reasons:

First, this narrative assumes without evidence that officers regularly *and accurately* assess their likelihood of successfully mounting a qualified immunity defense in light of the binding precedents in their respective jurisdictions when deciding whether (and, if so, how) to use force.[3] A sizeable body of research has shown that, in the context of situations involving the use-of-force, police officers overwhelmingly tend toward an "intuitive" decision-making process, which, according to a 2018 paper on this subject, "involves recognizing and identifying

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[1] This statement will assume a relatively sophisticated understanding of qualified immunity on the part of readers, but those interested in a brief, but more-thorough, review of the doctrine should consider my colleague James R. Copland's recent essay on this topic. *See*, James R. Copland, *Qualifying the Debate Over Qualified Immunity*, NEWSWEEK (Apr. 28, 2021).

[2] For examples of this argument, see: Editorial Board, *How the Supreme Court Lets Cops Get Away With Murder*, NEW YORK TIMES (May 29, 2020) ("[I]t is the Supreme Court that has enabled a culture of violence and abuse by eviscerating a vital civil rights law to provide police officers what, in practice, is nearly limitless immunity from prosecution for actions taken while on the job."); Yohnka, et al., *Ending Qualified Immunity Once and For All is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021) ("Qualified immunity makes it nearly impossible for individuals to sue public officials by requiring proof that they violated 'clearly established law.'"); Editorial Board, *End the Court Doctrine That Enables Police Brutality*, NEW YORK TIMES: A SERIES ON GEORGE FLOYD AND AMERICA (2021) ("In practice, qualified immunity has become what Justice Sonia Sotomayor has called an 'absolute shield' that 'tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.'").

[3] It's worth noting that recent research casts doubt on the suggestion that officers are regularly surveying the legal landscape and are being trained in accordance with litigation outcomes. *See, e.g.*, Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, UNIVERSITY OF CHICAGO LAW REVIEW (2021).

cues, and then matching them to patterns organized in the individual's long-term memory."[4] That study presented the results of an assessment of police recruit decision-making in use-of-force contexts, which "indicate[d] that recruits used an intuitive approach to make use of force decisions."[5] That study "found no evidence of recruits using a purely analytical approach to their force decisions."[6]

The main reason for this tendency toward an intuitive approach to use-of-force decisions is that the encounters in which these decisions are generally made tend to be rapidly unfolding and volatile situations that simply don't lend themselves to the type of analysis that would go into an officer assessing his or her risk of personal liability based on the type and level of force used.

The ***second*** reason the standard story about qualified immunity doesn't hold water is that the available data seem to undermine the claim that the defense accounts for a significant share of police litigation outcomes. For example, the Legal Aid Society maintains a database of lawsuits (2,387 of them) filed against the New York Police Department (NYPD) between January 2015 and June 2018. Filtering those cases by disposition produces just 74 cases resolved in favor of the police defendants. Even if all 74 of those cases were disposed of on qualified immunity grounds, we're still only talking about 3% of the cases in the database.[7]

I'd also like to point the subcommittee to an empirical assessment of qualified immunity published in a 2017 issue of the Yale Law Journal by UCLA law professor (and noted qualified immunity abolitionist) Joanna C. Schwartz, which makes a case for abolition by illustrating that it "rarely serve[s] its intended role as a shield from discovery and trial."[8] Her study found that less than 4% of the more than 1,100 cases analyzed resulted in whole or partial grants of dismissal or summary judgement on qualified immunity grounds.[9] As professor Schwartz noted in the *Wall Street Journal* less than two years ago, unsuccessful cases against police tend to fail because of other procedural and substantive infirmities.[10] In that very same letter to the editor, professor Schwartz went on to note that "abolishing qualified immunity won't flood the courts with frivolous suits,"[11] undermining any suggestion that the explanation for why qualified immunity doesn't account for a particularly large share of police litigation outcomes owes to some large number of cases that did not get filed in anticipation of being disposed of on immunity grounds.[12]

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[4] See, e.g., Hine, et al., *Exploring Police Use of Force Decision-Making Processes and Impairments Using a Naturalistic Decision-Making Approach*, CRIMINAL JUSTICE AND BEHAVIOR (Aug. 2018).
[5] *Id.*
[6] *Id.*
[7] *See,* CAPstat, NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018, https://www.capstat.nyc.
[8] Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127, no. 1 (October 2017).
[9] *Id.* ("Qualified immunity was the reason for dismissal in just 3.9% of the cases in my dataset in which the defense could be raised, and just 3.2% of all cases in my dataset.").
[10] Joanna C. Schwartz, *Letters: Police Reforms Must Be Fair and Workable*, THE WALL STREET JOURNAL (June 18, 2020).
[11] *Id.*
[12] *See also*, Joanna C. Schwartz, "*Qualified Immunity's Selection Effects*," NORTHWESTERN UNIVERSITY LAW REVIEW 114, no. 5 (March 2020) (concluding that "Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds.").

The ***third*** major flaw in the dominant narrative about qualified immunity is that abolishing the defense wouldn't actually result in police officers having more financial skin in the game, because it's not actually the true source of financial protection for police officers. That's because when individual police officers are successfully sued, their employers indemnify them against liability—that is, they pick up the tab—pursuant to contractual or statutory obligations to do so. It's worth going back to the work of professor Schwartz, who empirically assessed the role of indemnification in police litigation and found in a 2014 study that, "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."[13] There is simply nothing in the available data indicating that abolishing qualified immunity would do anything to change this standard (indeed, nearly universal) practice.

While the idea that qualified immunity reform will significantly reduce both justifiable or excessive police uses of force is misguided, there are nevertheless a number of troubling examples in which dubious factual distinctions from prior cases have been drawn in order to grant qualified immunity on the grounds that the asserted right was not "clearly established" at the time. This, on its own, is reason enough to consider proposals to reform qualified immunity with an eye toward limiting the number of cases in which constitutional harms go without redress.

In a 2001 case called *Saucier v. Katz*,[14] the Supreme Court stated that qualified immunity analyses should first assess whether there was a rights violation *before* assessing whether the right was clearly established. Unfortunately, however, the Supreme Court reversed itself eight years later in a case called *Pearson, et al. v. Callahan*,[15] which gave judges the discretion to skip the first of these two questions.

The short version of my ***middle-ground proposal*** is to legislatively re-establish the *Saucier* sequence. Requiring courts to confront the constitutional or statutory questions before them in §1983 cases would both promote the development of the law in the civil rights arena, and more-quickly shrink the scope of not-yet-established rights. Preventing courts from leaving these questions unanswered may not eliminate the potential for grants of immunity based on dubious and absurdly narrow factual distinctions from prior precedents, but it will prevent situations in which multiple officers in the same jurisdiction get to avail themselves of qualified immunity in cases involving the same conduct over a period of time because courts have continually punted the question of whether the conduct was unlawful—and it would do this while maintaining the availability of the defense in cases in which sufficient legal notice was lacking, which, I think is important, given the signal the defense's abolition might send to an

[13] Joanna C. Schwartz, *Police Indemnification*, NEW YORK UNIVERSITY LAW REVIEW, Vol. 89, No. 3 (Jun. 2014).
[14] 533 U.S. 194 (2001).
[15] 555 U.S. 223 (2009).

embattled law enforcement community that understandably feels unfairly demonized[16] (even if the abolition of the defense won't change all that much in practice).

Another reason I think it's worth considering re-establishing the *Saucier* sequence is that it is often assumed that grants of qualified immunity based on the "clearly established" prong of the analysis involved actual violations of constitutional or federal civil rights; but this is not obviously the case. Making it clear to the public that liability is denied because the conduct wasn't actually unconstitutional is an important end to pursue, to the extent grants of immunity undermine public trust in law enforcement.

I hope this statement contributes to a better understanding of the realities underlying this important debate, and I look forward to addressing any questions raised by these points as best I can.

Thank you.
/s/ Rafael A. Mangual, J.D.
Senior Fellow and Head of Research, Policing & Public Safety Initiative
Manhattan Institute for Policy Research

[16] I should note, too, that police departments around the country—particularly in large urban areas—are experiencing a long-standing recruitment and retention crisis (*see*, *The Workforce Crisis, and What Police Agencies Are Doing About It*, POLICE EXECUTIVE RESEARCH FORUM (Sep. 2019); and *Survey on Police Workforce Trends*, POLICE EXECUTIVE RESEARCH FORUM (Jun. 2021). As such, being attuned to perceptions of members of the law enforcement profession can help stem the tide of this problem, which could be exacerbated by legislative action perceived as hostile, which, in turn, could have the effect of disincentivizing high-quality recruits and officers from continuing to pursue careers in law enforcement, thereby reducing the quality of policing and increasing the risk of misconduct.

Our next Witness is Jay Schweikert, senior research fellow for the Project on Criminal Justice at the Cato Institute. His research and advocacy focus on accountability for prosecutors and law enforcement, including a specific focus on the doctrine of qualified immunity in most recent years. Before joining Cato, he spent four years doing civil and criminal litigation at Williams & Connolly.

He earned his J.D. from Harvard Law School, where he was an articles editor for the *Harvard Law Review* and chaired the Harvard Federalist Society student colloquium program. Following law school, he clerked for the Honorable Diane Sykes of the U.S. Court of Appeals for the Seventh Circuit and Honorable Laurence Silberman, U.S. Court of Appeals for the District of Columbia. He holds a B.A. in political science and economics from Yale University. Having graduated from two Ivy schools, some would say he is not qualified for the Supreme Court. I would submit he is.

You are now recognized for five minutes.

STATEMENT OF JAY SCHWEIKERT

Mr. SCHWEIKERT. Thank you. Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee, thank you for convening this hearing and giving me the opportunity to express my views on this crucial subject.

For the last four years, I have been leading Cato's strategic campaign to challenge the doctrine of qualified immunity, which we see as the biggest impediment to meaningful accountability in the criminal justice system.

Unfortunately, the national debate around qualified immunity has given rise to several persistent misconceptions about what the doctrine actually is and what eliminating or reforming it would actually entail. In my comments today, I would like to focus on three of those, in particular:

(1) The misconception that qualified immunity protects good faith mistakes of judgment by the police,
(2) the misconception that qualified immunity protects against frivolous lawsuits, and,
(3) the misconception that reforming qualified immunity would damage the integrity or morale of the law enforcement community.

First, qualified immunity is not a good faith defense, and it is not necessary to protect the discretion of police officers to make difficult, on-the-spot decisions in the field. In other words, it does not protect honest mistakes. The doctrine of qualified immunity only matters when a public official has, in fact, violated someone's Federally protected rights. That means if a police officer has not committed any constitutional violation, then by definition they don't need qualified immunity to protect themselves because they haven't broken the law in the first place.

The Supreme Court has made crystal clear that when police officers make good faith mistakes of judgment, such as arresting someone who turns out to be innocent or using force that turns out with the benefit of hindsight to have been unnecessary, they have not violated the Fourth Amendment at all so long as they acted reasonably. In other words, deference to reasonable, on-the-spot decisions by police officers is already baked into our substantive Fourth

Amendment jurisprudence. The Fourth Amendment is what protects good faith decisions by police, not qualified immunity.

The cases where qualified immunity ends up mattering aren't those where officers made reasonable mistakes of judgment. They are the cases where officers acted in bad faith but where a court simply had yet to address that exact scenario. We could do nothing but list examples of this all day, but I will just give two to flesh out what this means in practice.

In a case called *Jessop* v. *City of Fresno*, the Ninth Circuit granted immunity to officers alleged to have stolen over $200,000 in cash and rare coins while executing a search warrant. In other words, they were alleged to have abused their authority for their own personal enrichment. Now, obviously, these officers were not acting in good faith, and no one contended that they were. They still received qualified immunity for the sole reason that the Ninth Circuit had yet to address that exact scenario.

Similarly, in a case called *Frasier* v. *Evans*, the 10th Circuit granted immunity to officers who knowingly violated a man's First Amendment rights by harassing, threatening to arrest, and illegally searching him all because he recorded them in public. Now, these officers had been explicitly trained by their department that citizens do have a First Amendment right to record the police in public. So, far from acting in good faith, they had actual knowledge they were violating his rights. They received qualified immunity because the 10th Circuit, unlike six other circuits, had yet to address that exact question.

Second, qualified immunity does not protect against frivolous civil rights claims. Again, the doctrine only matters where,

(1) a public official has violated someone's rights, but,
(2) a court holds that those rights were not clearly established at the time of the violation.

So, by definition, it only makes a difference where the underlying case is meritorious. If a civil rights suit is actually frivolous, in other words if it lacks legal or factual merit, then other tools of civil procedure are perfectly capable of dismissing those claims.

This is, indeed, borne out by Professor Joanna Schwartz's 2017 article, "How Qualified Immunity Fails," where she found that only a minuscule fraction of section 1983 cases, 0.6 percent, were dismissed prior to discovery on the basis of qualified immunity. In other words, notwithstanding qualified immunity's purported value in sparing defendants from having to litigate nonmeritorious cases, the doctrine almost never achieves this intended goal.

Third, reforming qualified immunity would not hurt retention or morale in the law enforcement community. In fact, the exact opposite is true. Qualified immunity itself hurts the law enforcement community by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively.

Policing is dangerous, difficult work. Public perception of accountability is absolutely essential to police effectiveness. Yet, in the aftermath of many high-profile police killings, most obviously the murder of George Floyd, Gallup reported that trust in police officers had reached record lows and that for the first time ever less than half of Americans placed confidence in their police force. This drop in confidence was driven in large part by the perception that

officers who commit misconduct are rarely held accountable. So, qualified immunity exacerbates what is already a crisis of confidence in law enforcement. Even if only a small proportion of officers routinely violate the law, if those officers are not held accountable, the community as a whole suffers a reputational loss.

Thank you and I welcome your questions.

[The statement of Mr. Schweikert follows:]



Statement

of

Jay R. Schweikert

Research Fellow
Project on Criminal Justice
Cato Institute

before the

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives

March 31, 2022

RE: Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity

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Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee:

Thank you for convening this hearing on Examining Civil Rights Litigation Reform, on March 31, 2022, and for providing the opportunity to express my views. My primary area of research and advocacy for the last several years has been the doctrine of qualified immunity. I am writing today to provide a brief overview of the doctrine, to explain how qualified immunity has severely undermined both the deterrent and remedial effects of our primary federal civils rights statute, and to identify and explain some of the most persistent misunderstandings around this issue.

In the landmark Supreme Court case of *Marbury v. Madison*, Chief Justice John Marshall stated that: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[1] Stated differently, the substance of constitutional rights means little if state actors can violate those rights with impunity.

Congress created a robust means for ensuring the accountability of state and local officials back in 1871, when it passed what would become our primary civil rights statute. That statute is presently codified at 42 U.S.C. § 1983, and thus is usually called "Section 1983" after its place in the U.S. Code. It was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, which itself was part of a series of "Enforcement Acts" designed to help secure the promise of liberty and equality enshrined in the then-recently enacted Fourteenth Amendment.[2]

As currently codified, the statute states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[3]

In other words, the statute states simply and clearly that any state actor who violates someone's constitutional rights "shall be liable to the party injured." The purpose behind creating such a cause of action is quite simple: individuals whose rights are violated

[1] 5 U.S. (1 Cranch) 137, 163 (1803).

[2] *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871).

[3] 42 U.S.C. § 1983.

deserve a remedy, and at a structural level, the potential for such a remedy ensures accountability among public officials.

But the Supreme Court has effectively gutted the effect of Section 1983 through the invention of a doctrine called "qualified immunity." This judicial doctrine shields state and local officials from liability, even when they act unlawfully, so long as their actions did not violate "clearly established law."[4] In practice, this is a huge hurdle for civil rights plaintiffs, because the Court has repeatedly insisted that "clearly established law must be 'particularized' to the facts of the case."[5] In other words, to overcome qualified immunity, civil rights plaintiffs generally must show not just a clear legal *rule*, but a prior case in the relevant jurisdiction with functionally identical *facts*.

Although the Supreme Court has always purported to say that an exact case on point is not strictly necessary,[6] it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate."[7] And in practice, lower courts routinely hold that even seemingly minor factual distinctions between a case and prior precedent will suffice to hold that the law is not "clearly established." To give just a couple concrete examples:

- In ***Baxter v. Bracey***,[8] the Sixth Circuit granted qualified immunity to two police officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. A prior case had already held that it was unlawful to use a police dog without warning against an unarmed suspect laying on the ground with his hands at his sides.[9] But despite the apparent factual similarity, the *Baxter* court found this prior case insufficient to overcome qualified immunity because "Baxter does not point us to any case law suggesting that *raising his hands, on its own*, is enough to put [the defendant] on notice that a canine apprehension was unlawful in these circumstances."[10] In other words, prior case law holding unlawful the use of police dogs against non-threatening suspects who surrendered by *laying on the ground* did not "clearly establish" that

[4] *See White v. Pauly*, 137 S. Ct. 548, 551-52 (2017).

[5] *Id.* at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[6] *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

[7] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

[8] 751 F. App'x 869 (6th Cir. 2018), *petition for cert. filed*, 2019 U.S. S. Ct. Briefs LEXIS 1365 (U.S. Apr. 8, 2019) (No. 18-1287).

[9] *See Campbell v. City of Springsboro*, 700 F.3d 779, 789 (6th Cir. 2012).

[10] *Baxter*, 751 F. App'x at 872 (emphasis added).

it was unlawful to deploy police dogs against non-threatening suspects who surrendered by *sitting on the ground with their hands up*.

- In ***Latits v. Philips***,[11] the Sixth Circuit granted immunity to a police officer who rammed his vehicle into the car of a fleeing suspect, drove the suspect off the road, then jumped out of his vehicle, ran up to the suspect's window, and shot him three times in the chest, killing him. The court acknowledged that several prior cases had clearly established that "'shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat.'"[12] Even though that statement would seem to govern this case exactly, the majority held that these prior cases were "distinguishable" because they "involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight," whereas here "Phillips shot Latits *after* Latits led three police officers on a car chase for several minutes."[13] The lone dissenting judge in this case noted that "the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet."[14]

Thus, given how the "clearly established law" test works in practice, whether victims of official misconduct will get redress for their injuries turns not on whether state actors broke the law, nor even on how serious their misconduct was, but simply on the happenstance of the fact patterns of prior judicial decisions.

Perhaps most disturbingly, the doctrine can have the perverse effect of making it *harder* to overcome qualified immunity when misconduct is *more* egregious—precisely because extreme, egregious misconduct is less likely to have arisen in prior cases. In the words of Judge Don Willett, one of President Trump's appointees to the Fifth Circuit, "[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."[15]

There is no shortage of cases illustrating this point, but the following two are representative:

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[11] 878 F.3d 541 (6th Cir. 2017).

[12] *Id*. at 552-53 (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 17 (6th Cir. 2012)).

[13] *Id*. at 553.

[14] *Id*. at 558 (Clay, J., concurring in part and dissenting in part).

[15] *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

- ***Corbitt v. Vickers***:[16] Police officers pursued a criminal suspect into an unrelated family's backyard, at which time one adult and six minor children were outside. The officers demanded they all get on the ground, everyone immediately complied, and the police took the suspect into custody. But then the family's pet dog walked into the scene, and without any provocation or threat, one of the deputy sheriffs started firing off shots at the dog. He repeatedly missed, but did strike a ten-year-old who was still lying on the ground nearby. The child suffered severe pain and mental trauma and has to receive ongoing care from an orthopedic surgeon. The Eleventh Circuit granted qualified immunity on the grounds that no prior case law involved the "unique facts of this case."[17] One judge did dissent, reasonably explaining that "no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children."[18]

- ***Kelsay v. Ernst***:[19] Melanie Kelsay was playing at a public pool with her friend, when some onlookers thought her friend might be assaulting her and called the police. The police arrested her friend, even though she repeatedly told them he had not assaulted her. While talking with a deputy, Matt Ernst, Kelsay saw that her daughter had gotten into an argument with a bystander and tried to go check on her. Ernst grabbed her arm and told her to "get back here," but Kelsay again said she needed to go check on her daughter, and began walking toward her. Ernst then ran up behind her, grabbed her, and slammed her to the ground in a "blind body slam" maneuver, knocking her unconscious and breaking her collarbone. The Eighth Circuit granted Ernst qualified immunity on the grounds that no prior cases specifically held that "a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer."[20]

In the wake of George Floyd's death at the hands of Minnesota police in May 2020, policing reform in general and qualified immunity reform in particular have emerged as issues of national importance. Indeed, journalists and commentators of all stripes—

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[16] 929 F.3d 1304 (11th Cir. 2019).

[17] *Id.* at 1316.

[18] *Id.* at 1323 (Wilson, J., dissenting).

[19] 933 F.3d 975 (8th Cir. 2019) (en banc).

[20] *Id.* at 980.

including the New York Times,[21] Fox News,[22] Slate,[23] and Reason[24]—noted the direct connection between George Floyd's death and the doctrine of qualified immunity. Unfortunately, the national debate around qualified immunity has given rise to several persistent misunderstandings about what the doctrine actually is, and what eliminating or reforming it would actually entail. In the remainder of my testimony, I will discuss the most important of these misunderstandings.

***First*, qualified immunity is not a "good faith" defense, and it is unnecessary to protect the discretion of police officers to make difficult, on-the-spot decisions in the field.** One of the most prevalent misunderstanding of qualified immunity is that the doctrine is somehow necessary to protect police officers from civil liability anytime they make a good-faith mistake of judgment in the line of duty. But this belief fundamentally misunderstands what qualified immunity actually is and how it works in practice.

The doctrine of qualified immunity only matters when a public official has, in fact, violated someone's federally protected rights. This means that if a police officer has not committed any constitutional violation, then by definition, they do not need qualified immunity to protect themselves from liability, because they have not broken the law in the first place. And the Supreme Court has made crystal clear that when police officers make good-faith mistakes of judgment—like arresting someone who turns out to be innocent, or using force that turns out to have been unnecessary—then they have not violated the Fourth Amendment at all, so long as they acted reasonably.[25]

In other words, deference to reasonable, on-the-spot decisions by police officers is already baked into our substantive Fourth Amendment jurisprudence, and qualified immunity is

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[21] Editorial, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. Times, May 29, 2020.

[22] Tyler Olson, *George Floyd case revives 'qualified immunity' debate, as Supreme Court could soon take up issue*, Fox News, May 29, 2020, *available at* https://www.foxnews.com/politics/george-floyd-case-revives-debate-on-qualified-immunity-for-government-officials.

[23] Mark Joseph Stern, *The Supreme Court Broke Police Accountability. Now It Has the Chance to Fix It.*, Slate, May 27, 2020, *available at* https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html.

[24] C.J. Ciaramella, *The Supreme Court Has a Chance To End Qualified Immunity and Prevent Cases Like George Floyd's*, Reason, May 29, 2020, *available at* https://reason.com/2020/05/29/the-supreme-court-has-a-chance-to-end-qualified-immunity-and-prevent-cases-like-george-floyds/.

[25] *See Graham v. Connor*, 490 U.S. 386, 397 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

unnecessary to protect it. The cases where qualified immunity ends up making the difference are not cases where officers made reasonable mistakes of judgment, but rather cases where officers were acting objectively *unreasonably*, but where a court simply had yet to address that exact scenario.

For example, in a case called *Jessop v. City of Fresno*,[26] the Ninth Circuit granted immunity to police officers alleged to have stolen over $225,000 in cash and rare coins while executing a search warrant. The court said that while "the theft [of] personal property by police officers sworn to uphold the law" may be "morally wrong," the officers could not be sued for the theft because the Ninth Circuit had never specifically decided "whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment."[27] In other words, the fact that these officers were self-evidently acting in bad faith was entirely irrelevant—all that mattered was that this particular court had yet to address this particular question.

Similarly, in a recent decision called *Frasier v. Evans*,[28] the Tenth Circuit granted immunity to police officers who knowingly violated a man's First Amendment rights by harassing, threatening, and illegally searching him, all because he had recorded them making an arrest in public. For years, these officers had been explicitly trained that citizens have a First Amendment right to record them in public, so there was no dispute that these defendants, far from acting in good faith, had *actual* knowledge that they were violating someone's rights. But they still received immunity, for the sole reason that the Tenth Circuit had yet to address this exact question.[29]

***Second*, qualified immunity does not help deter or dismiss "frivolous" civil rights claims.** Another of the common arguments made in support of qualified immunity is that the doctrine is necessary to ensure that public officials, especially police officers, are not forced to endure the time and expense of defending themselves against non-meritorious lawsuits. While this concern is reasonable in the abstract, it once again misunderstands the nature of the qualified immunity and the reality of civil rights litigation.

Recall that qualified immunity only makes a difference in cases where (1) a public official has, in fact, violated someone's constitutional rights, but (2) a court nevertheless holds that those rights were not "clearly established" at the time of their violation. Thus, by definition, qualified immunity only makes a difference where the underlying case is meritorious. If a civil rights suit is actually "frivolous"—i.e., it is either legally or factually

[26] 936 F.3d 937 (9th Cir. 2019).

[27] *Id.* at 941 & n.1.

[28] 992 F.3d 1003 (10th Cir. 2021).

[29] *Id.* at 1021.

unsupported—then qualified immunity is irrelevant, and other tools of civil procedure are perfectly capable of dismissing such claims.

This common-sense understanding is borne out by the empirical data, which reveals that qualified immunity is remarkably *ineffective* at dismissing suits at the earliest stages of civil litigation. The best source of information here is Professor Joanna Schwartz's 2017 article *How Qualified Immunity Fails*.[30] Schwartz analyzed all Section 1983 claims brought against law enforcement officials in a sample of five federal judicial districts from 2011-2012. This included a total of 979 cases in which qualified immunity could, in principle, be raised. And out of all 979 cases, only *seven* (0.6%) of them were dismissed prior to discovery.[31] Courts were much more likely to dismiss cases based on qualified immunity at the summary-judgment stage (after discovery occurred), but this still resulted in dismissing only 31 (2.6%) total cases. In other words, notwithstanding qualified immunity's purported value in sparing defendants from having to litigate non-meritorious cases, the doctrine almost never achieves this intended goal.

Schwartz's analysis also reflects that other tools of civil procedure are far more effective at weeding out non-meritorious complaints than qualified immunity is. For example, out of all the Section 1983 cases that she considered, 86 were resolved on motions to dismiss *not* based on qualified immunity (compared to 7 that *were* based on qualified immunity), and 100 were resolved on motions for summary judgment not based on qualified immunity (compared to 27 that were based on qualified immunity).[32]

***Third*, eliminating or reforming qualified immunity would not negatively impact retention or morale in the law enforcement community.** Although qualified immunity applies in all civil rights cases brought against any public official, the doctrine has special urgency in the context of law enforcement. One persistent narrative in our ongoing national debate is that retaining qualified immunity is necessary to protect the integrity and morale of the law enforcement profession, but the exact opposite is true—qualified immunity *hurts* the law enforcement community, by depriving officers of the public trust and confidence that is necessary for them to do their jobs safely and effectively.[33]

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[30] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 1 (2017). Schwartz's analysis is largely consistent with a prior study finding that, in constitutional cases brought against federal actors, qualified immunity led to just 2% of case dismissals over a three-year period. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

[31] Schwartz, *supra*, at 46.

[32] *Id.*

[33] *See generally* James Craven, Jay Schweikert, and Clark Neily, *How Qualified Immunity Hurts Law Enforcement*, CATO INSTITUTE (February 22, 2022), https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement.

Policing is dangerous, difficult work, and public perception of accountability is absolutely essential to police effectiveness.[34] Yet in the aftermath of many high-profile police killings—most obviously, the murder of George Floyd—Gallup reported that trust in police officers had reached a twenty-seven-year low.[35] For the first time ever, fewer than half of Americans placed confidence in their police force. This drop in confidence has been driven in large part by videos of high-profile police killings of unarmed suspects, but also the public perception that officers who commit such misconduct are rarely held accountable for their actions.[36] Indeed, according to a recent survey of more than 8,000 police officers themselves, 72 percent *disagreed* with the statement that "officers who consistently do a poor job are held accountable."[37]

Without public trust, police officers cannot safely and effectively carry out their responsibilities.[38] In the survey mentioned above, a staggering nine in ten law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings.[39] Eighty-six percent agreed that their jobs have become more difficult as a result. Many looked to improved community relations for a solution, and more than half agreed "that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public."[40] Responding officers also showed strong support for increased transparency and

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[34] *See generally* Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* (2008).

[35] Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html.

[36] *See* Mike Baker, et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html.

[37] Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017), https://pewrsr.ch/2z2gGSn.

[38] Inst. on Race and Justice, *supra*, at 20-21 ("Being viewed as fair and just is critical to successful policing in a democracy. When the police are perceived as unfair in their enforcement, it will undermine their effectiveness."); U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.").

[39] Pew Research Ctr., *supra*, at 65.

[40] *Id.* at 72.

accountability, for example, by using body cameras,[41] and most importantly for these purposes, by holding wrongdoing officers more accountable for their actions.[42]

Qualified immunity therefore exacerbates what is already a crisis of confidence in law enforcement. Even if it is only a small proportion of the law enforcement community that routinely violates the law, ordinary citizens cannot help but accurately observe that even those officers will rarely be held accountable. The antidote to this crisis is exactly the sort of robust accountability that Section 1983 is supposed to provide, but which qualified immunity severely undercuts. When judges routinely excuse egregious misconduct on technicalities, then *all* members of law enforcement suffer a reputational loss. Qualified immunity thus prevents responsible law enforcement officers from overcoming negative perceptions about policing, and instead protects only the minority of police who routinely break the law, thereby eroding relationships between police and their communities.

For these reasons, amongst many others, opposition to qualified immunity enjoys more cross-ideological and cross-professional support then nearly any other public policy issue today. A recent *amicus* brief challenging the doctrine included, in the words of Judge Don Willett, "perhaps the most diverse amici ever assembled"[43]—including (but not limited to) the ACLU, the Alliance Defending Freedom, Americans for Prosperity, the Law Enforcement Action Partnership, the NAACP, and the Second Amendment Foundation.[44]

The Supreme Court may have created the doctrine of qualified immunity, but Congress has the power to fix it. By clarifying that Section 1983 means what it says—that state actors who violate constitutional rights "shall be liable to the party injured"—Congress can reinvigorate the best means we have of ensuring accountability for public officials and help restore the public trust and confidence that police officers need to do their jobs safely and effectively. I welcome your questions.

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[41] *Id.* at 68.

[42] *Id.* at 40.

[43] *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

[44] *See* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law, *I.B. & Doe v. Woodard*, No. 18-1173 (U.S. Apr. 10, 2019).

Mr. COHEN. Thank you, sir.

Mr. Arthur Ago is Director of Criminal Justice Project at the Lawyers' Committee for Civil Rights Under Law. Before joining the Lawyers' Committee in November of 2019, he spent close to two decades at the Public Defender Service for the District of Columbia representing indigent children and adults facing serious delinquency and felony criminal charges in DC, ultimately serving as its Trial Chief. He has also been an Adjunct Professor at the Georgetown University Law Center, American University Washington College of Law, and the University of District of Columbia David A. Clarke School of Law.

He received his J.D. from George Washington University Law School, his M.A. from the Asian American Studies, in Asian American Studies, excuse me, from the University of California at UCLA, and his B.A. from Amherst.

You are recognized for five minutes.

STATEMENT OF ARTHUR AGO

Mr. AGO. Thank you, sir. Good morning, Chair Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of this Subcommittee. My name is Arthur Ago, and I am the Director of the Criminal Justice Project at the Lawyers' Committee for Civil Rights Under Law. Thank you for the opportunity to testify today about qualified immunity and how it both undermines civil rights and is a barrier to police accountability.

The Lawyers' Committee has been a leader in the battle for equal rights since it was created in 1963 at the request of President Kennedy to enlist the private legal bar's leadership and resources in combating racial discrimination. Our Criminal Justice Project works to protect equal justice under the law by confronting the ways in which racism infects every stage of our criminal justice system, including advocating for and working toward increased police accountability.

Approximately two years ago in the wake of the killings of George Floyd, Breonna Taylor, and far too many other people of color, tens of millions of Americans took to the streets to protest enduring police abuse and violence, particularly against communities of color, and to demand a fundamental transformation of policing. We commend the U.S. House of Representatives for twice passing the George Floyd Justice in Policing Act in response. Because the Justice in Policing Act has yet to be enacted, the country has not seen those transformative changes. Nevertheless, Congress has the opportunity today to take a critical step in achieving this necessary transformation by abolishing the doctrine of qualified immunity.

In the simplest of terms, qualified immunity undermines civil rights in the United States. In the years following emancipation and the radification of the 13th, 14th, and 15th Amendments, Congress enacted the Civil Rights Act of 1871, which includes the well-known section 1983. The Act was the direct result of a congressional desire to secure to all citizens, including formerly enslaved people, the rights guaranteed to them by the Constitution. What the Act emphatically did not contain and what the Constitution emphatically does not contain and what this Congress has never

legislated is a way to immunize those who violate others' civil rights under color of law.

It was the Supreme Court of the United States, and not Congress, a century after 1871 that created the defense of qualified immunity. It is a defense that enables police officers to have an otherwise meritorious civil rights case dismissed even when no one disputes those officers' conduct. As you have heard from my fellow Witnesses, it is a defense that is fundamentally flawed because it creates too high a burden on victims of police abuse and misconduct, preventing these victims from having their day in court.

I am certain that we will discuss the specific ways that the judge-made qualified immunity defense is flawed during the course of the hearing today. I would like to take a moment to emphasize the tragic effect that qualified immunity has had on people of color and in particular, Black people.

Black Americans are three times more likely than White Americans to be killed by the police, and Latinos nearly twice as frequently as White people. Although Black people make up only about 13 percent of the U.S. population, Black Americans account for 26 percent of those killed by the police and about 37 percent of those killed while unarmed. In all use-of-force cases, depending on how you define the different types of force, including those not resulting in death, Black people and Latinos experience police use of force 50 percent more often than White people and up to 3½ times more often depending on the type of force.

Despite these devastating numbers, Americans, and especially people of color, are unable to hold police accountable through other avenues. Police do not effectively police themselves, nor can Americans rely on the criminal justice system for accountability. From 2005–2020, police across the country have fatally shot approximately 15,000 people. Of those, 110 were charged and only 40 convicted.

What remains for victims of police misconduct is accountability in civil court through civil lawsuits against police officers who commit misconduct. This is precisely what Congress envisioned in 1871. The Supreme Court has severely restricted this avenue of police accountability since it established qualified immunity.

It is now time for Congress to Act and for this body to return the Civil Rights Act of 1871 to its original intent, which is to allow redress for people whose constitutional rights were violated by those, including law enforcement, acting under color of law, violations that continue to be endured disproportionately by Black people and other people of color. I urge you to seize this opportunity.

Thank you for asking me to appear before you today to share the views of the Lawyers' Committee for Civil Rights Under Law. I look forward to your questions.

[The statement of Mr. Ago follows:]



TESTIMONY OF ARTHUR AGO
DIRECTOR, CRIMINAL JUSTICE PROJECT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE JUDICIARY COMMITTEE
Subcommittee on the Constitution, Civil Rights and Civil Liberties

HEARING ON
"Examining Civil Rights Litigation Reform, Part One: Qualified Immunity"

March 31, 2022

Good Morning, Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and members of this Subcommittee. My name is Arthur Ago, and I am the Director of the Criminal Justice Project at the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today about qualified immunity and how it both undermines civil rights and is a barrier to police accountability. Congress must abolish the doctrine of qualified immunity if victims of police misconduct are to have a meaningful opportunity to pursue justice under the law, particularly Black people and other people of color, who disproportionately bear the brunt of this misconduct.

The Lawyers' Committee has long been on the front lines in the battle for equal rights. We are a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real.

I have been the Director of the Criminal Justice Project at the Lawyers' Committee for nearly three years, after working for close to two decades at the Public Defender Service for the District of Columbia representing indigent children and adults facing serious delinquency and felony criminal charges in Washington, D.C., ultimately serving as its Trial Chief. The Lawyers' Committee combats mass incarceration and strives for equal justice by confronting the ways in which racism infects every stage of the criminal justice system. We challenge laws and policies that criminalize poverty, promote access to justice and representation of indigent people charged with crimes, and advance police accountability and structural reform of police departments. As part of this work, we help educate the public, as well as Congress, about various aspects of policing reform, including the abolishment of the doctrine of qualified immunity.

Police accountability is essential to meaningful police reform. Without accountability, policing culture will not change. And it must change. For many years, police officers have operated within a system that discriminates against Black people and other people of color, over-criminalizes low-level property and drug crimes, and fails to protect communities of color. Police encounters with Black people disproportionately result in civil rights violations, including far too many tragic encounters that end in the

killings of men, women, and children of color. Indeed, Black Americans are three times more likely than white Americans to be killed by the police.[1]

In the wake of the killings of George Floyd, Breonna Taylor, and far too many other people of color, Americans demanded change to this flawed system of police accountability. Congress can, and must, play a central role in promoting this kind of transformative change by abolishing the doctrine of qualified immunity. We commend the U.S. House of Representatives for twice passing the George Floyd Justice in Policing Act, which would abolish qualified immunity for police officers, among other common-sense reforms.[2]

But since the George Floyd Justice in Policing Act has yet to be enacted, the judicially-created doctrine of qualified immunity continues to shield police officers who violate the law from facing legal accountability. The lack of any such accountability not only amounts to an impenetrable structural barrier for victims of police brutality seeking justice, but it also sends a resounding message to police officers that they are empowered to act without consequence. The system cannot continue to function under these principles.

Today, I would like to provide you with a short history of the judge-made doctrine of qualified immunity, explain how the doctrine prevents victims of police misconduct from obtaining justice, underscore the devastating impact of police misconduct on people of color, describe real-life examples of how qualified immunity operates to prevent victims of police misconduct from seeking justice, and explain why it is imperative that Congress abolish qualified immunity in order to better serve victims of police misconduct, their broader communities, and the police themselves. Though qualified immunity applies to a variety of public officials, my focus today will be on the applicability of qualified immunity to law enforcement.

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[1] Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping fatal police violence across U.S. metropolitan areas: Overall rates and racial/ethnic inequities, 2013-2017*, PLoS ONE 15(6) (2020) (finding, based on an analysis of 5,494 police-related deaths between 2013 and 2017, that Black Americans were on average 3.23 times as likely as white Americans to be killed during a police encounter), *available at* https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686.

[2] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congr. (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congr. (2021).

I. QUALIFIED IMMUNITY UNDERMINES CIVIL RIGHTS

Qualified immunity, as applied to police officers, is a fundamentally flawed doctrine because it operates as an ironclad shield to accountability for those officers who commit acts of misconduct, brutality, and even murder. What's more, qualified immunity is not, and has never been, enshrined in statute. It is a judge-made doctrine that does not operate with the imprimatur of a democratically enacted law and that, in practice, endangers the very communities America's police forces are sworn to protect.

In the simplest of terms, qualified immunity undermines civil rights in the United States. In the wake of emancipation and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, Congress enacted the Civil Rights Act of 1871. The Act, which includes the well-known Section 1983,[3] was the direct result of a congressional desire to "secure to all citizens the rights so garantied [sic] to them" by the U.S. Constitution.[4] It was a direct response to a persistent refusal by large numbers of Americans, under color of law, to recognize, respect, and protect the constitutional rights of formerly enslaved people.[5] What the Act emphatically did not contain—and what Congress has never legislated—is a way to immunize those who violate others' civil rights under color of law.

Qualified immunity is exactly that: a litigation defense that enables police officers to have an otherwise meritorious civil rights case dismissed even when no one disputes the officers' conduct. It was the Supreme Court of the United States and not Congress, a century after 1871, that ruled that victims of civil rights abuses by police officers may only seek redress in court when a particular right in question was "clearly established" at the time of the violation.[6]

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[3] 42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immuuities secured by the Constitutiou and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..."

[4] *Cong. Globe App'x*, 42nd Cong., 1st Sess., at 210 (Apr. 11, 1871) (statement of Sen. John Sherman).

[5] *See McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) ("Restoration of civil authority ... was a major concern," particularly after "increasing numbers of attacks, often fatal, against blacks and Union syiupathizers ..."); *Stern v. U.S. Gypsum*, 547 F.2d 1329, 1334 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (Civil Rights Act of 1871 "was enacted by a Congress acutely aware of the massive and frequently violent resistance in the southern states to federal Reconstmction after the Civil War").

[6] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted).

In other words, under federal law, qualified immunity requires plaintiffs seeking to hold police officers accountable for misconduct to overcome a daunting hurdle. They must not only show that the officer accused of misconduct violated a constitutional right, but also that the right had been "clearly established" in a previous ruling.[7] The doctrine was created in 1967[8] and refined to its current form in 1982[9] by judges, not Congress, in an attempt by the Supreme Court to balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[10]

Over time, however, the Supreme Court has increasingly struck that balance in favor of shielding officers, so much so that now, the doctrine is not just a shield against "harassment, distraction, and liability" for reasonable conduct, but a protection against almost any accountability whatsoever. If a police officer is sued for damages by a victim of police misconduct, the police officer can move to dismiss the case solely on qualified immunity grounds, and does not have to respond to any of the victim's substantive allegations. Such ironclad protections for police officers mean that officers rarely face legal repercussions for their misconduct, and are empowered to continue acting with impunity. This, of course, sends a message to other officers that they, too, can engage in similar misconduct without the threat of any legal liability. As Justice Sotomayor eloquently wrote in her dissenting opinion in *Kisela v. Hughes*, the application of qualified immunity in cases where there is clear evidence of the use of excessive force by police officers "sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished .... [T]here is nothing right or just under the law about this."[11]

As the history of qualified immunity has shown us, it is up to Congress to abolish this inherently unjust judge-made doctrine as it applies to law enforcement officers. Though many states have attempted to abolish the doctrine, the outsized influence of

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[7] *See, e.g., Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011).

[8] *Pierson v. Ray*, 386 U.S. 547 (1967).

[9] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[10] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted).

[11] *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

police officers and police unions have thwarted nearly every attempt.[12] Between mid-2019 and late 2021, at least 35 state bills attempting to abolish qualified immunity for police officers failed.[13] Even though a handful of states have reformed qualified immunity, those changes are clearly limited to those states, and limited to claims brought only under state law.[14] And ultimately any reliance on the states to abolish and abrogate qualified immunity thwarts the intent of Civil Rights Act of 1871, which was to vindicate the rights of all Americans in all states, equally: a victim of police abuse in Greenwich, CT, where qualified immunity has been reformed, should have no more of an ability to prosecute a civil rights lawsuit than a person 15 minutes away in White Plains, NY, a state that has not abolished qualified immunity. In many cases, the failures to abolish qualified immunity can be attributed to focused lobbying efforts by police officers and unions, who argue that eliminating qualified immunity will make it difficult for police departments to recruit, hire, and retain qualified officers. As I will explain in a moment, these kinds of arguments are unfounded and ignore the benefits to police officers of abolishing qualified immunity.

Recent history also shows that qualified immunity reform is exceedingly unlikely to occur in the federal courts. The Supreme Court has shown over the years an increasing unwillingness to review cases in which qualified immunity was successfully invoked by police defendants, including cases decided as recently as this term. Two unanimous Supreme Court decisions on October 18, 2021, illustrate how the Court continues to broadly interpret qualified immunity in a manner that limits suits against police officers.

In *Rivas-Villegas v. Cortesluna*, police in Union City, California, responded to a domestic violence call.[15] The person suspected of domestic violence came out of the house and was shot twice with beanbag rounds by the police when he put his hands down after being told not to do so. During the course of his arrest, a police officer placed and held his knee on the man's back while the man was lying on the ground. The Supreme Court

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[12] Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill*, THE WASHINGTON POST (Oct. 7, 2021), *available at* https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html.

[13] *Id.*

[14] Emma Tucker, "States tackling 'qualified immunity' for police as Congress squabbles over the issue," CNN (Apr. 23, 2021), *available at* https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html

[15] 142 S. Ct. 4 (2021).

unanimously held that the officer was protected from liability by qualified immunity, stressing the absence of a case with sufficiently similar facts to establish that a "clearly established" right had been violated.

On the same day, the Court reached a similar conclusion in *City of Tahlequah v. Bond*.[16] That case arose in a domestic violence situation where police in Tahlequah, Oklahoma, were called by a woman to remove her ex-husband from her home. The police confronted the ex-husband in a garage. While talking to the police, the ex-husband picked up a hammer and held it in a threatening manner. When the ex-husband disobeyed the police order to drop the hammer, police shot and killed him. Like in *Rivas-Villegas*, the Supreme Court ruled that qualified immunity applied due to the absence of a case with sufficiently similar facts.

It is impossible to ascertain whether the police violated civil rights in these two cases because of the fundamental flaw of qualified immunity. In both cases, the U.S. Supreme Court, based on its own judge-made doctrine, prevented the plaintiffs from even having their day in court, thereby preventing a jury from determining whether the plaintiffs' civil rights were violated.

In light of the disheartening pattern of the U.S. Supreme Court ruling against civil rights plaintiffs under the shield of qualified immunity—a shield that the Court itself created—it is clear that the task of abolishing the doctrine must be addressed by Congress. The Lawyers' Committee urges Congress to act expeditiously and decisively to abolish qualified immunity protections for law enforcement officers and to take an important step towards meaningful police reform.

II. QUALIFIED IMMUNITY PREVENTS VICTIMS OF POLICE MISCONDUCT FROM OBTAINING JUSTICE

The fundamental reason that qualified immunity must be abolished is that the doctrine prevents victims of civil rights abuses from being made whole. As a preliminary matter, victims of police misconduct are unable to pursue accountability through internal police disciplinary systems or through the criminal justice system. Chicago is a prime example of the failure of police systems to achieve accountability. The U.S. Department

[16] 142 S. Ct. 9 (2021).

of Justice found that between 2004 and 2017, the Chicago Police Department's internal disciplinary system was "broken" and "seldom h[eld] officers accountable for misconduct."[17] During that period, DOJ further found that "without even conducting a disciplinary investigation in over half of those cases, [Chicago] recommended discipline in fewer than 4% of those cases it did examine."[18] Over a five-year period, the Chicago Police Department investigated 409 police shootings and concluded that just two of the shootings were unjustified.[19] Additionally, criminal prosecution of police officers who violate the law is exceedingly rare. Since 2005, the police across the country have fatally shot approximately 15,000 people, but only 110—0.73%—resulted in homicide charges against the police officers responsible. Of those 110, only 42, comprising 0.28%, resulted in convictions.[20] This leaves victims of police misconduct with only one avenue for accountability: civil court, where they encounter the exceedingly high hurdle of qualified immunity.

Under the judge-made doctrine of qualified immunity, federal courts apply a two-part test: first, whether the police officer violated a federal statutory or constitutional right, and second, whether the unlawfulness of their conduct was "clearly established at the time."[21] When analyzing these two prongs, judges are tasked with balancing "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[22] Over time, however, federal courts—including and especially the Supreme Court—have watered down this balancing test in a way that better protects officers from liability and redefines the limits of the doctrine in a manner that runs counter to the underlying purpose of civil rights laws. Today, qualified immunity protects officers from almost any accountability whatsoever. In the words of the Supreme

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[17] U.S. Dep't of Justice, Investigation of the Chicago Police Department (Jan. 13, 2017), *available at* https://www.justice.gov/opa/file/925846/download.

[18] *Id.*

[19] *Id.*

[20] Amelia Thomson-DeVeaux, Nathaniel Rakich, and Likhitha Butchireddygari, *Why It's So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 2, 2020), *available at* https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/.

[21] *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

[22] *Pearson*, 555 U.S. at 231.

Court, qualified immunity protects "all [police officers] but the plainly incompetent or those who knowingly violate the law."[23]

As an initial observation, the ability of a police misconduct victim to sue only officers who are plainly incompetent or knowingly violate the law contradicts both the spirit and letter of civil rights laws. Take for example a person's civil rights claim that a police officer falsely arrested her without probable cause, seemingly exposing that officer to liability for violating her civil rights.[24] To be clear, that officer retains the defense at trial that the arrest was, in fact, reasonable because the officer had probable cause. The essential problem is that courts have interjected themselves into the calculus before there even is a trial—before the evidence can be evaluated by a jury, including whether the parties are credible in their claims—and ask whether the officer was plainly incompetent or knowingly violated the law. In the end, the question of whether the officer's arrest was reasonable and based on probable cause, which is what the law requires, is never even considered let alone answered, thanks to the doctrine of qualified immunity. The final result is that police officers are never forced to face their accusers in court and thus never held accountable for civil rights violations such as this one.

This lack of accountability is rooted in two fundamental problems that are baked into the qualified immunity test itself. First, there is a fatal flaw in the second prong of the qualified immunity test, which requires that a right be "clearly established" in order for a law enforcement officer to be subject to liability for violating it. And second, there is a fatal flaw in how the current two-prong qualified immunity test is applied.

A. Plaintiffs Are Unable to Pass the "Clearly Established" Second Prong of the Qualified Immunity Test Because It Requires Too Much Specificity.

The second prong of the Supreme Court's qualified immunity test requires a court to determine whether a right "was clearly established at the time an action occurred" before permitting a lawsuit to proceed.[25] Although the Supreme Court held that the

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[23] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[24] *See, e.g., Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) ("[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.").

[25] *Harlow*, 457 U.S. at 818.

second prong "does not require a case directly on point for a right to be clearly established,"[26] it has also directed "clearly established law must be 'particularized' to the facts of the case."[27] Despite repeated court precedent that cases with *similar* facts should define what is "clearly established" law, courts, including the Supreme Court, have demanded much more *specificity*. One context in which this has become increasingly clear is in cases related to a police officer's use of excessive force. The Supreme Court has repeatedly recognized that "specificity is especially important in the Fourth Amendment context, where ... it is sometimes difficult for an officer to determine how the relevant legal doctrine, here, excessive force, will apply to the factual situation the officer confronts."[28] This trend toward specificity has transformed qualified immunity into a doctrine of protection against almost any accountability whatsoever.

Thus, to avoid dismissal, a civil rights plaintiff is left to identify a precedent—published by the Supreme Court or a federal Circuit Court of Appeals governing the jurisdiction—which includes facts or circumstances that are very close to, if not virtually identical with, those in the plaintiff's case. In practice, a court in almost any case will be able to distinguish the facts in a manner that creates a difference between the case before the court and the precedent put forth by a civil rights plaintiff. Therefore, courts too often rule that plaintiffs have not demonstrated that their rights were "clearly established." This has led to absurd results.

For example, in 2018 in *Baxter v. Bracey*, the Sixth Circuit found an officer had qualified immunity after he instructed a police dog to attack a burglary suspect who was sitting on the ground in a residential basement with his hands up, in surrender.[29] The victim pointed to past Sixth Circuit precedent that held an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was lying on the ground with his hands at his sides.[30] Yet, the Sixth Circuit concluded that the plaintiff failed to point to "any case law

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[26] *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551).

[27] *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[28] *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)) (internal quotations omitted).

[29] 751 F. App'x 869, 872 (2018); *cert. denied*, 140 S. Ct. 1862, 1865 (2020) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.") (Thomas, J. dissenting from denial of certiorari).

[30] *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013).

suggesting that [a suspect] raising his hands, on its own" was enough to put the officer in the case on notice that his actions were unlawful.[31] This is but one of many troubling examples of how generality in the qualified immunity inquiry is actually not generality, but specificity. Making the issue worse, the Supreme Court has refused to provide any further guidance on what level of factual similarity is needed,[32] resulting in courts demanding a higher level than what is attainable by plaintiffs. As a result, this prong has transformed qualified immunity into an absolute shield against officer accountability.

The "clearly established" prong also creates the danger of inconsistent standards of justice across the country. Courts have ruled that a clearly established right must be one recognized by the Supreme Court, the U.S. Court of Appeals with jurisdiction over where the violation occurred, or the state supreme court of that jurisdiction.[33] This means that a clearly established right in the District of Columbia might not be one recognized across the Potomac River in Arlington, VA—something that Congress in 1871 surely did not intend.

B. Courts Do Not Have to Consider the First Prong of the Qualified Immunity Test, Making Future Accountability Unachievable.

The second problem with the Supreme Court's two-prong test is that it no longer requires both of its two prongs, further eroding the ability of victims to hold law enforcement accountable. In 2001, the Supreme Court was clear that a trial judge must first consider whether the victim's constitutional rights were violated, followed by a consideration of whether those rights were clearly established at the time.[34] By 2009, though, the Supreme Court in *Pearson v. Callahan*[35] discarded the strict order of the two-

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[31] Add pin cite.

[32] *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question...." (internal citations omitted)).

[33] *See, e.g., Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999) (clarifying that the law is clearly established only when it has been decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the forum state).

[34] *See Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level ....").

[35] 555 U.S. 223 (2009).

prong test, thereby expanding this shield against officer accountability. *Pearson* held that courts may consider the second question in the qualified immunity analysis before the first. In other words, judges may now hold that a right was not clearly established, without ever having to address whether a constitutional right has even been violated. This prevents further developments in the law because courts can circumvent the merits of the suit by finding that no clear right existed. In turn, there would be no precedent created that establishes the right for the future, meaning defendant-law enforcement officers could continue their pattern of misconduct while continuing to argue that the right has not been clearly established.[36]

By not having to consider the first prong, courts never have to determine whether specific facts, if proven, amount to civil rights violations. In 2001, victims of police misconduct might not have been able to successfully sue because the facts underlying their claims had not yet been clearly established civil rights violations. But at least courts were forced to consider the first prong of qualified immunity in examining these cases: whether there was a violation of constitutional rights. To this extent, based on specific case facts, courts could clearly establish a constitutional violation so that future plaintiffs who experienced similar facts would be able to prosecute their lawsuits. After 2009, though, and the Supreme Court's ruling that the first prong of the qualified immunity test did not actually have to be considered first, constitutional rights are prone to be frozen in time. The country is now faced with a Catch-22: how can plaintiffs demonstrate that a right is clearly established when courts can refuse to clearly establish them?

These limitations are compounded by the real-world impact of qualified immunity. Specifically, the collateral order doctrine, when applied to qualified immunity cases, effectively gives police officers at least three chances to have lawsuits against them thrown out at the appellate level. First, if a district court denies qualified immunity at the motion-to-dismiss stage, the officer can file an interlocutory appeal. Second, if the first appeal is unsuccessful and the district court denies qualified immunity at the summary judgment stage, the officer can then appeal a second time. And third, if the second appeal is denied, the case goes to trial and the officer may, yet again, appeal. The practical result is a Hobson's choice for civil rights plaintiffs: either litigate the question of qualified immunity across years of time-consuming and expensive litigation that often ends in a

[36] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 5 (2015).

result favorable to the officer, or do not bother to seek justice at all. In a 2011 study of more than 40 attorneys or law firms with multiple civil rights cases from 2006 through 2011, "[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense played a substantial role at the screening stage."[37] Victims of police misconduct can be now effectively shut out of court—something that Congress in 1871 never intended, and something that this Congress should find deeply troubling.

III. QUALIFIED IMMUNITY DISPROPORTIONATELY PREVENTS BLACK PEOPLE AND OTHER PEOPLE OF COLOR FROM SEEKING REDRESS

The issues inherent in the qualified immunity doctrine make it unworkable and nearly impossible for civil rights victims to be made whole. And this hurdle disproportionately affects people of color—particularly Black Americans. People of color experience fear of police violence at far greater rates than white people. One recent study found that among a nationwide sample, approximately 45% of the Black respondents preferred to be robbed or burglarized than to have unprovoked contact with officers—compared to just 18% of white respondents feeling that way.[38] This fear is rooted in reality: empirical evidence shows that Black Americans suffer the most from injustice by the police. Although Black people make up only about 13% of the total U.S. population, Black Americans account for 26% of those killed by police and about 37% of those killed while unarmed.[39] In short, Black people killed by police are more than twice as likely to be unarmed as white people.[40] Indeed, for young men, police violence is a leading cause of death that is disproportionately borne by young Black men.[41] Approximately 1 in 1,000

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[37] Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

[38] Justin T. Pickett, Amanda Graham, Francis T. Cullen, *The American Racial Divide in Fear of the Police*, CRIMINOLOGY (forthcoming 2022), *available at* https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12298.

[39] German Lopez, *There are huge racial disparities in how US police use force*, VOX (Nov. 14, 2018), *available at* https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities.

[40] Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 Criminology and Public Policy 309, 309 (Feb. 2017).

[41] *See* Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*, 116 Proceedings of the National Academy of Sciences 16793, 16793–94, Aug. 2019, *available at* https://www.pnas.org/content/116/34/16793?source=post_page-----1a2ce329f8e0----------.

Black men are killed by police—a rate 2.5 times higher than for white men.[42] And police use force in their interactions with Black people 3.6 times more often than with white people, regardless of whether death is a result.[43]

In addition to use of force, police disproportionately enforce laws against Black people across the country. For example, in San Francisco in the second half of 2018, Black people amounted to 5 percent of the city's population but represented 26 percent of all police stops.[44] In Washington, D.C., while there is little difference in rates of drug use, there are significant disparities between white and Black people in drug arrests: almost 9 out of 10 arrests for drug possession are of Black people.[45] And for many years, the New York Police Department engaged in widespread racial profiling of Black and Latinx residents as reflected in its stop and frisk policies.[46] This troubling pattern of misconduct persists: a recent report found that NYPD's Internal Affairs Bureau investigated 2,947 civilian complaints related to race-and-bias-based policing from 2014-2019—and did not substantiate a single one.[47] Across the country, communities of color are intentionally targeted and disproportionately charged with violations of law.[48]

The devastating impact of police abuse on communities of color, along with the high burdens to overcome a qualified immunity defense, has created a crisis of legitimacy for law enforcement, thereby undermining public safety in the very communities police aim to protect. When communities of color suffer from police injustice, and federal courts

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[42] *Id.*

[43] Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force*, at 15 (July 2016), *available at* https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

[44] Darwin Bond Graham, *Black people in California are stopped far more often by police, major study proves*, The Guardian (Jan 3, 2020), *available at* https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.

[45] Washington Lawyers' Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*, 2-3 (July 2013), *available at* https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf.

[46] *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013) (finding that "NYPD implements its policies regarding stop and frisk in a manner that intentionally discriminates based on race" and that "the use of race is sufficiently integral to the policy of targeting 'the right people' that the policy depends on express racial classifications."). *See also Davis v. New York*, 10-cv-0699-AT (S.D.N.Y.) (challenging NYPD's racially discriminatory and unconstitutional trespass-enforcement practices in public housing); *Ligon v. City of New York*, 12-cv-2274 (S.D.N.Y.) (challenging NYPD's discriminatory stops and arrests in private buildings it patrolled).

[47] Tenth Report of Independent Monitor, *Davis et al. v. City of New York, et al.*, 10-cv-0699-AT, Dkt. No. 496, at 73.

[48] *See, e.g.*, U.S. Dep't of Justice, Investigation of the Ferguson Police Department, 62 (March 4, 2015); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 Stan. L. & Pol'y Rev. 257 (2009).

use qualified immunity to shield officers from liability, those communities begin to view the federal courts as illegitimate. It sends the wrong message to people of color that police officers are above the law. This, in turn, denigrates people of color, and undermines their confidence in our institutions. As a result, the federal courts are transformed from havens for civil rights abuse victims to places where state-sanctioned violence is not remedied.

IV. REAL-LIFE EXAMPLES OF QUALIFIED IMMUNITY ESTABLISH HOW POLICE AVOID ACCOUNTABILITY

There are many tragic examples how the "clearly established" standard has enabled officer wrongdoing without legal remedy. These are just four examples of the absurd results that qualified immunity has yielded.

In the first example, police officers were called to a home because a man was suicidal, was holding a gasoline can, and was threatening to set himself on fire.[49] Despite one officer shouting out, "[i]f we tase him, he is going to light on fire," the police nevertheless used their tasers after the man doused himself with gasoline, causing his death. The man's widow sued the police officers. But the U.S. Court of Appeals for the Fifth Circuit ruled that the case should have been dismissed on qualified immunity grounds because the officers' use of a taser, which they correctly predicted would result in a suicidal man covered in gasoline being set on fire, was reasonable under the specific circumstances of the case.[50] In short, the court determined without trial that the widow failed to meet the first prong of the qualified immunity test, which is that the police violated her deceased husband's constitutional rights. The man's widow, who had called the police so that they could assist her husband, was thus prevented from holding the police accountable after the police caused the very thing that she wanted them to prevent—her husband's death.

In another case, police officers pursued a criminal suspect into an unrelated family's backyard where one adult and six minor children happened to be playing.[51] An officer entered the backyard area and demanded that they all get on the ground, and everyone including the minor children complied. While the family was laying down as

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[49] *Ramirez v. Guadarrama*, 3 F.4th 129, 132 (5th Cir. 2021).

[50] *Id.* at 137.

[51] *Corbitt v. Vickers*, 929 F.3d 1304, 1318 (11th Cir. 2019).

demanded by the officer, the family's pet dog approached the family, but did not show any aggression or pose a threat to the officers. One of the officers started firing shots at the dog. He repeatedly missed, but struck a ten-year-old who was still lying on the ground nearby, resulting in the child suffering severe pain and requiring ongoing medical care. The boy's mother sued the officer who shot her son, but the case was dismissed on qualified immunity grounds after review by the U.S. Court of Appeals for the Eleventh Circuit. The court "conclude[d] that [the mother's] argument cannot overcome [the police officer's] claim of qualified immunity. No case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person."[52] The court, in this way, ruled that the plaintiff failed to pass the second prong of the qualified immunity test, finding that the boy's rights were not clearly established with specificity at the time of the shooting.

In yet another case, police investigating an idling car found a man asleep at the wheel.[53] A police officer, who never identified himself, knocked on the window of the car, causing the man to start to drive away. The police officer dove into the car and, as the man was driving, used his taser on the man, used the taser to beat the man, and eventually shot the man five times, killing him. The man's mother's lawsuit against the police officer was dismissed based on qualified immunity, with the U.S. Court of Appeals for the Sixth Circuit ultimate affirming the trial court's dismissal of the case. The Sixth Circuit held that the plaintiff failed to show sufficient specificity under the second prong of the qualified immunity test: "[Plaintiff] has pointed to no cases in this circuit involving an officer being driven in a suspect's car, much less a case that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness."[54]

Finally, the police were called to a hospital to help control a patient.[55] The patient was ill for several days before being admitted with pneumonia. The patient's blood oxygen levels dropped drastically and he became disoriented, refused treatment, ultimately resulting in his belief that he was Superman. The police, in attempting to

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[52] *Id.* at 1318.

[53] *Stewart v. City of Euclid*, 970 F.3d 667 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2690 (2021).

[54] *Id.* at 675.

[55] *Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016).

control the patient, used their tasers on him, struggled with him, and held him down so that a nurse could inject him with a sedative. After the injection, though, the patient went into cardiac arrest and subsequently died. The medical examiner determined that "exertion during the struggle with the officers exacerbated his underlying pneumonia."[56] The man's estate sued the police officers under a theory that they used excessive force. The U.S. Court of Appeals for the Tenth Circuit ruled that the case should have been dismissed on qualified immunity grounds, finding that "[u]nder [the] rules [of qualified immunity], the Estate cannot show that the officers violated clearly established law."[57] Once again, a plaintiff was prevented from having a case tried because a court determined that there was not sufficiently specific precedent to meet the second prong of the qualified immunity test.

Each of these cases illustrate how qualified immunity has been exploited by police officers to prevent plaintiffs from even having a jury hear their cases. The cases also illustrate for Congress how the doctrine permits courts to inject themselves into a case in ways that the Civil Rights Act of 1871 and Section 1983 never intended. It is time to abolish this defense.

V. ABOLISHING QUALIFIED IMMUNITY WILL ALSO BENEFIT THE POLICE

While there are many ways in which qualified immunity harms victims and the broader community, abolishing it would also better serve police officers themselves. Abolishing qualified immunity would allow victims whose rights have been violated to have their day in court, and to be heard and receive a chance at justice. Abolishing qualified immunity would also send a broader signal to the community that everyone has access to justice and that police abuse will not be tolerated by society. But perhaps least understood, abolishing qualified immunity would help police officers in two ways: by providing clearer guidelines on what is permitted and what is not, resulting in clearer rules for the police officers and leading to better policing overall; and by increasing public trust in the police.

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[56] *Id.* at 876 (internal quotations omitted).

[57] *Id.* at 877.

Recent years have shown an increased public mistrust of law enforcement, which serves to make communities less safe while also undermining police officer morale. It is clear that public confidence in policing has declined over the past decade.[58] In 2020, public confidence in police fell below 50 percent for the first time on record.[59] Police officers see the effects of this erosion in public trust: 86% of police officers surveyed themselves acknowledged that high-profile incidents where police had fatal encounters made it harder for them to do their jobs.[60] The perception that police officers are above the law also clearly lowers public confidence in police, which makes the job of policing more difficult. Abolishing qualified immunity would send a strong message to the community that police misconduct will not be tolerated, a strong message to victims that they can and will be heard in court, and a strong message to police departments and state and local governments that bad actors have no place in law enforcement. And individual police officers would have clearer guidelines of what is and is not appropriate behavior in law enforcement.

Qualified immunity, in addition to providing no recourse for victims of police misconduct, fails to provide sufficient guidance to the police themselves. Despite repeated court precedent that cases with similar facts should define what is "clearly established," courts, including the Supreme Court, have demanded much more specificity, further transforming qualified immunity to a doctrine of protection against almost any accountability whatsoever. Making the issue worse is the fact the Supreme Court has refused to define what factual similarity means.[61] Therefore courts—not to mention the police—are forced to adjust their qualified immunity analysis in an ad hoc manner, further shielding police officers from accountability but also leaving other officers uncertain of what is permissible conduct. Courts have substantial disagreements over which authoritative sources may be used to show "clearly established" law because

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[58] Megan Brenan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (Jul. 14, 2021), *available at* https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx.

[59] James Craven, Jay Schweikert, and Clark Neily, *How Qualified Immunity Hurts Law Enforcement*, CATO (Feb. 15, 2022), *available at* https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement

[60] *Id.*

[61] *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question...." (internal citations omitted)).

the Supreme Court has failed to articulate a single approach, resulting in lower courts employing conflicting standards.[62] By abolishing qualified immunity, Congress would eliminate this uncertainty, for both courts around the country as well as for the police.

The concern that police officers and police unions often express—that eliminating qualified immunity would make it harder for police departments to recruit and that police officers would be hesitant to do their jobs because they are exposed to financial ruin—is simply unrealized. State and local law nearly always ensures that police officers are not required to pay for settlements or judgements against them.[63] In nearly 10,000 cases against law enforcement agencies where the victim received payments, individual law enforcement officers contributed to settlements in less than one half of one percent of the cases, and paid approximately 00.02% percent of the total awards to plaintiffs.[64] This is because police officers and other government officials are almost always indemnified by government employers. Abolishing qualified immunity thus comes without risk of financial ruin for police officers, but increases guidance on what is permitted police conduct, resulting in increased community trust in the police and the courts.

VI. CONCLUSION

The time to eliminate qualified immunity is long overdue. As conservative Fifth Circuit judge Don Willett noted in a 2019 dissent, "even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence."[65] Justice Clarence Thomas has also made clear his view that the courts "should reconsider… qualified immunity jurisprudence."[66] Although judges like these have urged such a reconsideration, the fact remains that courts

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[62] *See, e.g.*, *Hatch v. Dep't. for Children, Youth, & Their Families*, 274 F.3d 12, 23 (1st Cir. 2001) (explaining that courts must look not only to Supreme Court precedent but to all available case law in order to determine the contours of a particular right). *But see Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999) (clarifying that the law is clearly established only when it has been decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the forum state).

[63] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 1797, May, 2018. *See also* NYC Comptroller, Fiscal Year 2019 Annual Claims Report (2020) at 18-20, *available at* https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2019.pdf (finding that NYPD claims accounted for $220.1 million (36% of total) of New York City tort claim payouts).

[64] *See* Schwartz, 93 Notre Dame L. Rev. at 1805.

[65] *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., dissenting).

[66] *Ziglar v. Abbasi*, 137 S. Ct. at 1872 (Thomas, J., concurring)

around the country have not followed through. It is past time for Congress to act, and for this body to return the Civil Rights Act of 1871 to its original intent: to allow redress for people whose constitutional rights were violated by those—including law enforcement—acting under color of law. As in 1871, these violations continue to be endured disproportionately by Black people and other people of color. Thoughtful legal scholars on the left and right agree that the current regime is simply not working and fails to achieve the goals that supporters of qualified immunity seek to achieve. Congress has the opportunity to make this important change—a change that would result in increased police accountability. I urge you to seize this opportunity. Thank you for asking me to appear before you today to share the views of the Lawyers' Committee for Civil Rights Under Law, and I look forward to your questions.

Mr. COHEN. Thank you for appearing before us. Thank you for your testimony.

Our final Witness is Captain Frederick Thomas. Captain Thomas is President of the National—excuse me? Oh, I skipped Mr. Johnson. Well, no, I didn't skip Mr. Johnson. Our next to final Witness is Captain Frederick Thomas. Captain Thomas is President of the National Organization of Black Law Enforcement Executives, an organization of professional CEOs and officers in the field of law enforcement. He assumed NOBLE's presidency, NOBLE being the National Organization of Black Law Enforcement Executives, in August 2021 and has been in the organization for 11 years. He is also a captain of the East Baton Rouge Parish Sheriff's Office and has over 30 years of experience as a law enforcement officer. He is also a military combat veteran.

Captain Thomas received his bachelor's degree in criminal justice from Grambling State University in 1989 when Eddie Robinson was still there, I think. Later, in 2013, he earned a Master of Science degree in law enforcement and corrections from Southern University A&M. He is the recipient of numerous commendations and awards.

Captain Thomas, you are recognized for five minutes as our penultimate Witness.

STATEMENT OF CAPTAIN FREDERICK THOMAS

Captain THOMAS. Thank you. Good morning, Chair Jerrold Nadler; Ranking Member Congressman Jim Jordan; Subcommittee Chair Congressman Steve Cohen; Ranking Member Congressman Mike Johnson; and Committee Members. Thank you for the opportunity to provide a testimony regarding qualified immunity on the behalf of the National Organization of Black Law Enforcement Executives, otherwise known as NOBLE.

My name is Frederick L. Thomas. I am also a captain with the East Baton Rouge Parish Sheriff's Office, which is located in Baton Rouge, Louisiana.

I have been in law enforcement profession 30 years, and 26 years in the Louisiana Army National Guard, from which I retired. I am a U.S. military combat veteran who served in support of Operation Iraqi Freedom.

NOBLE members serve at every level of command, in Federal, State, and local law enforcement agencies. Fifty chapters across the nation. We represent thousands of individuals, including criminal justice practitioners. Our members are as diverse as the nation we protect and serve. Their views vary just as much.

However, we all agree that qualified immunity needs to be revisited. NOBLE is honored to testify in hopes of addressing the unintended consequences and many misconceptions that keep us from police reform.

The clearly established standards in the current documents set a high bar that favors law enforcement. Getting rid of qualified immunity altogether threatens public safety. Instead, NOBLE proposes strengthening trust and legitimacy between communities and law enforcement and making police more humane and effective.

In my experience, the unresolved issues around police violence and the failure to create safeguards that addressed the present im-

balance have had consequences on law enforcement agencies across the country.

Recruitment and retention are at an all-time low. State and local government budgets are strained to their insurance limits. Officer performance and morale have been negatively impacted.

NOBLE believes in doing the right thing for the public. We call for our professions to come together to provide reasonable recommendations to our legislators. The problem is misinformation. Our saving grace is unity.

As public servants, we must share our expertise with transparency so you can make a real Federal policy change. NOBLE joins law enforcement organization nationwide to propose a system of claims of qualified immunity based on whether an officer conduct was objective and reasonable, or if there was a fair notice that the conduct violates a constitutional right.

Fair notice allows plaintiffs to point to the related case laws to prove the conduct in question is unconstitutional. The objectively reasonable standard accounts for the situations where there are no previous case laws related to the conduct in question.

These recommendations ease the burden of plaintiffs while ensuring law enforcement officers are still appropriately protected. They increase transparency and better ensure those who engage in gross misconduct are held accountable.

NOBLE knows firsthand the history of civil rights in this country. We know it from the legislative experience, we know it from our law enforcement experiences, and most important, we know it from personal experience.

This intimate knowledge lets us understand this is not a black-and-white issue. Real reform requires us to explore best practices, such as improving officer training and de-escalating tactics, crisis intervention, and deploying effective alternates to legal force.

Embracing procedure with justice. Instituting more selective recruiting methods and standards. Re-imagining public safety without depending so much on the police.

We lend our expertise as public servants to creating a nation that united balance and assure justice for all. We dare to re-imagine police based on dialog, examining—examination and allocation of resources. We believe that oversight will help us build trust and transparency in our neighborhoods, especially communities of color.

This is a noble profession. Most police officers do their job every day with respect and commitment to the values and life of our democracy. NOBLE was founded in 1976 during a three-day symposium to discuss high crime rates in the Black urban communities. Today, this organization represents over 3,400 members who serve all communities and all Americans.

In closing, NOBLE supports comprehensive legislation that improves law enforcement in all ways, at all levels. Police reform and qualified immunity are complex issues. We encourage all interested parties and law enforcement and Congress to come together to address them.

I thank you, Chair Nadler, and the Committee Members for supporting our profession and listening to the voice of NOBLE members, and for the invitation to appear today. Thank you.

[The statement of Mr. Thomas follows:]

COVER PAGE

NAME: Frederick L. Thomas

Position: National President, National Organization of Black Law Enforcement Executives (NOBLE), Captain, East Baton Rouge Parish Sheriff's Office

DATE: March 31, 2022

TITLE: Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity

Prepared Testimony of Captain Frederick L. Thomas

President of the National Organization of Black Law Enforcement Executives

Before the U.S. House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on: "Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity"

Thursday, March 31, 2022

Chairman Jerrold Nadler, Ranking Member, Congressman Jim Jordan, Subcommittee Chairman, Congressman Steve Cohen, Ranking Member, Congressman Mike Johnson, and committee members:

Thank you for the opportunity to provide testimony regarding Qualified Immunity on behalf of the National Organization of Black Law Enforcement Executives.

My name is Frederick L. Thomas. I am the National President of NOBLE. I am also the Captain of the East Baton Rouge Parish Sheriff's Office. I have been in law enforcement for 30 years and 26 years in the Louisiana Army National Guard. I am a U.S. Military Combat Veteran who served in "Operation Iraqi Freedom."

NOBLE members serve at every level of command in federal, state, and local law enforcement agencies. 50 chapters across the U.S. represent thousands of individuals, including criminal justice practitioners. Our members are as diverse as the nation we protect and serve. Their views vary just as much. However, we all agree that qualified immunity needs to be revisited.

NOBLE is honored to testify, in hopes of addressing the unintended consequences and many misconceptions that keep us from police reform.

The "clearly established standard" in the current doctrine sets a high bar that favors law enforcement. But getting rid of qualified immunity altogether threatens public safety.

Instead, NOBLE proposes:

- Strengthening trust and legitimacy between communities and law enforcement

AND

- Making policing more humane and effective.

In my experience, the unresolved issues around police violence, and the failure to create safeguards that address the present imbalance have had consequences on law enforcement agencies across the country.

- Recruitment and retention are at an all-time low
- State and local government budgets are strained to their insurance limits
- Officer performance and morale have been negatively impacted

NOBLE believes in doing the right thing for the public. We call for our profession to come together to:

- Provide reasonable recommendations to our legislators

AND

- Educate the public about the real consequences on either side of the arguments.

The outlaw is Misinformation. Our saving grace is Unity, as public servants we must share our expertise with transparency so you can make real federal policy changes.

NOBLE joins law enforcement organizations nationwide to propose the assessment of claims of qualified immunity based on whether an officer's conduct was objectively reasonable, or if there was fair notice that the conduct violates a constitutional right.

- Fair notice allows plaintiffs to point to related case law to prove the conduct in question was unconstitutional.
- The objective reasonableness standard accounts for situations where there is no previous case law related to the conduct in question.

These recommendations ease the burden on plaintiffs while ensuring law enforcement officers are still appropriately protected. They increase transparency and better ensure those who engage in gross misconduct are held accountable.

NOBLE knows firsthand the history of civil rights in this country:

- We know it from our legislative experience.
- We know it from our law enforcement experience.
- Maybe, most importantly, we know it from personal experience.

This intimate knowledge lets us understand this is not a black and white issue. Real reform requires us to explore best practices, such as:

- Improving officer training in de-escalation tactics, crisis intervention and deploying effective alternatives to lethal force
- Embracing procedural justice
- Instituting more selective recruitment methods and standards

AND

- Reimagining public safety without overreliance on police.

We lend our expertise as public servants to creating a nation that is united, balanced and ensures justice for all. We dare to reimagine policing based on dialogue, examination, and allocation of resources. We believe oversight will help build trust and transparency in our neighborhoods, especially our communities of color.

This is a noble profession. Most police officers do their jobs every day with respect and commitment to the value of life and our democracy. NOBLE was founded in 1976 during a 3-day symposium to discuss the high crime rate in black

urban communities. Today, this organization represents over 3,400 members who serve all communities and all Americans.

In closing, NOBLE supports comprehensive legislation that improves law enforcement in all ways, at all levels. Police reform and qualified immunity are complex issues. We encourage all interested parties in law enforcement and Congress to come together to address them.

I thank you, Chairman Nadler, and the Committee Members, for supporting our profession, listening to the voices of NOBLE members, and for the invitation to appear today. I will now answer any questions you may have for me.

Mr. COHEN. You're welcome, sir. You know my Chief Davis, I presume.

Captain THOMAS. Sir?

Mr. COHEN. Chief Davis in Memphis?

Captain THOMAS. Yes.

Mr. COHEN. She's a—we hope she's a star. She appears to be a star.

Captain THOMAS. Okay.

Mr. COHEN. Thank you, sir.

Now, our final Witness we've all been waiting for, Mr. William Johnson. He's the Executive Director and General Counsel of the National Association of Police Organizations, a coalition of police unions and associations from across the United States.

He represents more than 241,000 law enforcement officers, and a thousand police units and associations. In his role as Executive Director, Mr. Johnson is responsible for NAPO's day-to-day operations, testifies before Congress, provides advocacy before various governmental bodies.

He received his J.D. from Georgetown University's Law Center and an undergraduate degree from Brown University. He holds a post-graduate certificate in the nonprofit leadership and management from Michigan State University, Mr. Izzo's team.

Mr. Johnson, you're recognized for five minutes.

STATEMENT OF WILLIAM J. JOHNSON

Mr. JOHNSON. Thank you very much, Chair Mr. Cohen, Chair Mr. Nadler, Vice Chair Ms. Ross, and Ranking Member Johnson, and the distinguished Members of this Subcommittee.

Thank you for the opportunity to speak today on behalf of the rank-and-file officers on this critical issue of qualified immunity.

First, it is vitally important from our view to emphasize what qualified immunity is and what it is not. Qualified immunity, when it applies at all, is limited in scope to a small subset of civil lawsuits.

To determine whether qualified immunity applies in any given situation, a court must ask whether it would have been known to a reasonable officer that the alleged conduct was unlawful in the situation she confronted at the time of the incident itself.

If a reasonable officer could not have known that the conduct was unlawful, then she is immune from further civil liability, but only as to that particular allegation.

Qualified immunity is therefore an issue of fundamental fairness. It only has effect when plaintiffs' attorneys allege liability on the part of an officer based upon the violation of a right that, in fact, was not known or defined at the time of the incidents.

Qualified immunity also simply does not apply at all outside this small subset of particular civil cases. It has nothing to do with cases such as the prosecution of Minnesota officers in the George Floyd case, nor any other prosecutions of officers.

The officers involved in the death of Mr. Floyd were arrested, charged, and convicted. They are already incarcerated or pending sentencing. The same holds true in the prosecutions of police officers for the Daunte Wright, Botham Jean, Walter Scott, Rodney

King, and Breonna Taylor cases. The doctrine does not and cannot affect such cases at all.

Second, the doctrine of qualified immunity itself is one repeatedly recognized by our Supreme Court as part of its constitutional juris prudence. It was not invented by police unions, police associations, or police departments.

The same independent judiciary that the Constitution requires to supervise officers in matters such as warrant issuance and execution, evidence collection, Miranda warnings, and the affording of due process rights to suspects has also recognized that a functioning society requires that reasonable officers be provided this qualified immunity in applicable civil cases.

Without it, the orderly Administration of justice would come to a halt amidst the paralyzing fear of personal liability for unknowingly violating an unknown and unknowable right.

Qualified immunity, thus, does not make officers immune to State or Federal criminal charges for a wrongful act, and it does not protect officers from internal investigations or disciplinary actions including termination.

Another area that it falls to NAPO to emphasize as the only rank-and-file entity present today is the vital importance of qualified immunity to individual front-line officers. It is these men and women who perform the most difficult and dangerous roles in our society.

The policymakers and administrators who define and assign the tasks that our members are to perform are generally not themselves at risk of personal liability for their decisions. Line officers, as a rule, do not have the financial resources or the institutional personnel at their disposal to defend themselves from unfounded allegations that agencies, municipalities, and high-ranking officials do.

The line officer, like other working persons of modest means, must thus place her confidence in the court system and integrity of justice—integrity of judges to correctly apply this constitutional standard.

Related to this point, we note that there have not been similar calls for reform or abrogation of qualified immunity for firefighters, EMTs, code enforcement officers, construction inspectors, or other public actors, all whom, also, have duties that directly impact the health, safety, and very lives of citizens.

The next-to-last point I wish to raise concerns the consequences of doing away with qualified immunity. Well-qualified officers, by definition, are able to choose another less hazardous, either physically, psychologically, or financially, line of work. The public, however, needs and relies upon experienced officers.

Police work, like many other professions, is not learned over night, particularly in specific areas of law enforcement such as sexual assault, homicide, crimes against children, and anti-terror. Years and years of training and experience are required before an officer becomes really good at their job.

If one of us or a family member was a victim or such a crime, we would want officers and detectives with decades of experience handling that case. Doing away with qualified immunity cuts di-

rectly against this public policy good. Legitimate, proactive policing would be discouraged and chilled.

In summary, a knowing violation of a right already entails significant administrative, economic, and even criminal liability for officers and the agencies that employ them. Qualified immunity reform is, in our view, largely a solution in search of a problem.

Since this type of reform would only serve to impose liability in cases where no reasonably officer could have known that a right was being violated, it cannot, by definition, improve policing, nor deter misconduct.

The public policy tendency of such reform is to create an incentive for officers to do nothing since they cannot, by definition, know if they might be personally liable in any given situation in which they do act. That is a result that no citizen, and certainly no Member of this House, as a lawmaker, should conscience.

Thank you very much, and I'd be happy to answer any questions.

[The statement of Mr. Johnson follows:]



NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

Representing America's Finest

U. S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Statement of William Johnson on behalf of the
National Association of Police Organizations
317 S. Patrick Street, Alexandria, Virginia 22314

"Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity"
March 31, 2022

Chair Mr. Cohen, Vice Chair Ms. Ross, Ranking Member Mr. Johnson, and distinguished members of the Subcommittee, my name is Bill Johnson, and I serve as the Executive Director and General Counsel of the National Association of Police Organizations (NAPO). Thank you for the opportunity to speak today on behalf of NAPO on the critical issue of qualified immunity. NAPO is a coalition of police associations from across the nation, representing more than 241,000 sworn law enforcement officers, which was organized for the purpose of advancing the interests of America's law enforcement officers through the legislative process, legal advocacy, and education.

Today's witnesses have been asked to limit our remarks to five minutes, so I will do my best to highlight what rank-and-file officers see as the most significant points regarding the issue of qualified immunity. If the Subcommittee has areas it wishes to explore more thoroughly, I will be happy to answer those questions as permitted, or to supplement my remarks with a written follow-up, as may be deemed most helpful.

First of all, it is vitally important, in our view, to emphasize what qualified immunity is, and what it is not. Qualified immunity, when it applies at all, is limited in scope to a small subset of civil lawsuits. And, it has absolutely nothing to do with criminal charges. According to a recent study of more than one thousand Section 1983 suits filed in five different federal Districts, "[Q]ualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in [the] study, just thirty-six (3.7%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds." (Note 1)

To determine whether qualified immunity applies in any given situation, a court must ask whether it would have been known to a reasonable officer that the alleged conduct was unlawful in the situation she confronted, at the time of the incident itself. If a reasonable officer could *not* have known that the conduct was unlawful, then she is immune from further *civil* liability, and only as to that particular allegation.

Qualified immunity, is, therefore, an issue of fundamental fairness. It only has effect where plaintiffs' attorneys allege liability on the part of an officer based upon the violation of a right that in fact was not known or defined at the time of the incident. Courts have noted repeatedly that the doctrine does not shield the inept or willfully blind, but does protect governmental officials, not just law enforcement

1. Schwartz, Joanna C., How Qualified Immunity Fails (January 10, 2017). 127 Yale Law Journal 2 (2017), UCLA School of Law, Public Law Research Paper No. 17-02, Available at SSRN: https://ssrn.com/abstract=2897000

officers, from attempts to impose after-the-fact liability for actions that no reasonable official could have known were unlawful at the time. It does *not* apply to cases where the civil right in question was in fact a recognized right.

As I mentioned earlier, qualified immunity also simply does not apply at all outside this small subset of particular civil cases. It has nothing to do with cases such as the prosecution of the Minnesota officers in the George Floyd case, nor any other prosecutions of officers. The officers involved in the death of Mr. Floyd were arrested, charged, and convicted. They are already incarcerated or pending sentencing. The same holds true in the prosecutions of police officers in the Daunte Wright, Botham Jean, Walter Scott, Rodney King, and Breonna Taylor cases. The doctrine does not, and cannot, affect such cases at all.

Secondly, the doctrine of qualified immunity itself is one repeatedly recognized by the United States Supreme Court as part of its constitutional jurisprudence. It has been consistently acknowledged by the Court in the police context since at least 1967. It was *not* "invented" by police unions or police departments, and it applies to governmental workers, appointees, and officials in general, not just law enforcement officers. It is important to note that officers do not award themselves qualified immunity, *courts* do. The same independent judiciary that the Constitution requires to supervise officers in matters such as warrant issuance and service, evidence collection, *Miranda* warnings, and the affording of due process to suspects, has also recognized that a functioning society requires that *reasonable* officers be provided this *qualified* immunity in *applicable, civil* cases. Without it, the orderly administration of justice would come to a halt amidst paralyzing fear of personal liability for unknowingly violating an unknown and unknowable right.

Qualified immunity thus does *not* make officers immune to state or federal criminal charges for a wrongful act. It does *not* protect officers from internal investigations or disciplinary actions, including termination. Qualified immunity only protects officers from *civil* liability for acts that no reasonable person could have known violated a constitutional right. To retroactively punish an officer for conduct that he or she had no way of knowing at the time would later be found to violate the Constitution would be wrong and detrimental to the profession and to public safety.

A third very important point is that the immunity is *qualified.* The immunity will be denied by the court if the right in question was recognized or clearly defined. Other persons in governmental service, such as legislators, judges, and prosecutors, enjoy *absolute* immunity for their workplace actions, decisions, and errors. As a matter of fairness, therefore, we note that law enforcement officers may have *qualified* immunity only, which is narrow and carefully structured in its application; as opposed to the *absolute* immunity that judges, prosecutors, and Members of Congress enjoy, all of whom make their own decisions over the course of weeks, months, or even years, in a courthouse or office, not in a split second on the street.

Another area that it falls to NAPO to emphasize, as the only rank-and-file entity present today, is the vital importance of qualified immunity to individual, front line officers. It is these men and women who perform the most difficult and dangerous roles in our society. The policy makers and administrators who define and assign the tasks that our members are to perform are generally not themselves at risk of personal liability for their decisions. Line officers as a rule do not have the financial resources or the institutional personnel at their disposal to defend themselves from unfounded allegations that agencies, municipalities, and higher-ranking officials do. The line officer, like other working persons of modest means, must thus

place her confidence in the court system and the integrity of judges, to correctly apply this constitutional standard.

Related to this point, we note that there have not been similar calls for "reform" or abrogation of qualified immunity for firefighters, EMTs, code enforcement officers, construction inspectors, or other public actors, all of whom also have duties that directly impact the health, safety, and very lives of citizens. It is worth at least asking whether law enforcement officers are being singled out because law enforcement in general has been inaccurately but frequently portrayed as brutal, racist, or even unnecessary.

The next to last point I wish to raise concerns the consequences of doing away with qualified immunity. In the aftermath of Colorado enacting its qualified immunity ban, experienced officers left the profession in droves because they feared the risk of civil litigation. According to a March 2021 study on the challenges facing law enforcement in that state, 51 percent of the law enforcement agencies facing a shortage of full-time sworn officers said the shortage was greater than that of the year before. Eighty-two percent of responding agencies said they have seen an increase in officers expressing an intent to leave their position or expressing concerns for remaining in it, specifically citing the change in qualified immunity, as well as growing anti-police sentiment and unclear expectations of law enforcement as the reasons. (Note 2) Not just in Colorado, but across the nation, officers have chosen to leave law enforcement over the past two years due to the continued attack on the profession and the threat of revoking long-held legal protections for officers acting in good faith. Law enforcement agencies across the country are understaffed, under-resourced and struggling to hire and retain good, qualified officers. To significantly alter or repeal the legal protection of qualified immunity would greatly increase the difficulty agencies are having in recruiting and retaining qualified officers.

Well-qualified officers are by definition able to choose another, less hazardous (physically, psychologically, financially) line of work. The public, however, needs and relies upon *experienced* officers. Police work, like many other professions, is not learned overnight. Particularly in specific areas of law enforcement such as sexual assault, homicide, crimes against children, and anti-terror, years and years of training and experience are required before an officer gets really good at his or her job. If, G-d forbid, one of us or a family member was a victim of such a crime, we would want officers and detectives with decades of experience handling the case. Doing away with qualified immunity cuts directly against this public policy good.

Morale would also plummet, given that individual officers would now be *personally* liable for the violation of a "right" that did not exist and was not knowable at the time of the incident. Who would want to be a law enforcement officer, then? Those who could not find any other line of work? Those who have "nothing to lose"? Certainly, less qualified candidates. Legitimate, proactive policing would be discouraged and chilled. It is the public, especially in neighborhoods most victimized by crime, who will suffer, and terribly so.

There are also significant federalism concerns that militate against doing away with qualified immunity.

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2. Public Safety Colorado. *2020 Colorado Law Enforcement: Challenges and Opportunities*. March 8, 2021. https://static1.squarespace.com/static/5f8f921f55c6f5763679a1d9/t/6046295c0dce94272a5787cb/1615210847437/LE+Survey+FINAL.pdf)

As noted in a recent legal survey of qualified immunity protections across the United States, "[M]any of the reasons the U.S. Supreme Court has proffered for qualified immunity best sound in protecting the States' sovereign interests in recruiting competent officers and providing incentives for those officers to faithfully enforce State law. . . " (Note 3) Also, "[T]he States have embraced indemnification policies premised on the existence of federal qualified immunity." (Id.) If the scope of immunity is changed, it would have a profound effect on state and local laws and budgets.

In summary, a knowing violation of a right *already* entails significant administrative, economic, and even criminal liability for officers and the agencies that employ them. Qualified immunity "reform" is, in our view, largely a solution in search of a problem. Since this type of reform would only serve to impose liability in cases *where no reasonable officer could have known that a right was being violated,* it cannot, by definition, improve policing, nor deter misconduct. The public policy tendency of such "reform" is to create an incentive for officers to do nothing, since they cannot, by definition, know if they might be personally liable in any given situation in which they do act. And that is a result that no citizen, and certainly no member of this House, *as a lawmaker*, should countenance.

I would be happy to answer any questions. Thank you.

3. Nielson, Aaron and Walker, Christopher J., Qualified Immunity and Federalism (February 26, 2020). Georgetown Law Journal, Vol. 109, pp. 229-303, 2020, Ohio State Public Law Working Paper No. 530, BYU Law Research Paper No. 20-02, Available at SSRN: https://ssrn.com/abstract=3544897

Mr. COHEN. Thank you, Mr. Johnson.

That completes our Witnesses and we appreciate each. We now proceed under the five-minute Rule of questions where—and I will begin by recognizing myself for five minutes.

Mr. COHEN. Judge Newman, why do you propose making municipalities liable for the acts of their employees in constitutional tort cases as part of a solution to the problems as you see posed qualified immunity doctrine?

We need—we can't hear you. You're on mute. Start my time over, start my time over.

Judge NEWMAN. Can you hear me now?

Mr. COHEN. Yeah, we hear you now. Marcel, Marcel Marceau.

Judge NEWMAN. I propose it for two reasons. First, I think it's the right thing to do. I don't see why employers should be liable for every tort except a constitutional tort. My second reason, quite relevant to this hearing, is—let me begin by answering it this way.

As your Witnesses have indicated, qualified immunity is a highly controversial topic. You know that, and that's why you're having your hearing. If you create municipal liability, you substantially defuse the problem of qualified immunity and increase the chance of both having an effective remedy for the violation of constitutional rights, and indeed, increase the chances of passing a bill.

With qualified immunity so controversial, I think the chances of modifying it are very low. You would know that better than I do. I urge you, employer liability coupled with suit by the United States, both to defuse the controversy, if you did that, you don't even need qualified immunity.

Indeed, as I pointed out, you don't even need police officer liability, which ought to find common ground among the police. Because the plaintiff would sue the United States—would sue the city. The United States could bring the action.

So, any plaintiff would say why should I bother suing the police officer, I might as well sue the city. So, it would strengthen the remedy, it would defuse the problem, it would enhance the chances of getting anything done in this highly controversial area.

Mr. COHEN. Thank you, Judge. So, in essence, if we did this, Mr. Johnson's clients should be happy, Captain Thomas and his folks should be happy. Everybody would be happy. Is that right?

Judge NEWMAN. I really think, in all modesty, there's a good chance that would occur.

Mr. COHEN. Thank you, sir.

Mr. Ago, you confused me entirely. You said that this doctrine was created by the courts. Yet, most of my colleagues that support this doctrine without change support judges who are strict constructionist. How how do you reconcile that? I can't do it, it's really a quandary for me.

Mr. AGO. Thank you, Congressman Cohen, for your question. Without trying to avoid the question, I don't want to get between you and your colleagues.

Mr. COHEN. Come on.

Mr. AGO. I would say—

Mr. COHEN. I'm talking about my colleagues in the Senate.

Mr. AGO. I will say that it is a mystery as to why and how it has happened that in essence, what happened was in 1967, and

then refined really in 1983—I'm sorry, 1982, the Supreme Court of the United States in essence injected itself into the legislative process by writing into the Civil Rights Act of 1871 this defense of qualified immunity.

It's nothing that appears in the Civil Rights Act and it's nothing that appears in the Constitution. Now is the opportunity for this Congress to effectively say that the Supreme Court should not have done that, especially when there are Members of the Supreme Court on both sides of the political spectrum that are troubled by qualified immunity.

Mr. COHEN. Thank you, sir.

Professor Reinert, can you please help us with how the relevant legal history, which we discussed there, does not justify importing the defense of qualified immunity into 1983. What's your thought about that?

Mr. REINERT. Sure. Just elaborate a little bit. What the Supreme Court did that was so wrong was it said in the 1967 case, that it would assume that the common law immunities that applied in 1871 would be imported into the Civil Rights Act.

Now, that was wrong for two reasons.

(1) Was there was no common law immunity that looks anything like the qualified immunity of today. That's error number one.
(2) The reconstruction Congress in 1871 said when it enacted the statute, that's the precursor to section 1983, says we don't want State law interfering with this right. They said it in explicit language.

So, there's two reasons that the Supreme Court went off on the wrong road to announcing this judge-made doctrine of qualified immunity, which is not constitutionally required. Contrary to my friend, Mr. Johnson, it has nothing to do with the Constitution. It is simply an interpretation of a statute, which is erroneous.

Mr. COHEN. Thank you, sir. Let me ask you a question. Do you know my friend Agatha Cole?

Mr. REINERT. Yes, I do.

Mr. COHEN. Well, she's made herself distinguished. She wrote the amicus brief in *West Virginia* v. *EPA*, and I was very proud of her for doing that. She invited me to your law school, and I appeared there before your student body one time. She's a star.

Mr. REINERT. Yeah, she was a wonderful student of mine, so.

Mr. COHEN. She owes it all to you, then. Thank you, sir.

I want to ask unanimous consent that we enter into the record the statement from the Constitutional Accountability Center and the statement from the Major Cities Chiefs Association. Without objection, it will be done.

[The information follows:]

MR. COHEN FOR THE RECORD

CONSTITUTIONAL ACCOUNTABILITY CENTER

Statement of the Constitutional Accountability Center

Hearing on "Examining Civil Rights Litigation Reform, Part I: Qualified Immunity"

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

United States House of Representatives
March 31, 2022

The Constitutional Accountability Center (CAC) is a non-profit law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all and to protect our judiciary from politics and special interests. Through our expert commentary, issue briefs, narratives, and testimony to Congress, we provide the public and America's elected leaders with analysis of pressing topics in modern constitutional and federal law.

CAC submits this testimony to the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties to make two points.

First, Congress has broad powers to curb unjustified police use of force pursuant to its express constitutional power to enforce the Fourteenth Amendment. Indeed, as explained below, the Fourteenth Amendment was passed by Congress and ratified by the American people against the backdrop of horrific massacres in which law enforcement officers killed hundreds of African Americans in cold blood. Eliminating police killing and brutality is one of the critical purposes of the Fourteenth Amendment. But the courts have never given this part of the Fourteenth Amendment its due. The Supreme Court has never once recognized that the Fourteenth Amendment was ratified against the backdrop of brutal killings of people of color by the police. Getting this history right is essential to correcting police abuses today.

Second, far too often, individuals cannot obtain redress for brutal police conduct because of the judicially invented doctrine of qualified immunity. Section 1983, one of the most important civil rights laws enacted by Congress, has been rewritten by the Supreme Court to keep many suits against the police out of court. Because of this doctrine, when individuals go to court to redress police abuse of power, they almost always find that the courthouse doors are bolted shut. We at CAC believe that Congress should eliminate qualified immunity, which has eroded the enforcement of constitutional rights, undermined the rule of law, and denied justice to those victimized by the police and other governmental actors.

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I. Racial Police Violence and the Text and History of the Fourteenth Amendment

The Fourteenth Amendment was the nation's response to abuses in the South in the wake of the end of chattel slavery. In the aftermath of the Civil War, the South sought to reimpose the racist oppression of chattel slavery—though the institution itself had been formally abolished by the Thirteenth Amendment—and to deny African Americans their newly won freedom. Police abuse lies at the historical core of what the Fourteenth Amendment sought to prohibit, as CAC has detailed in a recent paper.[1] Police aggressively enforced vagrancy laws contained in Black Codes, making mass arrests to keep African Americans in subordinate status.[2] Police broke into the homes of African Americans and sought to steal their guns and personal property.[3] Police beat and killed African American people, while turning a blind eye to crimes committed against them.[4] The Fourteenth Amendment's substantive guarantees of liberty and equality were a response to these abuses of official authority, designed to vindicate the demands of African Americans newly freed from bondage that "now that we are free we do not want to be hunted," we want to be "treated like human[] beings."[5]

Congress' Joint Committee on Reconstruction, which authored the Fourteenth Amendment, catalogued the conditions in the South that necessitated new constitutional guarantees to secure "the civil rights and privileges of all citizens in all parts of the republic."[6] The Joint Committee's report laid out, often in gruesome detail, how white police officers were engaged in a campaign of unending violence against African Americans. Even these horrific instances were just a fraction of the violence visited on those seeking to enjoy freedom for the first time in their lives. As historian Leon Litwack has written, "[h]ow many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known."[7]

Witness after witness recounted gratuitous, violent seizures by police officers, who were a "terror to . . . all colored people or loyal men."[8] In North Carolina, the Joint Committee learned, the police "have taken negroes, tied them up by the thumbs, and whipped them unmercifully."[9] A federal officer, who worked for the Freedman's Bureau, which was charged with protecting the rights of the newly freed people in the South, recounted an incident in which "[a] sergeant of the local police . . . brutally wounded a freedmen when in his custody, and while the man's arms were tied, by striking him on the head with his

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[1] David H. Gans, *"We Do Not Want to be Hunted": The Right to be Secure and Our Constitutional Story of Race and Policing,* 11 Colum. J. Race & L. 239 (2021).
[2] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 199-202 (1988).
[3] William McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* 71-72 (1967).
[4] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* 79 (2019) (observing that "in the context of the violence sweeping the postwar South, the word 'protection,' in the Fourteenth Amendment conjured up not simply unequal laws but personal safety").
[5] Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), *reprinted in Freedom: A Documentary History of Emancipation, 1861-1867, ser. 3: vol. 1 Land and Labor, 1865*, at 857 (Steven Hahn et. al. eds., 2017).
[6] *Rep. of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xxi (1866).
[7] Leon F. Litwack, *Been in the Storm So Long: The Aftermath of Slavery* 276-77 (1979).
[8] *Rep. of the Joint Committee on Reconstruction*, pt. II, at 271.
[9] *Id.* at 185.

gun, coming up behind his back; the freedman having committed no offense whatsoever."[10] This beating was so bad that "[t]his freedman lay in the hospital . . . at the point of death, for several weeks."[11] The same sergeant, after a search of a freedman's house turned up no evidence of wrongdoing, "whipped him so that from his neck to his hips [to] his back was one mass of gashes."[12] Another witness told the Joint Committee about how a "policeman felled [a] woman senseless to the ground with his baton" and about another incident in which a "negro man was so beaten by . . . policemen that we had to take him to our hospital for treatment."[13] A Freedman's Bureau officer from New Orleans recounted, to rousing cheers, that "one of the police officers of the city, in front of the same block where my headquarters were, went up and down the street knocking in the head every negro man, woman, and child that he met, tumbling some of them in the gutter, and knocking others upon the sidewalks."[14]

Police brutality and murder flared up in the summer of 1866 as Congress completed its work on the Fourteenth Amendment and the American people considered whether to ratify the Amendment. These tragic events served as a reminder that state governments would not respect the fundamental rights of African Americans and that racial violence and discriminatory policing would continue unchecked without new constitutional protections. These bloody events convinced the American people that the Fourteenth Amendment was necessary to vindicate our bedrock constitutional promises of liberty and equality. The Fourteenth Amendment emerged out of these horrific incidents of murder and brutality.

In Memphis, Tennessee, on May 1, 1866, clashes between recently discharged Black Civil War soldiers and white police officers exploded in three days of racial violence. The result was a killing spree led by the Memphis police force to destroy African Americans and the community they had built. The conflict, as a subsequent congressional investigation concluded, "was seized upon as a pretext for an organized and bloody massacre of the colored people of Memphis" and was "led on by sworn officers of the law."[15] The congressional investigation highlighted the gruesome attacks perpetrated by the Memphis police, an all-white police force that had long abused African Americans in the city.[16] As the House report explained, "[t]he fact that the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage, gives a character of infamy to the whole proceeding which is almost without parallel in all the annals of history."[17] It detailed one unspeakable act after another: "policemen firing and shooting every Negro they met," "policemen shooting" at Black people and "beating [them] with their pistols and clubs," high-ranking police officers exhorting the mob that African Americans "ought to be all

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[10] *Id.* at 209.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 271.
[14] *Id.*, pt. IV, at 80.
[15] *Memphis Riots and Massacres*, H.R. Rep. No. 39-101, at 5 (1866).
[16] *Id.* at 6 ("[W]henever a colored man was arrested for any cause, even the most frivolous, and sometimes with cause by the police, the arrest was made in a harsh and brutal manner, it being usual to knock down and beat the arrested party."); *id.* at 30 (describing a case in which "a negro was most brutally and inhumanely murdered publicly in the streets by a policeman"); *id.* at 156 (testimony that "[w]hen the police arrested a colored man they generally were brutal towards him. I have seen one or two arrested for the slightest offence, and instead of taking the man quietly to the lock-up, as officers should, I have seen them beat him senseless and throw him into a cart.").
[17] *Id.* at 34.

killed," and policemen "firing into a hospital."[18] Under pretext of effectuating arrests or searching for weapons, police officers brutally raped African American women.[19] The police ransacked houses, broke open doors and trunks, robbed people of hard-earned money, and burnt down schoolhouses and churches.[20] In all these ways "the Memphis massacre had the sanction of official authority; and it is no wonder that the mob, finding itself led by officers of the law, butchered miserably and without resistance every negro it could find."[21]

Twelve weeks later, in New Orleans, local police led another massacre of African Americans, this one growing out of an attempt to reconvene the Louisiana constitutional convention of 1864 in order to guarantee voting rights to Black Louisianans and establish a new state government. On July 30, 1866, a small cadre of delegates gathered at the Mechanics Institute, joined by a group of African American supporters. Under the pretext of quashing what they viewed as an illegal assembly, the police, joined by a white mob, mercilessly murdered innocent Americans. It was, as Major General Phillip H. Sheridan wrote, "an absolute massacre by the police," in which Black people were brutally gunned down, even as they attempted to surrender.[22] By the time federal troops arrived, more than one hundred and fifty African Americans and twenty of their white allies had been killed or wounded.

A congressional committee once again investigated and issued a comprehensive report detailing how, on the morning of the convention, "the combined police headed by officers and firemen, . . . rushed with one will from the different part of the city towards the Institute, and the work of butchery commenced."[23] Police officers, who had been armed that morning, were instructed to shoot to kill,[24] and "the slaughter was permitted until the end was gained."[25] As the report laid out in sickening detail, "[f]or several hours, the police and mob, in mutual and bloody emulation, continued the butchery in the hall and on the street, until nearly two hundred people were killed and wounded."[26] "[M]en who were in the hall, terrified by the merciless attacks of the armed police, sought safety by jumping from the windows, . . . , and as they jumped were shot by police or citizens. Some, disfigured by wounds, fought their way down to the street, to be shot or beaten to death on the pavement. Colored persons, at distant points in the city, peaceably pursuing their lawful business, were attacked by the police, shot and cruelly beaten."[27] The scale of the cruelty and terror inflicted is hard to fathom. "[M]en were shot while waving handkerchiefs in token of surrender and submission; white men and black, with arms uplifted praying for life, were answered by shot and blow from knife and club."[28] Without new protections, the report

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[18] *Id.* at 8, 9, 10.
[19] *Id.* at 13-15.
[20] *Id.* at 10, 25.
[21] *Id.* at 34.
[22] *New Orleans Riots*, H.R. Exec. Doc. 39-68, at 11 (1867).
[23] *New Orleans Riots*, H.R. Rep. No. 39-16, at 17 (1867).
[24] *Id.* at 143 ("[W]e were ordered to march double-quick, and everybody commenced firing at the Institute, and at the negroes in the street, no matter whether they were innocent or not; and when a negro ran, they followed him till they killed him.").
[25] *Id.* at 17.
[26] *Id.* at 11.
[27] *Id.* at 10.
[28] *Id.*

concluded, "the whole body of colored people" would continue to be "hunted like wild beasts, and slaughtered without mercy and with entire impunity from punishment."[29]

The American people ratified the Fourteenth Amendment against the backdrop of these horrific instances of police beatings and murder, recognizing that new constitutional protections were necessary to ensure the right to life, basic dignity, and personal security for all, regardless of race. As this history shows, ending unjustified racial police violence lies at the core of the Fourteenth Amendment. The Fourteenth Amendment's guarantees of liberty and equality require eliminating the unjustified police violence that has long been visited disproportionately on communities of color. Congress can and should use its enforcement powers to enact reforms to ensure that governmental actors, including the police, are held accountable when they violate our most basic rights.

II. *The Qualified Immunity Doctrine Invented by the Supreme Court Closes the Courthouse Door to Victims of Police Violence*

Under 42 U.S.C. § 1983, a person whose constitutional rights were violated by state or local officials can sue those officials in federal court for damages. Congress enacted this law nearly a century and a half ago—a mere three years after ratifying the Fourteenth Amendment—to deter constitutional violations by imposing financial liability on the offenders. Yet the modern Supreme Court has made it nearly impossible for many victims to seek redress under Section 1983.[30] The qualified immunity doctrine now enables officials to have such suits dismissed at the outset, as long as their conduct did not violate "clearly established statutory or constitutional rights."[31] In practice, this has come to mean that injured plaintiffs cannot proceed with their suits unless they can point to a prior decision establishing that precisely the same conduct violates the law.[32] Worse still, when a court determines that the illegality of an official's conduct is not "clearly established," the court can dismiss the suit without determining whether that conduct actually violated the law.[33] This means that the next time an official harms someone through the same conduct, there will still be no clearly established law for the victim to rely on—and it will still be impossible to hold anyone liable for violating the Constitution. As a result, the law remains frozen in place and justice is denied to victims of police abuse of power.

Qualified immunity lets police officers commit flagrant constitutional violations with impunity. In one recent case, *Jessop v. City of Fresno*,[34] individuals sued police officers in Fresno, California, alleging that the police had stolen their property in the course of executing a search warrant. The federal court of appeals refused to permit the case to go forward, reasoning that there was no case that told the officers that stealing property violated the Constitution. The Supreme Court refused to review the decision. There are a number of rulings awaiting Supreme Court review with similarly egregious fact patterns, but

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[29] *Id.* at 35.

[30] David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 Cardozo L. Rev. de novo 90.

[31] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mullenix v. Luna*, 577 U.S. 7, 11 (2015); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018).

[32] *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (stating that qualified immunity permits liability only when "existing precedent" is so clear that the "constitutional question" is "beyond debate").

[33] *Pearson v. Callahan*, 555 U.S. 223 (2009).

[34] *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 2020 WL 2515813 (U.S. May 18, 2020).

the Supreme Court so far has been unwilling to grant review in a case and reconsider its qualified immunity doctrine. And the vast majority of qualified immunity rulings from the Roberts Court end the same way: the police are immune and cannot be sued. Indeed, during the Supreme Court's current term, the Justices used the Court's "shadow docket" to expand significantly the reach of qualified immunity and to suggest that police officers cannot be sued for using excessive force unless there is a prior Supreme Court precedent with nearly identical facts.[35] The Court is far too often unwilling to permit the police to be held liable, even for brutal conduct.

Qualified immunity allows many types of flagrant conduct by governmental actors to go unchecked, but its effects are especially pernicious when it comes to unjustified shootings and other abuses committed by police officers, as a report by Reuters demonstrated.[36] These types of incidents involve a myriad of factual variations, making it extremely difficult for victims to identify a previous case involving the exact same scenario. The result is a nearly impenetrable barrier to recovery for people who are harmed without justification during police encounters. And because states and localities rarely have to shell out money in damages for the actions of their law enforcement officers, they have little financial incentive to institute the kinds of trainings and policies that might prevent unnecessary shootings and other incidents of excessive force. As dissenting opinions by Justice Sonia Sotomayor have argued, qualified immunity has become "an absolute shield for law enforcement officers,"[37] and it has sanctioned "a 'shoot first, think later' approach to policing."[38] This result has no basis in Section 1983. Rather, as Justice Clarence Thomas has observed, the Court "substitute[d] . . . [its] own policy preferences" and disregarded the "mandates of Congress" reflected in Section 1983.[39]

Congress enacted Section 1983 several years after the Fourteenth Amendment's ratification, finding that southern states continued to "permit the rights of citizens to be systematically trampled upon."[40] Recognizing that a means of enforcing the constitutional rights guaranteed by the Fourteenth Amendment was needed, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,"[41] the first section of which is codified as 42 U.S.C. § 1983. To safeguard fundamental liberties, lawmakers concluded that the nation needed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."[42] Against the backdrop of systemic discrimination in the criminal

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[35] *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (summarily reversing the denial of qualified immunity because "[n]either Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here"); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam) (summarily reversing denial of qualified immunity where "[n]either the panel majority nor the respondent has identified a single precedent finding a Fourth Amendment violation under similar circumstances").
[36] Andrew Chung et al., *For Cops Who Kill Special Supreme Court Protection*, Reuters (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.
[37] *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).
[38] *Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting).
[39] *Ziglar v. Abassi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring); *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J, dissenting from the denial of certiorari).
[40] Cong. Globe, 42d Cong., 1st Sess. 375 (1871).
[41] 17 Stat. 13 (1871).
[42] Cong. Globe, 42d Cong., 1st Sess. 376 (1871).

justice system,[43] Congress provided that an "injured party should have an original action in our federal courts, so that by injunction or by the recovery of damages, he could have relief against the party who under color of law is guilty of infringing his rights."[44] This would "carry into execution the guarantees of the Constitution in favor of personal security and personal rights."[45] Section 1983 reflected the idea—fundamental to the rule of law—that "judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[46]

The qualified immunity doctrine invented by the Supreme Court does not serve this purpose and has no basis in law. The text of Section 1983 does not provide any immunity from suit. This was a conscious choice. The members of the 42nd Congress insisted that "whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity."[47] Indeed, Section 1983 was modeled on Section 2 of the Civil Rights Act of 1866, which created a federal criminal remedy that could not be overcome by a claim of immunity. In debates preceding the enactment of the Civil Rights Act of 1866, legislators repeatedly rejected the notion that persons acting under color of law should be entitled to immunity because of their status as officers of the government. This, Senator Lyman Trumbull urged, was "akin to the maxim of the English law that the King can do no wrong."[48] Senator Trumbull argued that such a claim of immunity improperly "places officials above the law."[49] Section 1983 incorporated this identical remedial framework.

Congress wrote Section 1983 to enforce the Fourteenth Amendment by holding state officials accountable for the violation of constitutional rights, not to give them a free pass. It sought to remedy constitutional wrongs, not immunize officers bent on denying African Americans the promise of freedom and equal citizenship. But the sweeping grant of immunity created by the Supreme Court guts the congressional objective to make the Fourteenth Amendment's guarantees that safeguard the individual from oppression at the hands of state authorities a reality. Further, the clearly established law requirement ignores the context in which the statute was passed. In 1871, the Fourteenth Amendment was only a few years old and the Supreme Court had not yet interpreted its sweeping guarantees. The idea that victims of abuse of power would be required to show that those acting under color of law violated clearly established legal precedents would have strangled the statute at birth.

The Supreme Court established the defense of qualified immunity based on the idea that the Congress that enacted Section 1983 gave "no clear indication" that it "meant to abolish wholesale all common-law immunities."[50] But the contours of qualified immunity have nothing to do with the common

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[43] Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1013 (1983) (discussing the Reconstruction Congress's "repeated familiar complaints concerning the widespread, systemic breakdown in the administration of southern justice").
[44] Cong. Globe, 42d Cong., 1st Sess. 501 (1871).
[45] *Id.* at 374.
[46] *Id.* at 578.
[47] *Id.* at app. 310.
[48] Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).
[49] *Id.*
[50] *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

law. In the early Republic, government actors were strictly liable for their legal violations, a principle grounded in English common law. No good faith defense existed at the time of Section 1983's enactment.[51] Strict liability did not typically require officials acting in good faith to personally bear the brunt of compensating their victims. Rather, these officials were generally indemnified.[52] The Supreme Court displaced our constitutional system of government accountability—an idea that was foremost in the minds of the Reconstruction Congress that enacted Section 1983—with one designed to keep suits against the police out of court.

By insulating officials from accountability for constitutional violations, the modern qualified immunity doctrine subverts a key aim of the Fourteenth Amendment: checking state-sponsored racial police violence. Notably, people of color are hit particularly hard by the effects of qualified immunity, as they continue to be disproportionately victimized by police misconduct. Today, for example, Black people are more likely than white people to be the victims of excessive force by police officers.[53] Thus, qualified immunity closes the courthouse doors to the very group of people that Congress was focused on helping when it passed Section 1983. And in so doing, it prevents enforcement of a critical part of the Fourteenth Amendment.

III. Conclusion

In our view, the best way to reform qualified immunity is to end it completely. Ending the qualified immunity doctrine would make the promise of the Fourteenth Amendment closer to a reality, enhance government accountability, encourage courts to play their historic role of redressing abuse of power, punish wrongdoing by those sworn to uphold the law, and create an incentive for governments to properly train their officers to avoid unnecessary use of force. If the judiciary is unwilling to fix its own mistake, Congress must step in to make clear that governmental actors should be held accountable when they violate people's constitutional rights. That is why CAC endorsed the Ending Qualified Immunity Act in the 116th Congress and still supports that legislation today.

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[51] David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972) (discussing the "insistence of nineteenth century courts upon [a] strict rule of personal official liability" and noting that the fact that "an officer personally could be separately liable *where the wrong was equally a wrong by the state*, is what gave the principal of personal official liability its major importance"); Albert Alschuler, Herring v. United States*: Minnow or Shark?*, 7 Ohio St. J. Crim. L. 463, 501 (2009) (observing that at the time of the framing of the Fourth Amendment, "officers who conducted illegal searches and seizures were held strictly legal in damages" and "had no immunity from civil lawsuits").

[52] James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1906-07 (2010) (surveying early petitions to Congress for indemnification and finding that where officers acted in good faith and within the boundaries conferred by law or their instructions, "Congress concluded that the government should bear responsibility for the loss").

[53] Phillip Atiba Goff et al., Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 21 (July 2016), https://bit.ly/2wJdTMW; *see, e.g.*, U.S. Dep't of Justice Civil Rights Division & U.S. Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department* 145 (Jan. 13, 2017), https://bit.ly/2wHvzIW ("the raw statistics show that CPD uses force almost ten times more often against blacks than against whites"); U.S. Dep't of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* 62 (Mar. 4, 2015), https://bit.ly/ 2TRWNog ("African Americans have more force used against them at disproportionately high rates, accounting for 88% of all cases").

STATEMENT FOR THE RECORD

MAJOR CITIES CHIEFS ASSOCIATION

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

"EXAMINING CIVIL RIGHTS LITIGATION REFORM, PART 1: QUALIFIED IMMUNITY"

MARCH 31, 2022

Chairman Cohen, Ranking Member Johnson, and distinguished members of the Subcommittee:

Thank you for granting the Major Cities Chiefs Association (MCCA) the opportunity to submit this statement for the record. The MCCA is a professional organization of police executives representing the 79 largest cities in the United States and Canada. The Association's mission is to provide a forum for police executives from large population centers to address the challenges and issues of policing, influence national and international policy that affects police services, enhance the development of current and future police leaders, and encourage and sponsor research that advances this mission.

The MCCA is a leader in national policy debates on policing reform and has consistently called for an approach to reform that is evidence-based, sustainable, and thoughtful. Every day, MCCA members work to protect and serve their communities while implementing professional law enforcement practices that are fair, equitable, transparent, and procedurally just. Furthermore, the MCCA remains steadfast in its commitment to help increase accountability and build trust between law enforcement and the communities we serve.

Qualified immunity is a legal doctrine that protects government officials, not just members of law enforcement, from civil liability for actions carried out while performing their official duties as long as those actions do not violate a clearly established constitutional right. Reforming this doctrine is one of the most contentious topics in policing-related policy debates. In May 2021, the MCCA's membership developed a qualified immunity reform policy statement, which outlined how the doctrine of qualified immunity can be reformed to improve transparency and ensure those individuals who engage in gross misconduct are held accountable for their actions.

Qualified Immunity Cannot Be Eliminated

The MCCA strongly opposes the complete elimination of qualified immunity. The doctrine must be preserved to ensure that law enforcement officers who act in an objectively reasonable manner have the protections necessary for them to discharge their duties effectively. For example, these protections are important when officers must make split-second decisions under very difficult circumstances. Furthermore, eliminating qualified immunity would likely have several unintended consequences, such as negative impacts on officer performance or law enforcement recruitment and retention efforts, both of which are detrimental to public safety overall. It could also result in additional strain on state and local government budgets due to increased insurance costs as well as attorney's fees and judgments related to an increase in lawsuits.

Misconceptions About Qualified Immunity

In order to have a productive debate about qualified immunity reform, it's crucial to operate off of the same set of facts. Several misconceptions about what qualified immunity does and does not do have complicated reform discussions. For example, the doctrine applies to the actions of all public officials and government employees, not just law enforcement officers. Qualified immunity also only applies to civil liability and does not prevent someone from being charged with a crime if their actions violated the law. Finally, these protections apply to all aspects of law enforcement's job, not just situations involving the use of force.

Current Challenges

The MCCA acknowledges that courts' current interpretation of qualified immunity has made it difficult for plaintiffs to prove their constitutional rights were violated in some cases. For a court to find that qualified immunity does not apply, plaintiffs need to demonstrate that their rights were violated and that it was clearly established at the time of the incident that the officer's actions violated those rights. To prove this, plaintiffs must point to a previous case in the relevant jurisdiction, with a substantially similar set of facts, in which the court determined an officer's conduct violated an individual's constitutional rights. However, due to the varying interpretations for what constitutes meeting the clearly established rights standard, qualified immunity protections have been applied in some extraordinary cases where the officer engaged in egregious behavior that the MCCA does not condone.

Key Principles

While the MCCA opposes the elimination of qualified immunity, the MCCA supports reforming the doctrine to better promote transparency and accountability. The MCCA recommends that any proposed reforms incorporate the following principles:

- Law enforcement officers must continue to have access to the necessary protections to allow them to do their jobs without fear of retribution for actions that are objectively reasonable and performed in good faith
- Officers who engage in conduct that is criminal must be held accountable—a failure to do so undermines the trust between law enforcement and the community that is critical to good policing
- When assessing claims of qualified immunity, courts should examine if the officer's actions were objectively reasonable or if there was fair notice or warning that the conduct was unconstitutional
- Any reforms to qualified immunity should apply to all government employees, not just law enforcement officers

Qualified Immunity Reform Proposal

While officers who break the law or intentionally violate an individual's constitutional rights should be held accountable civilly or criminally, those who seek to do their best to make the right decision under challenging circumstances deserve the protections afforded by qualified immunity. Accordingly, Congress should not abolish qualified immunity, and any changes to the doctrine should affect the protections afforded to all government officials.

Qualified immunity should be denied when an officer has fair notice that their conduct violates a constitutional right or the officer's conduct was not objectively reasonable. In other words, an officer can be on notice that their conduct violates established law even in novel factual situations.[1] Plaintiffs should not have to point to a previous case with a substantially similar set of facts to prove their rights were violated. These changes will ease the burden on plaintiffs while ensuring officers are still appropriately protected.

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[1] See *Hope v. Pelzer*, 536 U.S. 730 (2002). In this case, the Supreme Court held that courts could look not only to circuit precedent but also to the "obvious cruelty inherent in the practice itself" in order to determine if there was fair notice.

Examples Highlighting Impact of Proposed Reforms

Baxter v. Bracey

Officers Brad Bracey and Spencer Harris pursued Alexander Baxter in response to reports that Baxter was attempting to burglarize houses in the neighborhood. At the end of the pursuit, the officers, who had a police dog with them, found Baxter sitting on the ground with his hands in the air. Officer Harris released the dog, who bit Baxter, requiring emergency medical treatment.[2]

Baxter sued, claiming that Officer Harris's use of the police dog violated his Fourth Amendment rights. A previous Sixth Circuit case held that using a police dog against a non-threatening suspect laying on the ground with their hands at their side was unconstitutional. Despite this case, Officer Harris was granted qualified immunity. The court held that there was no case law suggesting that Baxter "raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances."[3]

If Congress enacted the MCCA's proposed reforms to qualified immunity, Baxter could have argued that Officer Harris had fair notice that his conduct violated a constitutional right from the previous Sixth Circuit case or that Officer Harris's conduct was not objectively reasonable under the facts and circumstances present.

Kelsay v. Ernst

Melanie Kelsay was engaged in horseplay at a public pool with a friend. Some bystanders thought she was being assaulted and called the police, who arrested the friend, despite Kelsay's claims that her friend was not assaulting her. Police ended up arresting Kelsay as well, and while speaking with Sheriff's Deputy Matt Ernst, Kelsay noticed her daughter had gotten into an altercation with a bystander. Kelsay tried to go over to her daughter, but Deputy Ernst grabbed her arm and told her to "get back here." Kelsay attempted to walk towards her daughter again. Deputy Ernst grabbed her from behind in a bear hug and threw her to the ground, which rendered Kelsay unconscious and broke her collarbone.[4]

Kelsay sued, claiming Deputy Ernst had violated her Fourth Amendment rights. The Eighth Circuit granted qualified immunity to Deputy Ernst, and the court upheld this decision after agreeing to rehear the case en banc. The Eighth Circuit held that at the time of the incident, it was not clearly established that:

> A deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instructions to "get back here" and continued to walk away from the officer. None of the decisions cited by the district court or Kelsay involve a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here.[5]

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[2] *Baxter v. Bracey*, No. 18-5102 (6th Cir. Nov. 8, 2018). See also, Jay Schweikert, "Qualified Immunity: A Legal, Practical, and Moral Failure," Policy Analysis no. 901, CATO Institute, September 14, 2020. <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure>

[3] *Ibid.*

[4] *Kelsay v. Ernst* 933 F.3d 975 (8th Cir. 2019). See also "The Federal Law Enforcement Informer," 9 Informer 19, *Federal Law Enforcement Training Center, U.S. Department of Homeland Security*, September 2019. <https://www.fletc.gov/sites/default/files/9informer19__1.pdf> [5] *Ibid.*

If Congress enacted the MCCA's proposed reforms to qualified immunity, Kelsay would have been able to argue that Deputy Ernst had fair notice that his conduct was unconstitutional. In fact, the principal dissenting opinion in this case cited four previous Eight Circuit cases to argue there was sufficient case law to "put a reasonable officer on notice that the use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands" was unconstitutional.[5] Additionally, Kelsay also could have argued that Deputy Ernst's conduct was not objectively reasonable under the facts and circumstances of the case.

Corbitt v. Vickers

Christopher Barnett, a criminal suspect, fled into the backyard of Amy Corbitt while being pursued by law enforcement. When Barnett entered the backyard, one adult and six children were present, and law enforcement ordered everyone to get on the ground. Everyone complied, and then the Corbitt family dog entered the backyard. While the dog did not appear to be threatening anyone, Deputy Vickers fired two shots at the dog but missed. The second shot hit Corbitt's 10-year-old child, who was still on the ground near the deputy.[6]

Corbitt sued, and the court granted Deputy Vickers qualified immunity because of the "unique facts" of the case. The court held there was not a previous case that could clearly establish that "a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person."[7]

If Congress enacted the MCCA's proposed reforms to qualified immunity, Corbitt would have been able to argue that Deputy Vickers' conduct was not objectively reasonable under the facts and circumstances present.

Frasier v. Evans

Levi Frasier recorded several officers who were using force to arrest an uncooperative suspect in public. Following the arrest, one of the officers followed Frasier to his car and requested he turn over the video of the arrest. Despite initially claiming that he did not have video of the incident, Frasier eventually produced the tablet he used to record it. One of the officers grabbed the tablet and began to look for the video. Frasier claimed the officer deleted the video, but later forensic analysis revealed the recording was still on the tablet.[8]

Frasier sued the officers, claiming they had violated his First and Fourth Amendment rights. While the district court granted the officers qualified immunity for the Fourth Amendment claims, the officers were denied qualified immunity for the First Amendment claims. The district court held that while at the time of the incident, no previous Tenth Circuit case clearly established "the right to record police officers performing their official duties in public spaces," the officers "actually

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[5] *Ibid.* The four cases cited in the opinion are *Brown v. City of Golden Valley,* 574 F.3d 491 (8th Cir. 2009), *Shannon v. Koehler* 616, F.3d 855 (8th Cir. 2010), *Montoya v. City of Flandreau*, 660 F.3d 867 (8th Cir. 2012), and *Shekleton v. Eichenberger* 677 F.3d 361 (8th Cir. 2012).

[6] *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) See also, Jordan Rubin, "High Court Won't Hear Law Enforcer Qualified Immunity Cases," *Bloomberg Law,* June 15, 2020.
< https://news.bloomberglaw.com/us-law-week/justices-wont-take-up-law-enforcer-qualified-immunity-doctrine>

[7] *Ibid.*

[8] *Frasier v. Evans*, No. 19-1015 (10th Cir. 2021).

knew from their training that this right existed," and "are not entitled to qualified immunity when they knowingly violate a plaintiff's rights."[9]

The officers appealed, and the appellate court overturned the district court's decision. The appellate court held that the officers should have been granted qualified immunity once the district court held that at the time of the incident, the right to record law enforcement officers "performing their official duties in public spaces" was not clearly established.[10]

If Congress enacted the MCCA's proposed reforms to qualified immunity, Frasier would have been able to argue that in light of the officers' training, their conduct was not objectively reasonable under the facts and circumstances present.

Conclusion

Officers who act in an objectively reasonable manner deserve to be protected by qualified immunity. These protections are necessary to ensure officers can act decisively in challenging situations and uphold public safety. Eliminating qualified immunity would have far-reaching impacts and make our communities less safe overall. However, law enforcement must acknowledge that courts' current interpretation of qualified immunity has presented a challenge. Therefore, the doctrine should be reformed so qualified immunity is denied when an officer has fair notice that their conduct violates a constitutional right or the officer's conduct was not objectively reasonable. These changes will increase transparency and accountability and help law enforcement continue building the trust with the community that is critical to good policing.

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[9] *Ibid.*

[10] *Ibid.*

I now recognize Mr. Johnson for five minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

Ask unanimous consent to enter into the record today this statement by Sheriff Greg Champagne. He's the former President, current Second Vice President and Chair of Legal Affairs Committee of the National Sheriffs Association. Without objection, I hope.

Mr. COHEN. Without objection, you hope rightly.

[The information follows:]

MR. JOHNSON OF LOUISIANA FOR THE RECORD

NATIONAL SHERIFFS' ASSOCIATION

STATEMENT ON QUALIFIED IMMUNITY FOR THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

MARCH 30, 2022

STATEMENT BY SHERIFF GREG CHAMPAGNE
Former President, Current 2nd Vice President, and Chair of Legal Affairs Committee,
National Sheriffs' Association

Thank you for the opportunity to present testimony before this body on the very important topic of qualified immunity.

Representing over 3000 elected Sheriffs throughout the United States, as well as over 13,000 additional members, the National Sheriffs' Association opposes any changes to the U.S. Supreme Court's doctrine of qualified immunity.

Qualified immunity is a widely misunderstood legal principal. Qualified immunity has been mischaracterized. It is not absolute, or complete, immunity. Qualified Immunity is the basis for courts to render a summary decision after they have thoroughly examined the facts and determine that no know constitutional right was violated.

Peace officers today are subject to civil liability and criminal prosecutions for intentional constitutional violations. Contrary to published media reports, qualified immunity is based on fundamental fairness. It was established by a U.S. Supreme Court decision holding that public employees should not be held liable for Constitutional violations that they could not have known violated the constitution at the time of their actions. To retroactively punish a peace officer, or any government employee, for conduct that they had no way of knowing would later be found to violate the Constitution would be unfair and be tantamount to a retroactive law.

The law is constantly changing, and even the U.S. Supreme Court Justices often disagree over whether something violates the Constitution. Qualified immunity provides peace officers with necessary protection to act in situations where the law is unsettled or unclear.

Eliminating qualified immunity may impede officers from making crucial, split-second, life or death decisions without hesitation to stop a threat. If a peace officer can be held liable for acts that were not previously determined to be constitutional violations, officers will hesitate to act quickly to defend themselves or others in emergency situations. Innocent victims and officers will be hurt or killed as a result. 458 officers died in the line of duty last year as it is.

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The Supreme Court has unanimously upheld the doctrine of qualified immunity as recently as October 18, 2021, in the City of Tahlequah v. Bond where officers had to make a split-second, life or death decision to protect themselves against a violent felon trying to attack them with a claw hammer at close range. Also on October 18, 2021, the Supreme Court again unanimously upheld qualified immunity in Rivas-Villegas v. Cortesluna where an officer on a domestic disturbance call placed his knee on a resisting subject's back for eight seconds to keep him from pulling a knife from his pocket on officers. This was after the subject threatened his girlfriend and her children with a chainsaw. Without qualified immunity, officers would not make these split-second, life or death decisions saving lives for fear of liability.

Make no mistake, the elimination of qualified immunity will affect public safety in our communities by resulting in de-facto defunding of police. It will ensure that government agencies will have less funds available to dedicate to funding public safety and combating the rise in crime in our communities.

Elimination of qualified immunity protection for law enforcement officers will have further negative consequences for law enforcement in America. Persons will be less likely to begin a career with, or remain in, the law enforcement profession. No one is going to want to work in an occupation where at any given moment an action they take could subsequently be declared unconstitutional, without warning, resulting in them being subject to a money judgment for all their worldly possessions.

As it is, law enforcement is facing a shortage of officers across the country while crime in America is continuing to rise. It is hard enough now to get people to enter the law enforcement profession without making them liable for unknown actions. The rogue actions of a few must not and cannot be the basis to change qualified immunity which protects those peace officers who put their lives on the line each and every day to protect us all.

Qualified immunity does not just protect law enforcement officers. Qualified immunity protects **ALL** government actors including child protection workers, social workers, public health nurses and any other government health care providers, firefighters, correctional officers, librarians, ambulance workers, teachers, animal control workers, custodians, park rangers, lifeguards, and other government officials who protect our most vulnerable citizens.

Under the current qualified immunity doctrine in place, victims of police misconduct can sue local municipalities. In 1978, the U.S. Supreme Court ruled that victims of misconduct can sue a local government or municipality for implementing unconstitutional policies and practices. Further, multi-million-dollar lawsuits have been filed and resulted in an award in almost all high-profile police use of force case. The settlement in the George Floyd case was $27 million, Justine Ruszcyk $20 million, Breanna Taylor $12 million, Freddie Gray $6.4 million, Eric Garner $6 million. These cases are not only about justice, but also money and attorney's fees.

Qualified immunity protects every single taxpayer in the United States by ensuring that public funds are not used to pay, settle, or defend lawsuits in situations where a peace officer has acted in accordance with the Constitution at the time they acted. Thousands of frivolous lawsuits alleging constitutional violations are filed against state and local government and public employees every year. Defending litigation in and of itself costs money. Even if those sued prevail, they still ultimately must expend valuable resources to defend a lawsuit that often was without merit. Qualified immunity reduces those

costs by allowing summary dismissal of frivolous claims. More importantly, even a one-dollar judgment carries with it the likelihood that an award for attorney fees will be in the hundreds of thousands of dollars. Eliminating qualified immunity will reward plaintiff attorneys at the expense of local community taxpayers.

For reasons of fundamental fairness to law enforcement officers, and other government employees, the safety of our communities, and the protection of taxpayers' funds, the National Sheriffs' Association opposes any changes to the doctrine of Qualified Immunity as set forth by the United States Supreme Court.

Sincerely,



Greg Champagne
Sheriff, St. Charles Parish, Louisiana
Past President and Chair, Legal Affairs Committee,
National Sheriffs' Association

Mr. JOHNSON of Louisiana. Thank you, thank you.

I stated earlier—my questions are going to be for Mr. Johnson. Just by review for everyone listening, he's the Executive Director and General Counsel of the National Association of Police Organizations. Grateful he can be with us by Zoom.

There are a number of Democrat politicians I mentioned earlier who have spent the last several years, and this is just a fact, and facts are stubborn things, as John Adams said, trying to take funding and resources away from police departments. I mean, that's just what happened.

It seems insane to us. I think people are recognizing how crazy the idea is. They've argued, ironically, that somehow this will make communities safer.

We don't have to look far to find individuals who have advocated for those things. In fact, we've got several on this very Committee. I mean, with respect, Committee Chair Nadler was asked a while back whether the New York Police Department budget should be cut, and he said, "Yes, it certainly should be cut."

Mr. Johnson of Georgia serves on our Judiciary Committee. He was asked whether he supports defunding the police. He said, "We certainly can repurpose some of the funding."

Of course, Ms. Bush, who serves on this Committee, spent approximately $200,000 in her campaign funds on private security detail last year, by the way. She's a leader, of course, of the Defund the Police movement.

Every single one, every single one of my Democrat colleagues on this Subcommittee have voted to end qualified immunity. So, these aren't political talking points, these are the facts. We have a disagreement on this very important issue.

Mr. Johnson, question, how does it—what is your response when you hear of politicians who voice support for defunding the police when you serve law enforcement members across the country who put their lives on the line every day to protect their communities?

Mr. JOHNSON. Thank you, Ranking Member. As a political question, I think that mantra is dying away. There certainly are some Members—some political officials who continue to tout that and some who say that, in fact the Democratic Party, or whatever party it is, hasn't gone far enough in a progressive direction.

I think that's incorrect. I think that the Members of Congress and other elected officials who have been around longer realize that message as a political message and didn't sell well in 2020. It certainly didn't sell well in 2021 in the elections in Virginia, New Jersey, and so forth.

Leaving aside the politics of it, just in terms of, I guess, the reality of men and women on the ground, whether you're a police officer or not, I think public safety is the primary value without which nothing else in a community can happen. Good schools, small business, people relocating to your community. None of that happens unless people feel safe in the community.

It doesn't—you don't have to be a rocket scientist to understand that people want police officers in their communities. They want ethical, honest, and diligent police officers. They want police officers. They want public safety.

Mr. JOHNSON of Louisiana. They need it. Even though those were—it was political talking points and a political proposal and thing they were trying to advance, it had real-world consequences. So, the recruitment and the retention of police clearly has been affected by this Defund the Police movement.

Also, we would imagine the eradication of qualified immunity. I've talked to law enforcement officers and sheriffs and police chiefs in my district, and they are deeply concerned that if qualified immunity were somehow to go away or be diminished, they would not be able to recruit and retain officers. Is that a real concern?

Mr. JOHNSON. It is and it's already happening. Qualified immunity is one facet of a public campaign in some ways to demonize the police or to blame the police for a lot of problems that they didn't create but that somehow, we find ourselves responsible. At two o'clock in the morning when you call, we're the people that show up here.

Who say that there aren't people who shouldn't be police officers for whatever given reason. When they're found out, they should be terminated, they should be prosecuted. All that has to happen.

In terms of policing itself, clearly, the continual mantra among not all, but some elected officials, among the media, that the police are somehow to blame for society's ills, it's inaccurate.

Police just like any other group, whether it's accountants, pharmacists, mechanics, or air conditioning repair people, if constantly all you're hearing and your family is hearing is that you're part of the problem, that you're brutal, racist, and ignorant, you can't be helped, you need to be reformed, this is just how they are.

Certainly, it's detrimental to the morale and the effectiveness of any profession, and police are no exception to that.

Mr. JOHNSON of Louisiana. Thank you for articulating that. I'm out of time, but I want to say, as you noted, this is not rocket science. We need to apply common sense here.

I yield back.

Mr. COHEN. Thank you. I just want to comment. It's like Ukraine has brought Democrats, most Democrats and Republicans together. Qualified immunity has—and the Democrats have called a Cato Institute person as our Witness, and the Republicans called a union official as theirs.

Mr. Nadler, you're recognized.

Chair NADLER. Thank you, Mr. Chair.

Let me start by setting the record straight. Mr. Johnson said that I suggested decreasing the funding of the New York City Police Department. It is true. There was a movement at that time to shift some of the functions of the Police Department to another city department. I agreed with that.

As the function went from one department to the other, so should the funding associated with that function. The total funding was not suggested to be decreased.

Mr. Schweikert, do you agree that qualified immunity has failed as a matter of law doctrine and public policy, and if so, why?

Mr. SCHWEIKERT. I do agree with that. I think it's failed as a matter of law for reasons that Professor Reinert has already ably explained. It was simply an invention of the Supreme Court.

While there is some dispute about whether the early Supreme Court cases employing an actual good faith understanding of qualified immunity had some support in common law, there is no dispute at all among any scholars today that the current clearly established law standard is absolutely unsupported by either the text of section 1983 or the history on which it was passed.

It's failed as a practical and moral matter because it has denied justice to victims whose rights have been violated, and it has undermined the efficacy of the law enforcement community by exacerbating the public's unfortunately accurate perception that police officers who routinely commit misconduct are not held accountable.

Chair NADLER. Thank you. Professor Wright, first, congratulations on your victory in the Supreme Court litigating *Taylor* v. *Riojas*. It's an incredible accomplishment, and we commend you for your work litigating on behalf of Mr. Taylor.

It seems the Supreme Court almost always decides its qualified immunity cases through the shadow docket. Can you describe why this practice is problematic?

Ms. WRIGHT. Thank you for your question, Chair.

The practice of deciding cases on the shadow docket is problematic for a number of reasons.

(1) It puts the processes of the Supreme Court behind a curtain that shields it from public view. So, when a case is decided on the shadow docket, there is no public argument. There are not even briefs on the merits. So, it prevents the public from understanding what's happening and it allows the Supreme Court to make law, and even some policy decisions that govern parts of the United States, without any transparency into the process. So, that's problem number one.

(2) When you decide these cases specifically on the shadow docket, qualified immunity cases. These are often cases where the facts are in some dispute. When you do it on the cert stage briefs alone, there is no opportunity for the parties to air that disagreement or to put the actual questions and the actual facts before the court.

So, it impedes lawmaking and impedes public trust in the judiciary process.

Chair NADLER. Thank you. Captain Thomas, how does qualified immunity exacerbate our accountability crisis among law enforcement?

Captain THOMAS. Accountability piece, that's what we're trying to do now. We must make people believe that the police are here to do the right thing at all times. The qualified immunity piece, we have officers now, this came up in Louisiana, they're actually buying umbrella policies just to protect their families.

So, taking this qualified immunity out of this talk would just—we'd be in a situation that we can't control. We couldn't control it.

So, we all need to just get together. That's why we're here with Congress. That's why I'm glad we have our colleagues here so we can discuss these things. Because we need more talking on them points.

Chair NADLER. Thank you. Judge Newman, can you explain how qualified immunity undermines official accountability and precludes individuals from effectively vindicating their constitutional rights?

Judge NEWMAN. Well, I don't want to see the matter overstated. I think it does that in some cases, and in some cases not.

I've heard the statistics today that very few cases are dismissed on qualified immunity. In the 30 cases I've presided over at trials in the District Court, most of them resulted them in a jury finding in favor of the police officer.

I think qualified immunity was simply a—they didn't understand it. We did a poll later of all the jurors who heard these cases. It was clear they didn't understand the doctrine at all. My sense was they were simply finding for the police officer because they didn't want him to have to pay, and they were unaware that the city was going to pay.

So, it undermined it in the sense that it tilted the scales in favor of a verdict for the police officer in a case.

Chair NADLER. Thank you. Professor Reinert. Proponents of qualified immunity often argue that the doctrine is necessary to protect officers from being subjected to second-guessing of their split-second decisions. Can you explain why this viewpoint is incorrect?

Mr. REINERT. Yeah, it goes to something that Mr. Schweikert laid out in great detail in his testimony. The basic reason: It's unnecessary to protect officers from being second-guessed is because the substantive law already does that.

That is, I can't violate the Fourth Amendment as an officer unless I Act unreasonably in light of all the facts that I know, in light of the circumstances, taking into account split-second decisions I have to make. So, already I'm protected by the substantive Fourth Amendment doctrine.

It's therefore unnecessary to have an extra layer of protection that qualified immunity provides. What that does is it actually, in a way, protects the officers who come up with novel ways of violating people's constitutional rights. Then they're protected because no prior case had said that this particular way of violating someone's rights was unconstitutional.

Chair NADLER. Thank you. My time has expired, I yield back.

Mr. COHEN. Thank you, Mr. Nadler.

Mr. Jordan, I believe, defers to Mr. McClintock. Mr. McClintock, you will be next.

Mr. MCCLINTOCK. Well, thank you, Mr. Chair.

Mr. Schweikert, does qualified immunity only apply to the police, or does it apply to all public officials?

Mr. SCHWEIKERT. Thank you, Congressman.

Qualified immunity applies across the board to all public officials who might be sued under section 1983.

Mr. MCCLINTOCK. So, for example, Lois Lerner violated the rights of thousands of Tea Party members by abusing the authority of the Internal Revenue Service to go after them for their political views. Can she be sued by those victims of her bad actions?

Mr. SCHWEIKERT. In the context of Federal officials, they are entitled to qualified immunity. There are also additional difficulties in suing them under the Bivens Doctrine because section—

Mr. MCCLINTOCK. I want to—let's just stick to qualified immunity protects people like Lois Lerner from the effect of their actions, correct?

Mr. SCHWEIKERT. It does, yes.

Mr. MCCLINTOCK. Could Michael Flynn sue Andrew McCabe for the violation of his civil rights under this doctrine of qualified immunity?

Mr. SCHWEIKERT. Qualified immunity would apply in any such suit.

Mr. MCCLINTOCK. I think it's unfortunate that this issue's been entangled with the left's attacks on law enforcement and the rule of law. The Fresno case that you mentioned, involving the theft of coins seized by obviously crooked police officers.

Now, you say they were shielded from the effect of their—from being sued by the victim by the doctrine of qualified immunity. They still broke the law, though, didn't they? They still stole the coins, didn't they?

Mr. SCHWEIKERT. Absolutely, but the fact that they broke the law, even committed a criminal offense, is simply a different question than whether there was clearly established law as to the constitutional violation they committed.

Mr. MCCLINTOCK. So, once they're convicted of that crime, can they be sued by the victim, or are those officers still shielded by qualified immunity?

Mr. SCHWEIKERT. Even a criminal conviction would be an entirely separate matter. Even a police officer who's convicted of murder, for killing someone, could still theoretically be protected by qualified immunity.

Mr. MCCLINTOCK. So, the victim would not be able to recover the costs that they had borne.

Mr. SCHWEIKERT. That's correct.

Mr. MCCLINTOCK. Because of this constitutional violation.

Mr. Johnson, employer liability that Judge Newman proposed seems to make sense. It would assure that there's a remedy for a violation of rights. It assures that individual officers wouldn't face financial ruin. It gives the local department then an incentive not to tolerate misconduct. Doesn't that make sense?

Mr. SCHWEIKERT. I think part of it does, yes, sir. I think that there's already a tremendous incentive on the part of agencies to deter misconduct.

Completely aside from the qualified immunity, just the attention given by the media, press, attorneys, and so forth, there's a tremendous spotlight on law enforcement in the United States, and there has been for several years now, specifically regarding allegations of misconduct. So, I don't—

Mr. MCCLINTOCK. Marshaling public opinion is one thing. Actually having an avenue that you can take to protect your constitutional rights, that seems to me an important recourse that was established by the original law in 1871.

Mr. Schweikert, is it the 1967 Warren decision that is the root of the problem, or is it the '82 modification on the clearly established standard?

Mr. SCHWEIKERT. I think the 1982 decision *Harlow* v. *Fitzgerald* is really the core of the problem. Because it is the clearly established law standard, which is what governs today, and that's the standard that excuses even unreasonable or intentional constitutional violations for the sole reason that there doesn't happen to be a prior judicial decision in that jurisdiction with similar facts.

Mr. MCCLINTOCK. So, if we codified the 1967 Warren test and explicitly removed the clearly established standard in the 1982 modification, would that be an improvement and would that solve the problem?

Mr. SCHWEIKERT. I think it would be an improvement. I don't think it would solve the problem, because that would still leave some circumstances where someone's rights were violated, and they're nevertheless left without a remedy.

I think a better solution would be a shared liability regime between employers and employees, and simply clarifying that if the individual officer had an actual good-faith belief in the legality of what they were doing, then it would simply be the employer who was liable, not the individual.

It's still essential to ensure that anyone whose rights are violated does get a remedy.

Mr. MCCLINTOCK. Well, obviously the maxim is that for every right, there must be a remedy. If you don't have a remedy, then you really don't have the right.

Mr. SCHWEIKERT. Exactly.

Mr. MCCLINTOCK. Thank you.

Mr. COHEN. Thank you, Mr. McClintock.

Next, we will let the tiger out of the cage. Mr. Raskin.

Mr. RASKIN. Thank you, Mr. Chair.

It's disappointed me that one of our esteemed colleagues chose to recycle debunked partisan dogma about defunding the police when it is his party that voted to oppose $350 billion in the American Rescue Plan that the majority used to fund the police and the firefighters and the first responders and the public health infrastructure. They voted no, they voted not to fund the police and the other public employees.

It's his party that had a couple dozen Members who voted not to award the Congressional Gold Medal to members of the Capitol Police Force who risked their lives to defend our lives on January 6th against a lethal, deadly, violent insurrection unleashed against us.

So, spare us the phony lectures about defunding the police, because everybody knows who wants to defund the police and who wants to defend the police. Ask any of the 150 cops who were wounded, hospitalized, and injured on January 6th right here at our own house.

It's disappointing maybe because this is an issue where we can have real bipartisan consensus, and we do. Take Fifth Circuit Court Judge Don Willett, a Trump appointee, who has now distinguished himself as a strong critic of qualified immunity, which he says smacks of unqualified impunity, letting public officials duck consequences for bad behavior, no matter how palpably unreasonable, as long as they were first to behave badly.

So, it's a remarkable doctrine that has evolved up totally made up by judges.

Now, Judge Newman, you said something which I thought had penetrating lucidity to it. Does the problem of qualified immunity go away entirely if we just decide to hold municipal employers accountable in respondeat superior fashion for the actions of their employees in tort?

Because the way I see this is that by absolving their employers, then people want to sue the cops. Of course a cop making 50 or 60 thousand dollars a year is not really going to be able to pay if they beat the hell out of somebody.

So, then we've constructed all these perverse doctrines to try to protect the cop, but we're avoiding the underlying issue, which is that there's no incentive to change the overall culture of policing in certain departments where they've given license to that conduct.

So, would you just elaborate what you said before? Would the problem of qualified immunity go away if we correct the decisions that have immunized local police departments and States and counties?

Judge NEWMAN. Whether it goes away would be entirely up to the legislation you all came up with. You can make employers liable and keep qualified immunity. Or you could make employers liable and abolish qualified immunity. So, whether it would go away depends on what you do with qualified immunity.

The point is, once you create employer liability, you don't need qualified immunity. You don't even need liability of the police officer. If you kept it, the plaintiffs would sue the employer.

So, if you kept it, it would probably be almost a non-issue. If you abolished it, then obviously it's a nonissue. Which way you go is up to you, but if you—

Mr. RASKIN. Am I recalling correctly that it was the *Monell* decision which said that the localities are not responsible in—

Judge NEWMAN. Correct. Not responsible unless they meet the ridiculously restrictive test of a policy of perpetrating misconduct. The cities don't do that.

Mr. RASKIN. Well, look, I just think this is something that cuts against the fundamental conservative principles and liberal principles, and we've got to deal with this problem quickly.

I think you for having this hearing, Mr. Chair. I yield back.

Mr. COHEN. Thank you, Mr. Raskin. Next, I think we've got Mr. Roy from Texas. He yields to Ms. Fischbach. I'm sorry, Ms. Fischbach.

Ms. FISCHBACH. Thank you, Mr. Chair.

Mr. Johnson, I think Ranking Member Johnson had asked you about how the Democrats' calls to defund the police and end qualified immunity have affected morale.

I want to know how this would affect their ability to do their job, because that's what we're talking about, is having police on the streets, doing their job, protecting all society. First with defunding the police, and second with removing qualified immunity.

Mr. JOHNSON. Thank you, Representative. Again, I don't want to, as a Witness, talk about one party versus the other party's policies.

On this particular issue, though, to answer your question, police officers, just like anybody else, they're men and women that we grew up with, we went to school with them, and they live in our neighborhoods. It affects them, it affects their morale, just any other profession would be affected by the constant attacks that somehow police are not to be trusted, are violent, brutal, racist, and this and that.

By using individual cases out of approximately a million officers in the United States to say that, well, that's how they all are,

that's how they act. They can't be trusted, they're brutal, and they're racist. We wouldn't tolerate that type of broad-brush attack on any other class of citizens. It becomes acceptable for police.

The effect of that on morale is very detrimental. The effect of that is bad for public safety. Just like any other profession, whether it's your auto mechanic, pharmacist, or journalist, if morale is low in the workplace, performance suffers.

Unfortunately in this case, when performance suffers, it's the public that pays the price in terms of public safety.

Ms. FISCHBACH. Thank you, Mr. Johnson. Not only are they people they went to high school with, but in my case, I have several in my family and former law enforcement officers that—so, they are in our family too and they are part of our family.

I appreciate your insight on that, and it seems to me that now is not the time to be talking about removing qualified immunity. Law enforcement is under attack, like you mentioned, in cities all around America. Members of this Subcommittee have called for defunding the police, and Members of Congress.

Meanwhile, crime is on the rise, and we may see crime continue to rise. So, now is the time to be standing behind law enforcement and supporting them from attacks on their morale and their ability to perform their job.

Just, as a follow up, Mr. Johnson, Democrats believe that officers who can demonstrate in a court of law that they are acting in good faith should be at risk of facing frivolous personal lawsuits.

What kind of effect will this have on the officers' willingness to intervene during a crime in progress? Doesn't ending qualified immunity punish officers who are willing to rush into volatile situations in an attempt to save lives and prevent further injury?

Mr. JOHNSON. Yes, yes, Representative Fischbach, it does. It creates a disincentive for officers to act. Because what we're talking about in the qualified immunity context, by definition, we're talking about situations where an unknown constitutional right, in fact, unknowable constitutional right, may cause personal liability to an individual officer.

Because, by definition, it was unknown and unknowable, then trying to address that cannot, by definition, deter other misconduct or improve police—policing. Because officers don't know what's allowed and what's not allowed in terms of this.

In addressing some of the legal arguments about well, this lawsuit or this class of lawsuits and so forth, I get it and I understand the argument in terms of large groups of lawsuits when you look at them as a whole.

When you talk about an individual officer and his or her mindset, they don't think about, well, it's unlikely that out of this class, I'm the unlucky person who gets personally held liable.

The situation that comes about in rank-and-file mind is that I might be liable. Therefore, it's a disincentive. It's safer for my career, for my family, for my financial health maybe just not to take action in this case. I think that's a situation that none of us wants, on any side of the aisle.

Ms. FISCHBACH. Thank you, Mr. Johnson. I just want to say this hearing, we know the reason. This is just another chance for Demo-

crats to try to vilify a profession which is built on selflessness and service.

Democrats want more drugs in the community. That's why we are going to floor to deal with the marijuana bill today. They want to bail out violent criminals. Now, they want criminals to be allowed to sue law enforcement officers.

With that, I yield back, Mr. Chair.

Mr. COHEN. Thank you, Ms. Fischbach, my friend and colleague. I'd share with you the difficulty I have in hearing from less than two percent of our caucus that's for defunding the police.

In defense of those Members that want to say they defund the police, none of them have invited any of us to orgies and none of us have invited people to snort cocaine.

I now recognize Mr. Hank Johnson.

Ms. FISCHBACH. Wow.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair. I thank the Witnesses for their testimony today.

Mr. Johnson, in your testimony, you stated, quote, "that a functioning society requires that reasonable officers be provided this qualified immunity in applicable civil cases. Without it, the orderly administration of justice would come to a halt amidst paralyzing fear of personal liability." Am I right?

Mr. JOHNSON. Yes, sir, that's in my testimony, Representative Johnson.

Mr. JOHNSON of Georgia. You heard Judge Newman, who testified that—and by the way, Judge Newman spent 42 years on the U.S. Court of Appeals and as a Federal District Court judge, he presided at the trial of more 30 police misconduct cases.

You recall he testified that contracts between cities and police unions provide that the city indemnify police officers found liable in lawsuits under section 1983.

Judge Newman also testified that it was his experience that jurors in police misconduct cases don't know that the municipality would pay the judgment against the police officer. They would frequently find the officer not liable, just to avoid what they thought would be the imposition of liability on the officer. In other words, the officer would have to pay the judgment themselves.

Mr. Johnson, you don't disagree with Judge Newman on that point, do you?

Mr. JOHNSON. No, Representative Johnson, I certainly don't disagree with his observations as a sitting judge and an appellate judge.

Mr. JOHNSON of Georgia. Let me ask you this—

Mr. JOHNSON. My experience comes from a different part of the criminal justice system.

Mr. JOHNSON of Georgia. Well, we're not talking about criminal justice system, we're talking about our civil justice system and its ability to do justice by way of persons who would be aggrieved by police misconduct.

I know Mr. Johnson, that you would agree that there are some instances of police misconduct, unnecessary use of force, those kinds of things do happen, isn't that correct?

Mr. JOHNSON. Of course, they do, sir. Yes, sir.

Mr. JOHNSON of Georgia. Yeah. Judge Newman recommends that Congress create a law that mandates that the city would be liable to pay any judgment rendered against a police officer for misconduct. That qualified immunity could remain a defense available to the police officer.

Mr. Johnson, what is wrong with Judge Newman's proposed solution?

Mr. JOHNSON. Representative Johnson, I would direct the Subcommittee to the submitted written testimony of the National Sheriffs Association, for example, for the concerns that employers have regarding that. I think that issue—

Mr. JOHNSON of Georgia. I mean, we're talking about putting it on the employer to have to pay any judgment rendered against their employee. What about that solution do you disagree with?

Mr. JOHNSON. That's what I—and I don't want to step out of my lane talking for the sheriffs and the chiefs, but—

Mr. JOHNSON of Georgia. Well, well, I mean—

Mr. JOHNSON. Since you ask, I'll answer the question.

Mr. JOHNSON of Georgia. This doesn't really require much analysis. It's a very common-sense solution to a real problem. Citizens have been stopped from holding rogue police officers accountable when they commit misconduct.

The denial of justice in those kinds of circumstances due to this doctrine of qualified immunity is an injustice. We're just simply talking about how to render an injustice something that does not continually happen in these cases in America.

So, what criticism would have on Congress on passing a law that imposed liability on governments for the actions of their employees?

Mr. JOHNSON. Thank you, Representative Johnson. I understand the argument.

My concern on that would be that when we're talking about liability itself, whether it's on the individual officer or on the employing agency, our view of qualified immunity, immunity in general in this context, whether it's for the officer or the employing agency, is that in fairness and in justice, it ought not be imposed if we're talking about a liability predicated upon the violation of a constitutional right when that right was not yet known at the time that the—

Mr. JOHNSON of Georgia. Well, you could still have the doctrine of qualified immunity in place, but you would simply have a situation where juries would know that if they found a police officer liable, then that police officer would not be personally liable. It would be the city that would pay the judgment. What's wrong with that?

Mr. COHEN. Quickly respond, we're over time. If you quickly respond to the—I'd appreciate it.

Mr. JOHNSON. Yes, Chair. I think the problem with that, writ large, is that the same reason that we don't want jurors to know, hey, if this person's liable, someone else is going to pay the bill. Because it tends to engender greater verdicts than we would otherwise have based simply on the evidence.

Mr. JOHNSON of Georgia. You just simply don't want to have police officers—

Mr. COHEN. Time's up.

Mr. JOHNSON of Georgia. Held liable, do you.

Mr. COHEN. I've got to call time.

Mr. JOHNSON of Georgia. With that, I yield back, Mr. Chair. Thank you.

Mr. COHEN. Thank you, thank you, Mr. Johnson. Next, I'd like to recognize Mr. Roy.

Mr. ROY. I thank the Chair, thank you for holding this hearing.

I'd like to note that I'm glad that my friend from Maryland who I don't see on the screen anymore is committed to attacking judicial activism as much as I like to do. Is now quoting my constitutionalist friend and Fifth Circuit judge Don Willett, whose daughter is a classmate of my son's school in Austin, Texas. He's a good friend.

Notably not being cited right now by my Democratic colleagues is my friend and great American devoted to the Constitution, Justice Clarence Thomas, who said in his concurrence in *Ziegler*, "I write separately to note my growing concern with our qualified immunity jurisprudence."

Until we shift the focus of our inquiry to whether immunity existed in common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence. Well, I'm glad we're all agreeing with Clarence Thomas today.

The problem is that, as my friend from California, Mr. McClintock, suggested, is that my Democratic colleagues are:

(1) Targeting almost entirely and solely police officers and that is entirely political.
(2) Intertwining that attack with a coordinated defunding effort, notwithstanding my friend from Maryland's characterization to the contrary.

Failing to acknowledge, for example, the $150 million cut in Austin, Texas; the $22 million in Baltimore, Maryland; the $16 million in Boston, Massachusetts; the $1 million in Burlington, Vermont; the $10 million in Denver, Colorado; $2 million in Hartford, Connecticut; $42 million in Kansas City; and $150 million Los Angeles, CA.

Of course, notably, most of these jurisdictions the following year refunded those cuts because they saw the foolishness of the kneejerk reaction that destroyed and devastated our police officers' ability to do their jobs across the country.

Austin puts money back in their budget, and guess what? The police academies are completely destroyed. Now, you have to go back and try to figure out how to recruit. Now, you don't have people being able to answer 911 calls.

Now, my Democratic colleagues want to talk about qualified immunity. Then they say, oh, you voted against $350 billion in funding. They don't tell you that was in a $1.9 trillion monstrosity filled with all sorts of other socialist, big government garbage.

They don't tell you that the $350 billion has language in there saying that it's about community investing. Not just money for cops to be able to go do their job, but community investing.

I heard the Chair of the Judiciary talk about, oh, I was fine with moving money from the cops to some other department. Well, of course he takes that money and take it away from cops and go

dump it into some social engineering program in New York, New York City.

That's the reality of what we're dealing with instead of being able to sit here and say let's actually have a discussion about qualified immunity. Last summer my colleagues forced a vote and didn't give us the chance to amend on the floor or have a debate on actual qualified immunity. Instead of just gutting it and targeting cops.

I actually think we're having a productive conversation here with respect to what Judge Newman has produced and put forward that I think my friend from California said positive things about, and that Mr. Schweikert from Cato has said.

So, I would just like to kind of throw out there in my last two minutes, and I'd like to throw a question to Judge Newman.

Do you believe, sir, Judge Newman, that if you were to go down the road you suggested, that would—you're talking about applying that across the board, not just to police departments, right? That would try to address the qualified immunity problem for government officials of all stripes.

Judge NEWMAN. Yes, just like 1983 said. Whenever somebody acting under color of law violates—denies the constitutional rights of a person, any person, under color of law. It could be a jailer. It's certainly not limited to police officers.

Mr. ROY. Okay. Well, I appreciate that. Then if I made direct a question to Mr. Mangual and Mr. Johnson.

How would you gentlemen view the possibility of going down the road of what Judge Newman puts out there, that we have liability for the cities, for the departments, etc., as opposed to targeting the individuals, and then let that get sorted out between the individuals and the cities, the sovereigns, if you will?

Mr. MANGUAL. I certainly think that's a proposal that's worthy of close consideration. I would note that it mirrors exactly what happens right now.

As I said earlier in my testimony, 99.98 percent of all dollars recovered against individual police officers are actually paid by the governmental entity that employs them. That's already the case. So, I do think it's certainly worth considering.

What I would add to that, though, is addressing the problem of *Saucier* and its reversal. I think allowing courts to continually punt constitutional questions leaves the law underdeveloped in the civil rights arena. Re-instituting that proper sequence I think would go a long way.

Mr. ROY. Well, thank you. I got 15 seconds left. I think Mr. Johnson answered Mr. McClintock's question on that. I would just note that this idea of making sure this applies beyond police officers is critically important.

I'll point out a case in Colorado Springs where a case worker for the El Paso County Department of Human Services received permission from her supervisor to inspect a four-year-old girl's buttocks, stomach, and back for signs of physical abuse. Did so, took pictures without approval from the parents. The parents had no recourse. We need to address this across the board.

Mr. Chair, I'm over my time, I appreciate it.

Mr. COHEN. Thank you, Mr. Roy.

I'd like to make a little mea culpa, I guess. I've been teasing you a little bit about the sex orgies and the cocaine. I just recently learned that Mr. McCarthy had a closed-door hearing with Mr. Cawthorn, and he apparently told Mr. McCarthy that what he said was untrue.

Now, Roger Stone says that's not true, that Mr. Cawthorn still backs it up. I'll take Mr. McCarthy's statement.

Ms. Ross, you're recognized for five minutes.

Ms. ROSS. Thank you, Mr. Chair, and thank you to all the Witnesses for testifying.

I'm thrilled that I went after Mr. Roy because we agree completely on this. The problem of qualified immunity goes well beyond the police. As a former civil rights litigator, I actually rarely sued the police. I sued lots of other people, and they invoked qualified immunity.

So, we should be addressing this problem writ large. Many examples in the public mind right now involve the police, and we shouldn't exempt them from any change in qualified immunity.

We have had egregious situations in North Carolina with the Department of Social Services. We've seen egregious situations with sexual misconduct and treatment of women. We've seen egregious situations with racial discrimination and discrimination against immigrants. All those issues should be on the table today.

As we know, the doctrine of qualified immunity protects State and local officials, not just the police, where they can only be held liable for violating somebody's rights if a court has previously ruled that the actions are unconstitutional, the actions. Therein lies the problem.

If no decision exists, the official can be immune from liability, even if they intentionally violate the Constitution. Qualified immunity acts like a time warp. In its current form, the doctrine allows conduct to be judged by completely outdated standards and parts of our history that we are trying to rectify. It doesn't let us rectify history.

Public officials should not be allowed to avoid the consequences for egregious actions by hiding behind judicial opinions that previously found conduct acceptable. The actions of law enforcement and other public officials must be judged under evolving standards of what constitutes constitutional conduct, not decades- or centuries-old endorsing of unconscionable practices.

My first question is for Mr. Schweikert. In your written testimony, you cite several cases in which qualified immunity was granted because the cased differed just slightly from clearly established precedent. In the interest of time, I'm not going to go through a couple of them. My question is how has the clearly established law test stunted the development of constitutional law?

Mr. SCHWEIKERT. Thank you very much for the question. It's has stunted the development of constitutional law because the Supreme Court has held, as Mr. Mangual has previously discussed, that courts are allowed to dismiss a case by saying, well, we're not even going to decide whether this was constitutional or not, we're just saying it's not clearly established. So, qualified immunity, case dismissed.

Which means the law then does not become clearly established going forward. So, this is why Judge Don Willett has called qualified immunity a catch–22.

It means that, in fact, the exact same misconduct could be committed the very next day and again, again, and again, and it could still be excused based on qualified immunity because courts refuse to decide the constitutional question, especially in the most difficult cases where clarification of the law is most needed.

Ms. ROSS. Thank you very much. Mr. Ago, we got a great example from Mr. Roy earlier of local officials who violated constitutional rights, but granted qualified immunity not in the law enforcement context. Could you share with us other examples outside of the law enforcement context?

Mr. AGO. Thank you, Congresswoman Ross. The Lawyers' Committee is concerned about law enforcement because of the devastating and differential impact of police abuse and misconduct against communities of color.

That said, there are substantial numbers of examples outside the law enforcement context where, for example, public school teachers abuse their power. In situations like what you mentioned, Congresswoman Ross, social workers abuse their power and violate the constitutional rights of the people that they're supposed to be serving.

So, that there are lots of examples outside of law enforcement. The Lawyers' Committee's concern is law enforcement, though.

Ms. ROSS. To our distinguished judge with my last 16 minutes, if we—16 seconds, I'm sorry. I wish I had 16 minutes. Would your solution deal with this broad problem much more effectively?

Judge NEWMAN. The answer is yes, I think it would make an effective remedy. I think it would make it a modification that has some chances of being enacted.

From the controversy I've heard today, I despair that, as what happened 30 years ago when I testified to you, nothing happened. So, I think you ought to consider municipal liability, employer liability generally, to get something done about this problem.

Ms. ROSS. Thank you, and I yield back.

Mr. COHEN. I am going to yield the Chair to Congressman Ross so she can have the opportunity to introduce and recognize her distinguished colleague.

Ms. ROSS. [Presiding.] Ms. Garcia, you are recognized.

Ms. GARCIA. Thank you, Madam Chair.

Thank you, Mr. Chair, for convening this very important hearing.

There seems to be some confusion as to why we are even here, and it has been really hard to sit here and listen to some of the comments that are made from the other side of the aisle about the reason for this hearing, and what Democrats do or don't believe, and even a Witness referred to the policies of the parties. This is not a discussion of a policy of any party, but it is, in fact, a very serious discussion about law, and law that was made by a court, and what we need to do to make some reforms, because reforms are needed. To hear my colleagues talk about defunding police and how Democrats are doing nothing but really focused in a coordinated effort to do this, I mean, that is just nonsense.

All they need to do is to read the President's proposed budget, and the President himself has said that we need to invest more money in funding effective, accountable community policing, not less. His budget reflects that, including by more than doubling cops hiring programs—300 new deputy marshals; $20.6 billion in discretionary funding for Federal law enforcement and State and local enforcement; crime prevention programs; $537 million to put more police officers—more police officers—on the beat for accountability of community policing. That is the keyword. It is about behavior; it is about accountability.

I am glad that Ms. Ross mentioned that this is not just a discussion about police. We know there are good police officers, and we also know there are good public officials. However, just like every crate of apples, the old saying says, there is always one bad apple in the crate. Unfortunately, I think that is what we are focused on today.

So, public officials, not only law enforcement, abuse their power and sometimes weaponize it against our most vulnerable communities. We cannot turn a willful blind eye to that fact. Revising the qualified immunity doctrine is a step in the right direction. The qualified immunity doctrine, in practice, ends up being absolute immunity and, effectively, deprives victims of their day in court.

Ms. Wright, I want to start with you. You mentioned the *Taylor* case, which in no way can be justified. Those officers, or those, I guess, jail attendants were acting in good faith; that is a defense. When we talk about qualified immunity, it really isn't just about those officers, because, in fact, those officers don't really pay the judgments, is that correct?

Ms. WRIGHT. That is correct, Congresswoman. In my experience, in almost all cases, it is not the officers on the line for the financial responsibility. It is their employers, or the State, or municipality.

Ms. GARCIA. Okay. This proposal to change it to an employer's liability, and really, it is their employers who end up writing the check because of the rules of indemnity. I know that there are some municipal governments throughout this country who, frankly, some have had to raise taxes to pay judgments. Some have had to float judgment bonds to pay those settlements. So, what is that doing to local governments and their ability to really focus on putting the police on the street, putting the crime prevention programs forward, and making sure that they keep the community safe?

Ms. WRIGHT. What we have seen in municipalities and jurisdictions where they have to pay these large settlements is that what often follows is a direction to police officers to not violate the Constitution in that specific way. So, it is a way of actually, because the citizens, the taxpayers, are ultimately really the ones who suffer, because it is their money that pays the judgment, there is pressure by the employer, by the municipality, to make sure that the officers are not doing the same thing again, because that will result in a political price. So, I think that proposal and municipalities being responsible actually increases accountability and officers acting within the law.

Ms. GARCIA. So, Mr. Schweikert, could you give us examples where the defense of good faith did work? I mean, that it was

upheld in court and the officer was absolved of any accountability and liability.

Mr. SCHWEIKERT. Sure. Thank you for the question.

I mean, the only think I would clarify is that qualified immunity that exists today is not a good-faith standard. It has nothing to do with whether officers were acting in good faith. In fact, in many cases officers are explicitly acting in bad faith, and they still receive qualified immunity.

Two examples that I mentioned were the *Jessop* case, where officers were alleged to have stolen money for their own personal enrichment. They received qualified immunity.

The Frasier case, where officers were—and I think, this does relate to a point that Mr. Johnson has repeatedly said, that this only applies in unknowable constitutional violations, and that is simply untrue. The officer in the Frasier case—

Ms. ROSS. Mr. Schweikert, could you wrap up?

Mr. SCHWEIKERT. Yes.

Ms. GARCIA. We are running overtime.

Mr. SCHWEIKERT. Of course.

The officers in Frasier were explicitly trained on this man's First Amendment rights and they violated it knowingly, and they still received qualified immunity.

Ms. GARCIA. Thank you, Madam Chair.

I am hopeful that my colleagues across the aisle will vote for the President's budget with all that money, all those investments to reduce crime and help our police officers.

Thank you.

Ms. ROSS. Noted.

Mr. Owens, you are recognized.

Mr. OWENS. Thank you, Madam Chair.

Like other States in America, Utah has an incredible law enforcement community. These men and women are heroes. The vast majority of them are good, honest officers who risk their lives every day to keep our communities safe.

With that, from what I have heard today again from my officers is eliminating the qualified immunity would impede the abilities of police officers to do their job. Our friends at the National Fraternal Order of Police have said the following, and I quote:

> Every single factual scenario a [police] officer encounters is different and unknown. It is almost impossible for an officer to determine how a legal doctrine will apply to a split-second factual scenario. Thus, . . . the reasonable officer needs to be afforded a certain degree of discretion to make split-second decisions in situations that could risk lives, including their own, and put them at risk.
>
> Qualified immunity does not protect officers who knowingly violate the law, nor does it affect criminal proceedings or internal investigations. This doctrine is vital to law enforcement officers who need this protection to perform their discretionary functions fundamental to their law enforcement and public safety mission. The FOP will not yield in our efforts to preserve the existing qualified immunity doctrine.

I end quote with that.

Mr. Mangual, does your research show that there is a significant number of claims against law enforcement officers that are denied because of qualified immunity?

Mr. MANGUAL. It does not. So, far as I am aware, the data are very clear in showing that qualified immunity accounts for a very, very small slice of police litigation outcomes.

Mr. OWENS. Okay. Thank you.

Mr. Johnson, I have heard from my local law enforcement officers, especially those in rural areas, and they are having trouble recruiting good candidates because of a number of factors, including a toxic defund the police movement we have all had to deal with the last couple of years that broad-brushed the meaning of an honorable profession, and now, inflation. In your opinion, will stripping law enforcement officers of qualified immunity hurt recruitment efforts, especially, specifically, in rural areas?

Mr. JOHNSON. Yes, Representative Owens, it would. The reason I say that is because there are so many hurdles that a man or woman has to go through to become a police officer in the first place—education, background checks, lie detector tests, drug tests, psychological evaluations, training, and so on.

The men and women that we recruit—and rightfully so—are well-qualified for these positions. By definition, they are also well-qualified to do other things, too. So, if this law enforcement profession becomes even more difficult and dangerous than it already is, and the men and women are demonized unfairly for trying to do a good job, then we can only expect that recruitment and retention are going to go down, and that is exactly what we are seeing in rural departments and in large agencies across the United States.

Mr. OWENS. Thank you.

Then, Madam Chair, I yield back my time. Thank you so much.

Ms. ROSS. Ms. Bush, you are recognized.

Ms. BUSH. Thank you, and I thank you for convening this hearing.

In America, the legal shield and court-made doctrine of qualified immunity has allowed police officers to kill Black people with impunity. When a police officer shot a 10-year-old child in Georgia, the 11th Circuit U.S. Court of Appeals held that the officer was entitled to qualified immunity. When police officers tazed an unarmed pregnant woman in Seattle, a court found that the officer was entitled to qualified immunity. When officers set a man on fire, the Fifth Circuit held that officers involved were entitled to qualified immunity.

All of this is happening as our country is reckoning with the reality of record-breaking police killings. There were only 15, "one" "five," 15 days last year in which police officers didn't kill someone. The year 2021 broke the record for police killings in this country, 1,055 deaths by law enforcement, and that is likely an undercount.

St. Louis continues to lead the country year after year in police killings per capita. In a country that is governed by the so-called rule of law, you have to ask yourself, are police officers above the law? Does the Constitution not apply to Black people?

Mr. Ago, I believe that true justice is saving lives. Can you please explain why achieving true justice demands that we reconsider the doctrine of qualified immunity?

Mr. AGO. Thank you for your question, Congresswoman Bush.

The problem with police misconduct and police violence is that it is meted out against communities of color in a devastating and differential way. Those are facts that we cannot get around.

By eliminating qualified immunity, what you do is you start to bring accountability for those situations where police violate the civil rights predominantly and disproportionately borne by people of color. What that creates is a cycle of trust and safety and better policing, because accountability breeds trust in the system by people who see that officers who violate the civil rights of people, predominately people of color, when we are talking about the statistics, then when those officers are held accountable, the other members of the community begin to trust that the system works for them. They begin to, then, trust policing. It is a cycle that benefits communities of color.

Ms. BUSH. Absolutely. Thank you, Mr. Ago.

Qualified immunity signals to law enforcement that they can get away with unconstitutional conduct. It is why I am happy to support Representative Pressley's Ending Qualified Immunity Act, and it is why I believe that any comprehensive police reform must include ending qualified immunity.

Professor Reinert, in the aftermath of the Civil War, the Ku Klux Klan and other White supremacist vigilantes violently attacked Black people and infiltrated law enforcement departments across this country, prompting the need for legal protections.

Can you talk about the history of qualified immunity and the way in which it is deeply tied to our country's history of enslavement and White supremacy?

Mr. REINERT. Yes, I would be happy to. Thank you for the question.

I think the first part of it goes to the premise of your question, which is that the point of the 1871 Civil Rights Act was both to provide a remedy for duly created rights and, also, to take enforcement of that remedy away from States because of the mistrust that States would actually enforce the Constitution against their own officers.

We fast forward to the Supreme Court's creation of the doctrine of 1967. It was in the context of arresting of people who were protesting desegregation. It was part of the Freedom Riders. That is where the Court first recognized this good-faith immunity. It is a way to undermine all the goals that the Reconstruction Congress was trying to achieve when it enacted the 1871 Civil Rights Act.

When the Court altered the immunity doctrine in 1982 to make it even more protective of police officers, and also, added all sorts of procedural protections along the way, as my written testimony details, it takes us even farther from enforcing the vision of the Reconstruction Congress, which was to truly enforce these transformative rights after the Civil War.

Ms. BUSH. Thank you. Thank you so much.

As lawmakers, we must be dedicated to saving lives, especially Black lives. To do that, we must confront and acknowledge the forces of White supremacy that we are up against. The truth is that less than two percent of police officers have been charged with a crime for police killing as a result of qualified immunity. So, true justice and true accountability means ending this legal shield.

Thank you and the truth you just heard.

I yield back.

Ms. ROSS. Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you so very much.

It leaves me to at least a moment of concluding the essence of this hearing and to make a proclamation or pronouncement that we can deal with qualified immunity, and we can save lives.

Let me indicate, for the framing of this, that both the Sixth and Seventh Amendments are seemingly violated with qualified immunity. In simple layman terms, what qualified immunities existence does is it stops everyone at the courthouse door. Because what happens is the court says you have no case because there is qualified immunity. You don't even get to the facts circumstance before cases are dismissed.

Evidence the Robbie Tolan case that went up to the United States Supreme Court on the basis of a Federal District court dismissing a police case, an officer out of Bellaire, Texas, before facts could even be heard. So, even out of fairness, qualified immunity must be subject to modification because you close the courthouse door.

Let me ask these questions, and as I do so, I raise these questions in the name of good law enforcement, Captain, across America. I raise these questions in the name of Danny Ray Thomas, Robbie Tolan, Nicolas Chavez, George Floyd, Pam Turner, Breonna Taylor, Daunte Wright, Eric Garner, and many others.

So, let me just say to you, have you seen a massive movement of police officers, good police officers, not rising to the occasion because of false rumors about local jurisdictions not wanting police officers? Captain?

Captain THOMAS. No, ma'am, Congresswoman, I haven't seen that.

Ms. JACKSON LEE. With the issue of qualified immunity—and I think you very much; we should note NOBLE has officers in all categories. You have officers, leading major chiefs as well, that are members of your organization.

In the instance of qualified immunity, is my simple definition one that you can accept, which means qualified immunity keeps the offended persons from even getting into the courthouse to get the facts of what happened?

Captain THOMAS. Yes, ma'am, that is true.

Ms. JACKSON LEE. Is it not wrong to keep people out of the courthouse, so that facts can be portrayed, whether it is the offendant police officer or the family who has lost a loved one?

Captain THOMAS. No, ma'am, I feel that everybody needs justice. The qualified amendment must be preserved and reformed. Everybody needs justice. So, they should be heard in the courthouse.

Ms. JACKSON LEE. Thank you.

Judge Newman, can we articulate your offering of the municipality can be sued, but you are not precluding the officer from being a defendant as well?

Judge NEWMAN. I am not precluding it, but I am saying the suit against the municipality would be much more successful because the municipality does not have the defense of qualified immunity.

Ms. JACKSON LEE. The monetary capacity, you are suggesting, would be in the realm of the municipality? Is that what you are saying?

Judge NEWMAN. That is correct. It has been pointed out they now indemnify, but you have to be careful here. Indemnifying means paying a judgment already entered against the employee. So, if there is no judgment against the employee, there is no indemnity. If the suit is directly against the employer and the employer has no qualified immunity, that is clear; it is a much more successful remedy than a suit against the officer.

Ms. JACKSON LEE. What I would say, Judge, is that I think this should be one of the frameworks—and I mean not the only one—that we look at in terms of dealing with qualified immunity. My point is you are blocked at the courthouse door if you use qualified immunity as saying there is no reason to even hold a trial. You understand what I am saying?

Judge NEWMAN. Yes, that certainly happens sometimes, but there are many cases where—in other words, if the case is dismissed as a matter of law at summary judgment because the facts are undisputed. There are many cases where the facts are disputed, where it doesn't go off on summary judgment. It goes to trial. As I indicated, I tried 30 of these many years ago, and they very often end up with a verdict for the police officer or the public employee.

Ms. JACKSON LEE. Thank you.

The facts in the Robbie Tolan case were the judge dismissed it on, as I understand it, summary judgment, just on the fact that qualified immunity existed, and gave that permissiveness, that protection to the officer.

Let me quickly go to Ms. Wright.

I want to thank Mr. Reinert and Mr. Schweikert for articulating the qualified immunity lack of being able to have case law.

Let me indicate to Ms. Wright, again, what a heinous set of circumstances as it relates to your client. Can you tell me the heinousness of the victimization of defendants or incarcerated persons when there is qualified immunity?

Ms. ROSS. Ms. Wright, briefly. I know this is a serious matter, but—

Ms. JACKSON LEE. I have some issues to put into the record.

I yield. Thank you, Madam Chair.

Ms. WRIGHT. Just briefly, I will say I have described what happened to Mr. Taylor, but the people who are imprisoned are among the weakest in our community because they rely on the State for everything.

Just now before the Supreme Court is a case where guards knew a person was suicidal, put him in a cell with a 30-foot cord and watched him commit suicide without intervening or calling for help. Those guards got qualified immunity. So, it is something that happens often within the prison context.

Ms. JACKSON LEE. Let me thank the Chair for her indulgence and, as well, all the Witnesses.

I would like to put into the record a Washington Post article, March 29, 2022, "Black Americans are killed at a much higher rate than White Americans. Although half of the people that are shot

and killed by police are White, Black Americans are shot at a disproportionate rate." This article will relay that.

Then, a full list of Black people killed by police in 2021. That is a *Newsweek* article on12/28.

Madam Chair, I yield back by saying this Committee and the Judiciary Committee can find solutions to this, and the Witnesses have given us a roadmap which we can follow.

I thank you so very much, and I yield back.

Ms. ROSS. Without objection.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

The Washington Post



In 2015, The Washington Post began to log every fatal shooting by an on-duty police officer in the United States. In that time there have been more than 5,000 such shootings recorded by The Post.

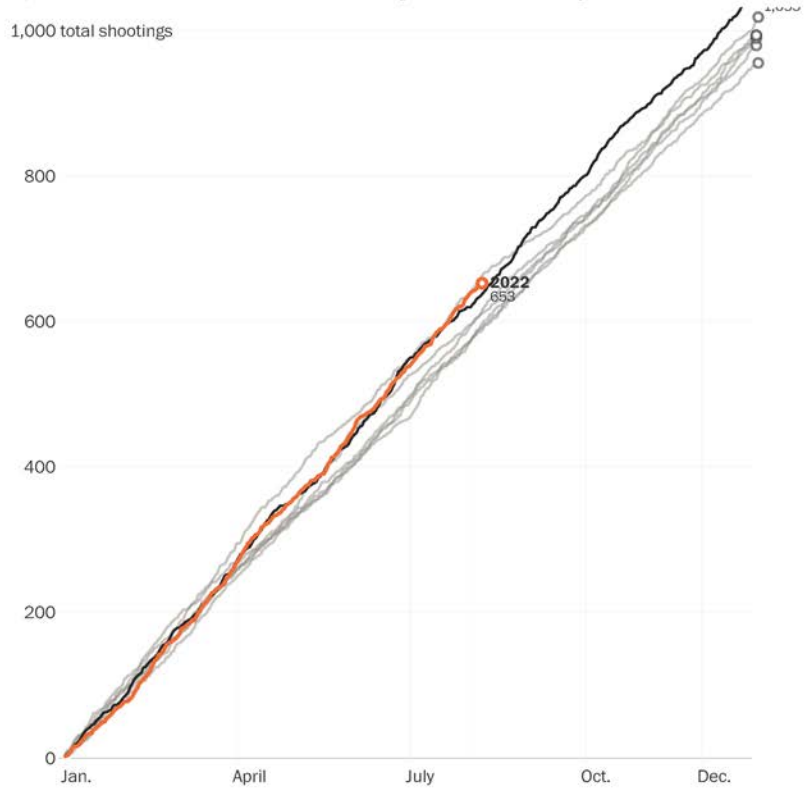
Jump to the database

After Michael Brown, an unarmed Black man, was killed in 2014 by police in Ferguson, Mo., a Post investigation found that the FBI undercounted fatal police shootings by more than half. This is because reporting by police departments is voluntary and many departments fail to do so.

The Post's data relies primarily on news accounts, social media postings and police reports. Analysis of more than five years of data reveals that the number and circumstances of fatal shootings and the overall demographics of the victims have remained relatively constant.

Rate of shootings remains steady

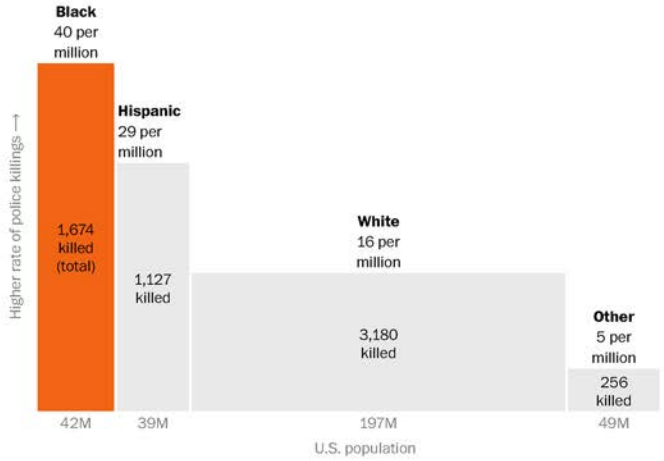
Despite the unpredictable events that lead to fatal shootings, police nationwide have shot and killed almost the same number of people annually — nearly 1,000 — since The Post began its project. Probability theory may offer an explanation. It holds that the quantity of rare events in huge populations tends to remain stable absent major societal changes, such as a fundamental shift in police culture or extreme restrictions on gun ownership.



Black Americans are killed at a much higher rate than White Americans

Although half of the people shot and killed by police are White, Black Americans are shot at a disproportionate rate. They account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of White Americans. Hispanic Americans are also killed by police at a disproportionate rate.

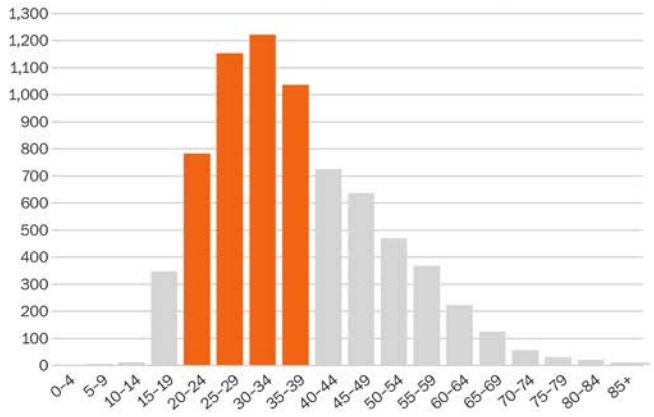
The rate at which **black Americans are killed by police** is more than twice as high as **the rate for white Americans.**



Most victims are young, male

An overwhelming majority of people shot and killed by police are male — over 95 percent. More than half the victims are between 20 and 40 years old.

Victims by age



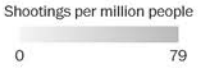
Victims by gender

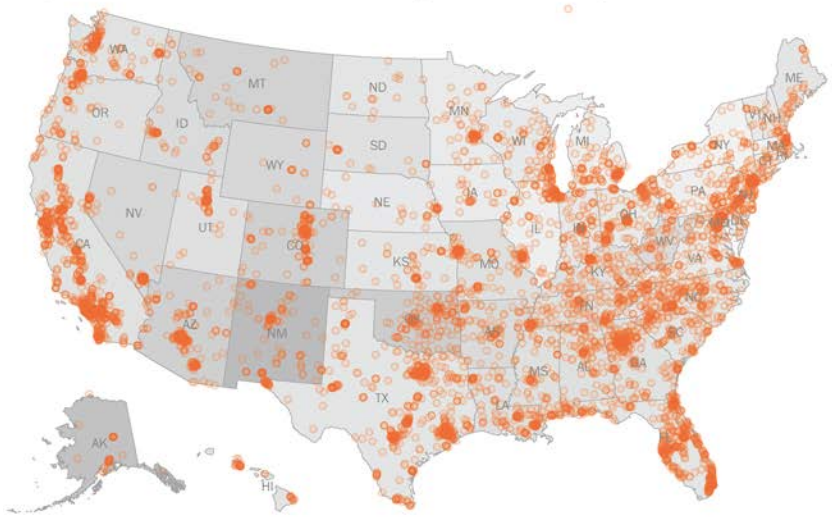


Shootings happen across the country

Police shootings have taken place in every state and have occurred more frequently in cities where populations are concentrated. States with the highest rates of shootings are New Mexico, Alaska and Oklahoma.

Each circle on the map below marks the location of a deadly shooting.





There are 821 shootings with unverified locations that are not shown on the map.

Search the database

This database contains records of every fatal shooting in the United States by a police officer in the line of duty since Jan. 1, 2015. It is updated regularly as fatal shootings are reported and as facts emerge about individual cases.

Note: When filtering by weapon, victims armed with multiple weapons will appear in multiple categories.

+ State + Gender + Race + Age + Mental illness + Weapon

+ Body camera + Fleeing the scene + Year Search by name

7,653 people shot and killed by police

An unidentified person,

person armed with a gun, was shot on Aug. 9, 2022, in Sioux Falls, S.D.

No/unknown mental illness • No body cam recording • Undetermined if fleeing

Sources: keloland.com • Argus Leader

1 of 7,653

The Post's reporting on fatal police shootings

Months after a fatal police shooting, a young officer turns his gun on himself Dec. 19, 2018

Fatal police shootings of unarmed people have significantly declined, experts say May 7, 2018

Nationwide, police shot and killed nearly 1,000 people in 2017 Jan. 6, 2018

In two years, police killed 86 people brandishing guns that look real — but aren't Dec. 18, 2016

In fatal shootings by police, 1 in 5 officers' names go undisclosed April 1, 2016

About this story

The Washington Post's database contains records of every fatal shooting in the United States by a police officer in the line of duty since Jan. 1, 2015.

In 2015, The Post began tracking more than a dozen details about each killing — including the race of the deceased, the circumstances of the shooting, whether the person was armed and whether the person was experiencing a mental-health crisis — by culling local news reports, law enforcement websites and social media, and by monitoring independent databases such as Killed by Police and Fatal Encounters. The Post conducted additional reporting in many cases.

The Post is documenting only those shootings in which a police officer, in the line of duty, shoots and kills a civilian — the circumstances that most closely parallel the 2014 killing of Michael Brown in Ferguson, Mo., which began the protest movement culminating in Black Lives Matter and an increased focus on police accountability nationwide. The Post is not

tracking deaths of people in police custody, fatal shootings by off-duty officers or non-shooting deaths.

The FBI and the Centers for Disease Control and Prevention log fatal shootings by police, but officials acknowledge that their data is incomplete. Since 2015, The Post has documented more than twice as many fatal shootings by police as recorded on average annually.

The Post's database is updated regularly as fatal shootings are reported and as facts emerge about individual cases. The Post seeks to make the database as comprehensive as possible. To provide information about fatal police shootings since Jan. 1, 2015, send us an email at policeshootingsfeedback@washpost.com.

There may be a lag between the date of the shooting and its inclusion in the database because of delays in reporting and data verification.

Credits

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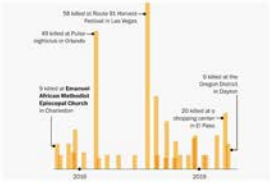
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The Washington Post spent months determining how many children have been exposed to gun violence during school hours since the Columbine High massacre in 1999.



More and deadlier: Mass shooting trends in America

Four or more people have been killed in a mass shooting every 47 days, on average, since June 17, 2015 when a young white supremacist killed nine people at a historic African American church in Charleston,



S.C. This weekend, the 30th and 31st such shootings since then took place just 13 hours apart.

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A

Full list of Black people killed by police in 2021

By Khaleda Rahman On 12/28/21 at 7:00 AM EST

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At least 200 Black people were killed by police officers across the U.S. in 2021.

Police killed a total of 1051 people this year according to Mapping Police Violence (MPV), a nonprofit organization that tracks fatal encounters with police.

Black people continue to be disproportionately impacted by police violence, the data shows. Black people account for 27 percent of those killed by police in 2021 (of those whose race is known), despite making up 13 percent of the U.S. population.

They are being killed at similar rates to previous years, the data shows, despite a national reckoning sparked by the police killings of George Floyd and other Black people.

Black people are three times more likely to be killed by police, yet 1.3 times more likely to be unarmed compared to white people, according to MPV.

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The organization's data also shows that most police killings began with traffic stops, mental health checks, disturbances, non-violent offenses and instances where no crime was alleged.



Demonstrators hold George Floyd and Daunte Wright's portraits during the sixth night of protests over the shooting death of Daunte Wright by a police officer in Brooklyn Center, Minnesota on April 16, 2021. CHANDAN KHANNA/AFP VIA GETTY IMAGES

Here are the names (where available), ages and locations of the Black people killed by police in 2021:

1. Carl Dorsey III, 39, Newark, NJ
2. La Garion Smith, 27, Homestead, FL
3. Tre-Kedrian Tyquan White, 20, Richburg, SC
4. Vincent Belmonte, 18, Cleveland, OH
5. Shawn McCoy, Spokane, WA
6. Robert "Lil Rob" Howard, 30, Memphis, TN
7. Kwamena Ocran, 24, Gaithersburg, MD
8. Jason Nightengale, 32, Evanston, IL
9. Matthew Oxendine, 46, Pembroke, NC
10. Paul Bolden, 37, Phoenix, AZ
11. Patrick Warren Sr., 52, Killeen, TX
12. Lymond Maurice Moses, 30, Wilington, DE
13. Kershawn Geiger, 24, Carmichael, CA
14. Reginald Johnson, 48, Biloxi, MS
15. Zonterious Johnson, 24, Lawton, OK
16. Christopher Harris, 27, Toledo, OH

17. Eusi Malik Kater Jr., 21, Titusville, AL
18. Tyree Kajawn Rogers, 38, Wichita Falls, TX
19. Randy Miller, Los Angeles, CA
20. Roger D. Hipskind, 37, Wabash, IN
21. Karl Walker, 29, Dixon, CA
22. Marvon Payton Jr., 27, Las Vegas, NV
23. Jenoah Donald, 30, Hazell Dell, WA
24. Dontae Green, 34, Baltimore, MD
25. Trey Webster, 18, Mobile, AL
26. Christopher Hagans, 36, Stratford, CT
27. Andrew Hogan, 25, Trotwood, OH
28. Dustin Demaurean Powell, 34, Lakeview, TX
29. Gregory Taylor, 45, Seattle, WA
30. Jordan Walton, 21, Austin, TX
31. Cortez Lee Bogan, 27, East Cleveland, OH
32. Brandon Wimberly, 36, Coral Gables, FL
33. De'Aire Jontae Gray, 28, Speedway, IN
34. Daverion Kinard, 29, Fontana, CA
35. Arnell States, 39, Cedar Rapids, IA
36. Alonte Damar Murphy, 22, Garden City, MI
37. Benjamin Tyson, 35, Baltimore, MD
38. Donald Francis Hairston, 44, Culpeper, VA
39. Chandra Moore, 55, Detroit, MI
40. Broderick Woods, 33, Houston, TX
41. Dwight Brown, 41, Abbeville, LA
42. Andrew Teague, 43, Columbus, OH
43. Howayne Gayle, 35, Lakeland, FL
44. Tyshon Jones, 29, Rochester, NY
45. Tyrell Wilson, 32, Danville, CA
46. Nika Nicole Holbert, 31, Nashville, TN
47. Charles Ray Phillips, 51, Monahans, TX
48. Christopher Ruffin, 28, Palm Bay, FL
49. Caleb Smith, 22, Hayward, CA
50. Matthew James Hurlock, 35, Cypress, TX
51. Exzabian Morgan Myers, 31, Graniteville, SC

52. Daryl Leonard Jordan, 50, Miami, FL
53. Kevin L. Duncan, 38, Bellefontaine, OH
54. Frankie Jennings, 32, Charlotte, NC
55. Aaron Pierre Thomas, Canton, OH
56. Travon Chadwell, 18, Chicago, IL
57. Malcolm D. Johnson, 31, Kansas City, MO
58. Donovon W. Lynch, 25, Virginia Beach, VA
59. Matthew Blaylock, 38, Los Angeles, CA
60. Michael Leon Hughes, 32, Jacksonville, FL
61. Willie Roy Allen, 57, Lithonia, GA
62. DeShawn Latiwon Tatum, 25, Rock Island, IL
63. Noah R. Green, 25, Washington, D.C.
64. Diwone Wallace, 24, Alorton, IL
65. Gabriel Casso, 21, Bronx, NY
66. Desmon Montez Ray, 28, Birmingham, AL
67. Roger Cornelius Allen, 44, Daly City, CA
68. Dominique Williams, 32, Takoma Park, MD
69. James Lionel Johnson, 38, Takoma Park, MD
70. James Alexander, 24, Philadelphia, PA
71. Raheem Reeder, 21, Tallahassee, FL
72. Deshund Tanner, 31, Georgetown, KY
73. Faustin Guetigo, 27, Rockford, IL
74. Daunte Wright, 20, Brooklyn Center, MN
75. Miles Jackson, 27, Westerville, OH
76. Matthew Zadok Williams, 35, Decatur, GA
77. Anthony Thompson Jr., 17, Knoxville, TN
78. Pier Alexander Shelton, 28, Bremen, GA
79. Lindani Myeni, 29, Honolulu, HI
80. Innes Lee Jr., 25, Cleveland, OH
81. Roderick Inge, 29, Tuscaloosa, AL
82. Larry Jenkins, 52, Winter Haven, FL
83. Ryan Oneal Williams, 31, Fort Worth, TX
84. Doward Syleen Baker, 39, Dothan, AL
85. Ma'Khia Bryant, 16, Columbus, OH
86. Andrew Brown, 42, Elizabeth City, NC

87. Tory Casey, 41, Rosenberg, TX
88. Michael Lee McClure, 26, Billings, MT
89. Marvin Veiga, 32, Nashville, TN
90. Hanad Abdiaziz, 25, Kansas City, MO
91. Terrance Maurice Parker, 36, Washington, D.C.
92. Eric Derrell Smith, 30, Biloxi, MS
93. La'Mello Parker, 1, Biloxi, MS
94. Latoya Denis James, 37, Woodbine, GA
95. Ashton Pinke, 27, Mesquite, TX
96. Adonis Traughber, 54, Clarksville, TX
97. Kalon Horton, 29, Lancaster, TX
98. Lance Lowe, 30, Stockton, CA
99. Monolito Ford, 48, Indianapolis, IN
100. Timothy Fleming, 49, Baltimore, MD
101. Denzell Nathan Clarke, 28, Waldorf, MD
102. Tyrone Penny, 21, Decatur, GA
103. Gary Moncrief, 32, Montgomery, AL
104. Darion M. Lafayette, 24, Champaign, IL
105. Patrick Watkins, 31, Pittsburg, CA
106. Kortnee Lashon Warren, 23, Albany, GA
107. Zaekwon Malik Gullatte-Graves, 25, Houston, TX
108. Juan Joseph Daniele Castellano, 38, Athens, GA
109. Darren Dejuan Chandler, 34, Lenexa, KS
110. Shannon Wright, 29, Denver, CO
111. Antonio Christopher Jones, 26, Houston, TX
112. Demetrius Stanley, 31, San Jose, CA
113. Bilal Winston Shabazz, 29, Yucca Valley, CA
114. William Brookins Sr., 39, Phoenix, AZ
115. Winston Smith, 32, Minneapolis, MN
116. Andrew Homen, 34, Braintree, MA
117. Timothy Flowers, 29, Rochester, NY
118. Michael Lee Ross Jr., 32, Forest Hill, TX
119. Terrell Gas, 36, College Park, GA
120. Josiah L. Byard, 21, Willcox, AZ
121. Rezek Yaqub Yahya, 39, Salt Lake City, UT

122. Solomon Jamison, 28, Jackson, MS
123. Jermaine Sonnier, 19, Houston, TX
124. Ansy Dolce, 29, Holly Springs, GA
125. Carlos Jackson, 43, Lithia Springs, GA
126. Briana Sykes, 19, Flint, MI
127. Jeff Melvin, 20, Salem, AL
128. De'Shon Hill, 39, Luray, VA
129. Earl Fitzgerald Hunter, 40, Greenville, SC
130. Fred Holder, 28, Norwalk, CA
131. Albert Wayne Finnie Jr., 22, College Station, TX
132. Tristan Trevino, 24, Corpus Christi, TX
133. Jerome Barber, 59, Azusa, CA
134. Joseph Lee Humbles, 29, Atlanta, GA
135. Shannon Earl Smith,45, Spartanburg, SC
136. John Reuben Turbe, 30, Tampa, FL
137. Gulia Dale III, 61, Newton, NJ
138. Klevontaye White, 34, Chicago, IL
139. Justin Powell, 32, Baltimore, MD
140. Marquez Floyd, 31, Albuquerque, NM
141. Ryan LeRoux, 21, Gaithersburg, MD
142. Maurice Sentel Mincey, 36, Savannah, GA
143. Quentin Bogard, 36, Canton, MS
144. Leslie Stephen Scarlett, 35, Tucson, AZ
145. Irvin Peterson, 35, Houston, TX
146. Gabriel "Sam" Parker, 38, Atlanta, GA
147. Losardo Lucas, 55, Calumet City, IL
148. Alexis C. Wilson, 19, Dolton, IL
149. Antonio King, 22, Nashville, TN
150. Dashawn "Big Top" Batiste, 22, Lafayette, LA
151. Marcus Martin, 40, Baltimore, MD
152. Christopher Robinson, 48, Seguin, TX
153. Antonio Jackson, 27, Memphis, TN
154. Broderick Shelton, 42, Milwaukee, WI
155. Terrence Bey, 29, Philadelphia, PA
156. Devonte Dawayne Brown, 28, Marietta, GA

157. James Matalice Smith, 41, Somerville, TX
158. Tyran Lamb, 31, Milwaukee, WI
159. Tory Brown, 22, College Park, GA
160. Robert Anderson, 38, Crescent City, CA
161. Antwan Gilmore, 27, Washington, D.C.
162. Fanta Bility, 8, Sharon Hill, PA
163. Christopher Corey Moore, 41, Greensboro, NC
164. Johnny Lee Perry II, 31, Missoula, MT
165. Paris Wilder, 38, West Melbourne, FL
166. James Williams, 33, Indianapolis, IN
167. Cedric Baxter, 60, Buena Park, CA
168. Frederick Thomas, 41, Miamisburg, OH
169. Josue Arias, 32, Clearwater, FL
170. Leden Boykins, 12, Douglasville, GA
171. Cedric Williams, 29, Oxon Hill, MD
172. Desmond Lewis, 30, Shreveport, LA
173. Tristan Vereen, 33, Longs, SC
174. Robert Parks, 39, Smyrna, GA
175. Joshua Cooper, 31, Brooklyn, NY
176. Dishawn Sanders, Jackson, MS
177. Adrian Cameron, 47, Nashville, TN
178. Unsfored Lewis Thurmond, 27, Smyrna, GA
179. Turell Brown, 28, Chicago, IL
180. Deon Ledet, 30, Houston, TX
181. Desmond Damond Louis, 20, Lake Charles, LA
182. Keith Cole, 50, Senatobia, MS
183. Gloria Marie Strong, 27, Allen, TX
184. Kyle Anthony Veyon, 26, Columbus, OH
185. Darrion Taylor, 26, Tucson, AZ
186. Demetrius Roberts, 21, Las Vegas, NV
187. Corey Daniel Wellman, 40, Nashville, TN
188. Simran Gordon, 24, Rochester, NY
189. Ramone Javaris Dwight, 29, Hagan, GA
190. Derrick Clinton, 27, Indian Land, SC
191. Michael Carothers, 17, Austin, TX

192. Jovan Lewis Singleton, 36, Woodlawn, MD
193. Jermaine Harris, 32, Tarboro, NC
194. Allan Lorenzo Robb, 33, West Palm Beach, FL
195. Deandre Johnson, 30, Washington, D.C.
196. Johnny McGee, 36, Houma, LA
197. Name withheld by police, 30, Columbia, MO
198. Steven Thomas, 36, Las Vegas, NV
199. Jabari Farafiai Asante-Chioke, 52, Metairie, LA
200. Anthony Harden, 30, Fall River, MA
201. Lionel Womack, 35, Kansas City, KS
202. Edward Allen Gatling, 38, Lithonia, GA
203. Anei Joker, 20, Taylorsville, UT

Ms. ROSS. Mr. Johnson?

Mr. JOHNSON of Louisiana. Thank you, Madam Chair.

Just briefly, I also have a unanimous consent. I wanted to enter into the record a list that our Committee put together of Democrat-led cities that have defunded the police with a total of $1.66 billion cut. Please enter that.

Ms. ROSS. Without objection.

[The information follows:]

MR. JOHNSON OF LOUISIANA FOR THE RECORD

House of Representatives
Judiciary Committee
Ranking Member Jim Jordan

Cities that have Defunded the Police

1. **Austin, TX** $150 million cut Aug. 13, 2020
   (Re-funded to original levels Oct. 1, 2021)
2. **Baltimore, MD** $22 million cut June 2020
   (Re-funded by $28 million June 8, 2021)
3. **Boston, MA** $16 million cut April 2021
4. **Burlington, VT** $1.1 million cut June 2020
5. **Denver, CO** $10.9 million cut Nov. 2020
   (Re-funded $17 million Nov. 2021)
6. **Eureka, CA** $1.2 million cut Aug. 2020
7. **Hartford, CT** $2 million cut June 10, 2020
   (Re-funded $3.6 million May 24, 2021)
8. **Kansas City, KS** $42 million cut May 2021
   (Defunding found to violate state Constitution by state judge in Oct. 2021)
9. **Los Angeles, CA** $150 million cut Jul. 2020
   (Increased police budget by $213 million Nov. 2021)
10. **Madison, WI** $2 million cut Oct. 2020
    (Re-funded by $1 million Oct. 2021)
11. **Minneapolis, MN** $8 million cut
    (The Minneapolis City Council voted to refund its police department by $6.4 million after the increase in crime. Moreover, in November 2021, Minneapolis voters rejected a City Council ballot proposal to replace the city's embattled police department.)
12. **New York, NY** $1 billion cut Aug. 2020
    (Re-funded $200 million June 2021)
13. **Norman, OK** $865,000 cut June 2020
    (State judge ruled that the vote by the city council violated state law; Norman then re-approved $865,000 defunding.)
14. **Oklahoma City, OK** $5.5 million cut
    (Increased police budget by $6.8 million)
15. **Philadelphia, PA** $33 million cut
16. **Portland, OR** $16 million cut June 2020
    (Increased police spending by $5 million Nov. 2021)
17. **Salt Lake City, UT** $5.3 million cut June 2020
    ($8.5 million increase in the police budget July 2021)
18. **San Francisco, CA** $120 million cut June 2020
19. **Seattle, WA** $69 million cut Nov. 2020
20. **Steamboat Springs, CO** $1.5 million cut
21. **Washington, DC** $15 million cut June 2020
    (Mayor Bowser proposes $27 million increase in police budget March 2022

TOTAL Cut: $1.66 billion cut

Mr. JOHNSON of Louisiana. Just one point of personal privilege. Mr. Raskin mentioned, I think when I was out of the room, that my statements about Democrats wanting to defund the police was inaccurate in some way. So, I was encouraged to hear him express his support, suddenly, on behalf of Democrats, for funding the police. We certainly welcome that.

The Democrats' $1.9 trillion partisan spending legislation does not specifically direct funding of local law enforcement agencies. I have urged the Biden Administration myself, Madam Chair, to correct that error in the rulemaking process by specifically directing a portion of that funding to local police departments and have gotten zero response.

Ms. JACKSON LEE. Would my good friend yield? Would my good friend yield?

Mr. JOHNSON of Louisiana. Well, I am almost—I have one—

Ms. ROSS. No, we are going to conclude today's hearing.

Mr. JOHNSON of Louisiana. The Ranking Member has the privilege of making—because the Chair does all the time, and Ms. Jackson Lee went over a minute. I am finished with one statement.

I want to invite Mr. Raskin to join me in signing on that effort to the White House, and I will send him the correspondence today.

I yield back.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. JOHNSON of Louisiana. Yes, ma'am.

Ms. JACKSON LEE. If I might, Madam Chair, if he would yield?

There are a lot of stereotypes that are going around. I respect individual positions of Members, Republicans and Democrats. I assume you do not associate with your Republican friends that consider January 6th just a group of tourists. Then, we may have a big tent; you might have a big tent.

I think you need to look at the facts by piercing those statistics that you have suggesting broad definitions. We have the right to have people with differing opinions, but I can assure you there are enough relatives of police officers in and among Democratic Members of Congress, that we are also respecters of the law.

I yield back.

Mr. JOHNSON of Louisiana. Well, I respect you, of course, my colleague, and I acknowledge that. I will tell you that it has been a position of Members on this Committee whom I quoted earlier who have wanted to defend the police. That is a fact.

I yield back.

Ms. ROSS. Okay. Thank you very much for this conclusion.

I do want to note that Mr. Roy and I are in complete agreement about how to solve this problem, and I hope that that and our judge's suggestion will help provide a roadmap going forward.

This concludes today's hearing. I want to thank all our Witnesses for appearing today.

Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

The hearing is adjourned.

[Whereupon, at 12:28 p.m., the Subcommittee was adjourned.]

APPENDIX

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Qualified Immunity Fact Sheet

Qualified immunity is a judicial doctrine that undermines accountability for government officials when they violate people's constitutional rights.

- **Qualified immunity shields officials when they commit constitutional violations.** It shields state government officials, including law enforcement officers, from liability in civil lawsuits and allows them to act with near impunity, even when they violate people's fundamental rights. For instance, courts have relied on qualified immunity to protect school officials who have conducted an outrageous strip search of a minor in search of contraband[1] and placed children in chokeholds;[2] and protected police officers who have shot unarmed children,[3] stolen money and valuables[4], tased an unarmed pregnant woman,[5] assaulted people for merely trying to enter their own homes[6] and setting a man on fire.[7] Victims have not been able to receive compensation for their injuries in civil suits because of qualified immunity.

- **The U.S. Supreme Court's requirement that a law must be "clearly established" before officials may be found liable for unconstitutional conduct denies justice to individuals whose constitutional rights have been violated by state officials.**[8] To satisfy the "clearly established" requirement, a plaintiff must identify a prior case with very similar facts in which a court found the actions of the official unconstitutional. Overcoming qualified immunity hinges upon this key factor, and courts do not always apply it consistently.[9] To make matters worse, the Supreme Court ruled in 2009 that a lower court

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[1] *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).
[2] Georgina Yeomans, The Court Now Says a Teacher Who Puts a First Grader in a Chokehold has Qualified Immunity, *Slate* July 29, 2021. https://slate.com/news-and-politics/2021/07/texas-corporal-punishment-qualified-immunity.html.
[3] *Corbitt v. Vickers*, No. 17-15566 (11th Cir. 2019).
[4] Nick Sibilla, *Federal Court: Cops Accused of Stealing Over $225,000 Have Legal Immunity*, Forbes, September 17, 2019. https://www.forbes.com/sites/nicksibilla/2019/09/17/federal-court-cops-accused-of-stealing-over-225000-have-legal-immunity/?sh=4f98a9405a85.
[5] *Brooks v. The City of Seattle*, No. 08-35526, slip op. (W.D. Wash. Mar. 26, 2010) https://cdn.ca9.uscourts.gov/datastore/opinions/2010/03/26/08-35526.pdf.
[6] *Howse v. Hodous. Also see* NAACP LDF Petition for Writ of Certiorari - https://www.supremecourt.gov/DocketPDF/20/20-636/159838/20201105165719709_Howse%20v.%20Hodous%20Petition.pdf.
[7] Nick Sibilla, *Court Grants Qualified Immunity To Cops Who Set A Man on Fire By Tasing Him*, Forbes, February 19, 2021. https://www.forbes.com/sites/nicksibilla/2021/02/19/court-grants-qualified-immunity-to-cops-who-set-a-man-on-fire-by-tasing-him/?sh=7760623fcff7.
8 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
[9] Reuters staff, *Reuters Finds Stark Disparity in How Judges Apply Qualified Immunity*, Reuters, August 25, 2020. https://www.reuters.com/article/uk-usa-police-immunity-takeaways/reuters-finds-stark-disparity-in-how-judges-apply-qualified-immunity-idUKKBN25L18B; *also see* e.g. Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018)

need not answer the question of whether a state government official's action violated the Constitution and can instead simply decide that it did not violate "clearly established law."[10] These rulings create two substantial issues. First, two cases rarely share the same exact facts so officials who violate people's fundamental rights will often be protected by qualified immunity. Second, by allowing courts to leave constitutional questions unanswered when a state government official benefits from qualified immunity, courts fail to rule on whether particular conduct violates the constitution, thereby making it impossible for future victims to identify the kind of "clearly established law" they need to win in court. This poses an incredibly high and arbitrary barrier to show that a state government official has violated a person's rights.

- **Qualified immunity signals to law enforcement that they can get away with unconstitutional conduct**. It creates a disconnect between unconstitutional behavior and consequences because law enforcement and other state officials frequently avoid accountability in civil suits for violating people's rights. Qualified immunity also makes the application of the law arbitrary because it turns on whether a prior case has ever been decided on the same facts and not on whether a state official violated the law or on the seriousness of the violation.

- **The threat of qualified immunity can dissuade people from engaging in litigation, even if their fundamental rights have been violated.** Rather than screening against frivolous lawsuits, qualified immunity has the unintended effect of making it more difficult for those who have actually been harmed to seek redress for violations of their civil rights. When a court rejects a defendant's qualified immunity defense, the defendant has two opportunities to appeal before even going to trial—first after losing a motion to dismiss, and second, after losing a motion for summary judgement. These appeals can seriously delay proceedings as plaintiffs may face three rounds of appeals, each of which could take a year or more to resolve. Such delays create extraordinary monetary duress on those who have been injured and are seeking damages. From the perspective of attorneys representing clients where qualified immunity is a factor, too often the recovery cost of redress does not justify the time and resources spent to litigate the case and respond to each appeal. Witnesses needed to help build the case may forget information before a case gets to the discovery or trial phase, making it more difficult to prove a case. This prolonged process can further dissuade victims, or alternatively cause individuals to settle or withdraw from suits in otherwise meritorious cases, precisely due to the financial and mental burden imposed by the extension of a legal proceeding. Limited evidence indicates that at least some attorneys may screen cases, and ultimately decline taking on cases, where qualified immunity issues may arise.[11]

(officers did not violate "clearly established" law when using a canine to apprehend a person who had surrendered with his hands raised even though a prior decision, Campbell v. City of Springboro, 700 F.3d 779, 789 (6th Cir. 2012), held officers violated Fourth Amendment by using canine on suspects who were not fleeing).

[10] *Pearson v. Callahan*, 555 U.S. 223 (2009).

[11] Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477 (2011).

Qualified immunity is not necessary to protect officials who stay within the bounds of the law.

- **Courts already afford police officers wide latitude to engage in problematic behavior and offer officers extensive protections**.[12] Abolishing qualified immunity is a critical component towards removing barriers to accountability and holding those who engage in abusive conduct liable. But abolishing qualified immunity alone will only solve part of the problem, and other barriers to accountability and problematic standards for law enforcement conduct will still need to be addressed. For instance, eliminating qualified immunity will not directly address issues with how the Court has interpreted the Fourth Amendment's prohibition on use of unreasonable force or pretextual stops of drivers which enable discriminatory policing.[13]

- **Qualified immunity does not screen frivolous cases – other procedural safeguards do so.** Available evidence shows that qualified immunity does not help officers avoid insubstantial claims before discovery, which the Supreme Court opined was one of the key goals of the doctrine.[14] In fact, available evidence suggests the opposite: that cases where qualified immunity is raised are very, very rarely dismissed before discovery.[15] Furthermore, various procedural rules already ensure that frivolous cases are thrown out of court without the assistance of qualified immunity.

- **Proponents of qualified immunity claim that officers will be bankrupted in the event qualified immunity is abolished, but this contention flatly ignores how the doctrine works in practice**.[16] The justification for qualified immunity is largely based on the idea that officers should not be bankrupted for making reasonable mistakes.[17] But officers are already protected from financial consequences by a separate mechanism: indemnification. One authoritative study of 81 law enforcement agencies showed that governments paid 99.98% of money plaintiffs recovered in lawsuits alleging civil rights violations by law

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[12] Chris Kemmitt and Kevin Jason, NAACP-Legal Defense Fund: This is the First Step to End Police Violence but Not the Last, Courts Routinely Grant Qualified Immunity to Officers that Shoot First and Think Later. That's a serious Barrier to Police Accountability and Fairness, There Are Others, USA Today, December 3, 2021. https://www.usatoday.com/story/opinion/2021/12/03/naacp-end-qualified-immunity/8633787002/.

[13] Craig M. Glantz, *Could This be the End of the Fourth Amendment Protections for Motorists?* Whren v. United States, 116 S. Ct. 1769, 87 The Journal of Criminal Law & Criminology 3, 864-894 (1996). https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6924&context=jclc

[14] *Ashcroft v. Iqbal* 556 US ____21 (2009). Accessible at: https://www.supremecourt.gov/opinions/08pdf/07-1015.pdf.

[15] Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 Noter Dame Law Review 1797 (2018). Accessible at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4796&context=ndlr.

[16] Joanna Schwartz, Ending Qualified Immunity Won't Ruin Cops Finances, It will Better Protect the Public. All Evidence Points to a Single Conclusion: Arguments Used to preserve qualified immunity – and Kill Reform Efforts — Have no Basis in Reality. USA Today, October 14, 2021, https://www.usatoday.com/story/opinion/2021/10/14/qualified-immunity-reform-police-accountability/6001696001/.

[17] *Pierson v. Ray*, 386 U.S. 547 (1967).

enforcement between 2006 and 2011.[18] Thus, even in the rare instance when plaintiffs are able to prove a violation of "clearly established" law, officers rarely pay for their unconstitutional conduct because they are almost always indemnified.[19] Abolishing qualified immunity would reinforce the importance of people's constitutional rights, address accountability lapses in law enforcement, and restore a degree of community trust in police. No longer would victims be barred from relief due to the many ways in which the doctrine protects officers to the detriment of justice. Qualified immunity is meant to strike a balance between the competing concerns of a state government official and harmed party, but in practice it is causing serious harms to the public without fulfilling its intended purpose.

A legislative remedy, such as HR 1470, is needed to end qualified immunity.

- **The U.S. Supreme Court has repeatedly upheld this problematic doctrine, leaving victims of unconstitutional conduct by state officials without relief.** Because law enforcement officers are rarely charged criminally for their violation of law, civil court is often the only avenue for victims to receive justice. The Supreme Court continues to apply—and even expand—qualified immunity to this day. Congress must act expeditiously to eliminate qualified immunity by passing HR 1470, the Ending Qualified Immunity Act.

[18] Joanna C. Schwartz, *Police Indemnification*, 89 New York University Law Review 3, 885-1005, 887 (June 2014). accessible at: https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-3-Schwartz.pdf.
[19] *See* Schwartz, *supra* note 12; In 2020 Colorado enacted SB-20-217, "Enhance Law Enforcement Integrity Act" which creates a cause of action under the Colorado Constitution for individuals to sue officers for violations of their rights. The law requires law enforcement agencies to indemnify officers for any liability resulting from judgement, unless officer's employer determines "the officer did not act good faith and a reasonable belief that the action was lawful, then the peace officer is personally liable and shall not be indemnified" up to $25,000.

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