



Center for Justice & Democracy's  
Public Policy Clinic  
New York Law School

## MEMORANDUM IN SUPPORT OF BANNING QUALIFIED IMMUNITY FOR ALL FEDERAL, STATE, AND LOCAL ENFORCEMENT OFFICERS

### Introduction

Police brutality, implicit bias, and excessive force are ongoing problems facing the nation at-large. The death of George Floyd, a 46-year-old Black man killed by Minneapolis police last May during an arrest, really sheds light on the need for systematic changes in policing. One policy proposal that could effectively alter policing, supported by both progressives and at least some conservatives, eliminates the qualified immunity defense for law enforcement officers.

Qualified immunity protects federal, state, and local officials from liability in virtually all circumstances of constitutional violations. The lack of accountability of law enforcement officers, in particular, has created a crisis for victims of law enforcement abuse. The Supreme Court created this crisis nearly a half-century ago and is unlikely to reverse it. Therefore, Congress must act by eliminating the doctrine of qualified immunity.

Congress has approached the issue in two main ways: The narrow approach is contained in the Justice in Policing Act (S.3912 in the last Congress), and the current House bill, the George Floyd Justice in Policing Act of 2021 (HR 1280), which would eliminate qualified immunity as a defense for federal, state, and local law enforcement officers. This legislation passed the House last year by a 236 to 181 vote but died in the Senate. The broader approach is the Ending of Qualified Immunity Act (S. 492), which would ban the use of the doctrine not only for federal, state, and local law enforcement officers but for *all* officials. We support both approaches, although the George Floyd act approach has the most momentum.

### What is Qualified Immunity?

Qualified immunity is a judicially created defense used in 42 U.S.C. §1983 civil rights actions. While the doctrine was first established in the 1967 Supreme Court case *Pierson v. Ray*,<sup>1</sup> it was greatly expanded in 1982 in the decision, *Harlow v. Fitzgerald*.<sup>2</sup> Under *Harlow*, government officials are covered under qualified immunity and thus shielded from liability for civil damages if their conduct does not

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<sup>1</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>2</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

violate “clearly established statutory or constitutional rights” of which a reasonably competent person would have known.<sup>3</sup> Put another way, state or local officials can use the defense of qualified immunity if they violate someone’s constitutional rights but were faced with a situation that no, or few other officials have found themselves in before.

Current events put this defense into perspective. On April 11, 2021, Duante Wright, a 20-year-old Black young adult, was pulled over by Brooklyn Center, Minn., Police Department officers for a traffic violation related to expired registration tags.<sup>4</sup> Soon after the stop, officers realized that Mr. Wright had a warrant out for his arrest.<sup>5</sup> The officers then tried to detain Mr. Wright, and during the course of detaining Mr. Wright, Officer Kim Potter shot him.<sup>6</sup> Officer Potter claimed that she meant to tase Mr. Wright and not shoot him.<sup>7</sup> Suppose Mr. Wright’s family wants to bring a federal civil rights suit on his behalf. In that case, they will have to prove that this particular situation, an accidental discharge of a gun instead of a taser, happened before to other officers and the courts in those cases found their actions unconstitutional. The Wright family has one case that they can point to, which was decided by a Minnesota federal court in 2005.<sup>8</sup> However, this one case alone will not be enough to overcome the defense of qualified immunity. The qualified immunity doctrine requires that existing precedent must place the constitutional question *beyond* debate.<sup>9</sup> A constitutional question is placed beyond debate when there are several cases, not just one, supporting the unconstitutionality of the officer’s actions.<sup>10</sup>

Contrary to the discussion in the media, qualified immunity does not eliminate all lawsuits by victims. Suits are allowed against cities, and many fix their problems only after such civil suits are brought.<sup>11</sup> But there is only a limited amount that can be accomplished in terms of reform and deterrence if the individual responsible is not held accountable somehow. As Jay Schweikert writing for the CATO Institute, remarked, “increased accountability brought by eliminating qualified immunity would affect these underlying [police] practices.”<sup>12</sup>

The judicial expansion of qualified immunity has been criticized by both ends of the political spectrum. For example, conservative Justice Clarence Thomas expressed the view that the qualified immunity doctrine, as it now stands, has gone too far and strays away from the original intent of Congress when it

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<sup>3</sup> Harlow v. Fitzgerald, 457 U.S. 800 (1982).

<sup>4</sup> *What to Know About the Death of Duante Wright*, THE NEW YORK TIMES (Apr. 23, 2021), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>.

<sup>5</sup> *What to Know About the Death of Duante Wright*, *supra* note 5.

<sup>6</sup> *What to Know About the Death of Duante Wright*, *supra* note 5.

<sup>7</sup> *What to Know About the Death of Duante Wright*, *supra* note 5.

<sup>8</sup> Alan Feuer and Mihir Zaveri, *At Least 15 Officers Mistook Guns for Tasers. Three Were Convicted.*, THE NEW YORK TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/nyregion/taser-manslaughter-cases-kim-potter.html>

<sup>9</sup> White v. Pauly, 137 S. Ct. 548, 551 (2017).

<sup>10</sup> Kisela v. Hughes, 138 S. Ct. 1148 (2018).

<sup>11</sup> Joanna C. Schwartz, *Watching the Detectives*, THE NEW YORK TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/opinion/16schwartz.html>.

<sup>12</sup> Jay Schweikert, *Yes, Abolishing Qualified Immunity Will Likely Alter Police Behavior*, CATO INSTITUTE (June 17, 2020, 6:06 PM), <https://www.cato.org/blog/yes-abolishing-qualified-immunity-will-likely-alter-police-behavior>

passed 42 U.S.C. §1983.<sup>13</sup> And in a recent survey conducted by the libertarian Cato Institute, nearly two-thirds (63%) of Americans support eliminating qualified immunity.<sup>14</sup>

## What We Support

Where someone is harmed by police abuse, they should be able to sue not only the city but also the individual responsible. The ability to hold individuals accountable is why Congress passed the Ku Klux Klan Act, in 1871, now codified as 42 U.S.C. § 1983, which in turn created a cause of action for individuals whose constitutional rights were violated to sue state officials for damages.<sup>15</sup>

We support both congressional approaches to accomplish this, both of which would add language to the end of 42 U.S.C. §1983:

1. The George Floyd Justice in Policing Act, also known as the Justice In Policing Act, eliminates the defense of qualified immunity for federal, local, and state law enforcement officers.

“It shall not be a defense or immunity in any action brought under this section against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2021), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code), that—

- (1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
- (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.”

2. The Ending Qualified Immunity Act eliminates the defense of qualified immunity for *all* federal, state, and local officials, not just law enforcement officers.

“In any suit pending on, or filed after, the effective date of the Ending Qualified Immunity Act of 2021, it shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or Federal laws were not clearly established at the time of

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<sup>13</sup> *Baxter v. Bracey*, 590 U.S. \_\_\_\_ (2020) (Thomas, J. dissenting).

<sup>14</sup> Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INSTITUTE (July 16, 2020), <https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police#:~:text=The%20Cato%20Institute%20Summer%202020,ruled%20officers%20may%20not%20engage>.

<sup>15</sup> Ku Klux Klan Act of 1871. Ch. 22. 17 Stat. 13; 42 U.S.C. § 1983.

their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.”

### **What Do Bill Opponents Say?**

There are three main arguments surrounding the opposition to the ban on qualified immunity. First, opponents of the ban fear that eliminating qualified immunity will be detrimental to the health and safety of the citizens of the United States.<sup>16</sup> They are worried that the elimination of qualified immunity will not only serve as a deterrent but as an over-deterrent, where law enforcement officers decide not to act or second-guess their decisions for fear of facing civil liability for split-second decisions.<sup>17</sup> While overdeterrence is a legitimate fear, it has little to do with qualified immunity. Underlying constitutional legal standards are already highly deferential to split-second decision-making. For instance, to prove that an officer acted with excessive force in facilitating an arrest, the plaintiff needs to prove that the officer’s action fell beyond the scope of reasonableness, which already considers that most police officers are often forced to make split-second judgments in situations.<sup>18</sup>

Second, eliminating qualified immunity would negatively impact the recruitment and retention of police officers because they would fear being sued and personally accountable for the damages. While it is true that damages awards can surpass a typical salary of a police officer, police officers are nearly always indemnified by their municipal employers in the event that there is a constitutional violation and plaintiffs do overcome qualified immunity. A 2014 article titled *Police Indemnification*, written by Joanna Schwartz, a UCLA law professor and one of the foremost scholars of qualified immunity stated that “governments paid approximately 99.8% of the dollars the plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.”<sup>19</sup> (See the Colorado example below.)

Lastly, qualified immunity is necessary to prevent frivolous lawsuits against police officers.<sup>20</sup> However, assuming there is a problem with frivolous civil rights lawsuits, the defense of qualified immunity does little to address that problem. There are specific tools that address and deter frivolous litigation, such as heightened pleadings standards, and depending on the subject matter and context, even more, stringent requirements apply.<sup>21</sup>

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<sup>16</sup> *Qualified Immunity Pros and Cons*, NATIONAL POLICE SUPPORT FUND (Feb. 4, 2021), <https://nationalpolicesupportfund.com/qualified-immunity-pros-and-cons/#:~:text=Pros%3A%20Qualified%20Immunity%20Benefits,jobs%20to%20keep%20communities%20safe>.

<sup>17</sup> *Qualified Immunity Pros and Cons*, *supra* note 13.

<sup>18</sup> *Graham v. Connor*, 490 US. 386 (1989).

<sup>19</sup> Joanna C. Schwartz, *Police Indemnification*, 89 NYU L. Rev. 885 (2014).

<sup>20</sup> *Qualified Immunity Pros and Cons*, *supra* note 13.

<sup>21</sup> Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They’re Wrong*, CATO INSTITUTE (June 19, 2020), <https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong>

## Case Study: The State of Colorado

The concerns that the opposition has regarding eliminating qualified immunity are valid but should be largely assuaged by how Colorado handled their affairs regarding qualified immunity and their current successes. In June 2020, Governor Jared Polis of Colorado signed a bipartisan sweeping law enforcement reform bill titled the Enhance Law Enforcement Integrity Act (SB20-217).<sup>22</sup> The Act created a new civil rights action that allows Coloradans to sue for damages in state court for deprivation of rights by all local and state law enforcement officers.<sup>23</sup> The cause of action explicitly prohibits the defendant from raising the affirmative defense of qualified immunity.<sup>24</sup> To respond to concerns about law enforcement officer's personal liability for the damages, the Act requires law enforcement agencies to indemnify their officers who acted upon a good-faith and reasonable belief that their actions were lawful.<sup>25</sup> This exception aside, the required indemnification places pressure on the agencies to root out bad actors that could put a financial strain on the agencies' funds.

### Expected Supporters

There has been extensive support for eliminating qualified immunity. The support has been shown by prominent organizations, businesses, and even professional athletes.

The Cato Institute, reflecting one of their recent polls that Americans support eliminating qualified immunity, has shown support for the ban of the defense.<sup>26</sup> In efforts to pass Massachusetts bills that would hold police accountable for violence and abuse, the American Civil Liberties Union brought together a collective of groups –including labor, faith, domestic violence, gun violence prevention, and racial justice groups, that supported the elimination of qualified immunity.<sup>27</sup> Endorsing organizations include 1199SEIU, A.D.L. New England, Black Economic Council of Massachusetts, Greater Boston Interfaith Organization, Jane Doe Inc., MA Coalition to Prevent Gun Violence, National Association of Social Workers - M.A. Chapter, the New England Area Conference of the NAACP, Violence in Boston, Inc., and 92 other statewide and local groups from around the Commonwealth.<sup>28</sup>

The Players Coalition, an organization of professional athletes spanning all sports, coaches, and owners that strive to improve social justice and racial equality, sent a letter on behalf of 1,100 + athletes and coaches and 300 + front personnel across the N.F.L., N.B.A., and MLB, supporting

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<sup>22</sup> Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=347eebbe378a>.

<sup>23</sup> Nick Sibilla, *supra* note 19.

<sup>24</sup> Nick Sibilla, *supra* note 19.

<sup>25</sup> Nick Sibilla, *supra* note 19.

<sup>26</sup> Emily Ekins, *supra* note 3.

<sup>27</sup> *ACLU, 100 Organizations Call for Reforms to Police Practices, Qualified Immunity*, ACLU (July 2, 2020, 3:00 PM), <https://www.aclum.org/en/news/aclu-100-organizations-call-reforms-police-practices-qualified-immunity>.

<sup>28</sup> *ACLU, 100 Organizations Call for Reforms to Police Practices, Qualified Immunity*, *supra* note 24.

the elimination of qualified immunity, one notable signee was Tom Brady, 7x Super Bowl Champion and 5x Super Bowl M.V.P.<sup>29</sup> It is clear that the ban on qualified immunity has broad, vocal public support and that Congress should codify the support.

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<sup>29</sup> *Tom Brady, Several Patriots Sign Petition to End Qualified Immunity*, NBC SPORTS (July 10, 2020), <https://www.nbcsports.com/boston/patriots/tom-brady-several-patriots-sign-petition-end-qualified-immunity>.

## APPENDIX: VICTIM STORIES

### Amy Hughes

Amy Hughes was subjected to excessive force at the hands of Officer Andrew Kisela while she was in the midst of a mental breakdown.<sup>30</sup> Officer Andrew Kisela and two other officers arrived on the scene after receiving a radio report that a woman, later identified as Ms. Hughes, was engaging in erratic behavior. The officers stood behind a chain-linked fence and saw a woman, Sharon Chadwick, and Ms. Hughes stand no more than six feet away from each other. Officers grew concerned when they saw Ms. Hughes holding a large kitchen knife. Since Ms. Hughes matched the description of the woman who had been described in the radio report, the officers told Hughes to drop the knife twice. Ms. Chadwick noticed the officers pull out their guns and told everyone to “take it easy.” Even though Ms. Hughes appeared calm; she did not acknowledge the officers’ presence or drop the knife. At this point, Officer Kisela took it upon himself to shoot Ms. Hughes *four* times. The officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. From the moment the officers saw Ms. Chadwick to the moment Officer Kisela fired the shots, less than one minute elapsed. Ms. Hughes brought a civil rights lawsuit but could not overcome the defense of qualified immunity.<sup>31</sup>

### Shase Howse

On July 28, 2016, Mr. Shase Howse was coming home from a convenience store and stopped on his front porch to look for his keys. Cleveland Police Officers who were patrolling the nearby area saw Mr. Howse on his front porch and stopped the vehicle to question whether or not he lived there. Mr. Howse responded that it was his house and continued to look for his keys. Detective Middaugh, one of the officers, got out of the car, started walking towards Mr. Howse’s front porch, and continued to question him about his relationship with the house. Detective Middaugh then told Mr. Howse to put his hands behind his back and that he was going to jail. Mr. Howse responded that he lived at the house they were at and refused to put his hands behind his back. The other officers in the patrol car ran the front porch to assist Detective Middaugh. At this point, Mr. Howse was “*slammed* to the floor of the porch” and was held down by Detective Middaugh and Hodous. Mr. Howse’s head was repeatedly slammed into the floor of the front porch when he tried to lift his head. Subsequently, Mr. Howse was arrested and put into the police car. Mr. Howse brought a civil rights lawsuit but could not overcome the defense of qualified immunity.<sup>32</sup>

### Alexander Baxter

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<sup>30</sup> Kisela v. Hughes, 138 S. Ct. 1148 (2018).

<sup>31</sup> Kisela v. Hughes, 138 S. Ct. 1148 (2018).

<sup>32</sup> Howse v. Hodous, 953 F.3d 402 (6<sup>th</sup> Cir. 2020) *cert. denied*, No. 20-636, 2021 WL 850627.

Alexander Baxter was burglarizing a house when a neighbor saw and called the police. Then, Mr. Baxter heard police sirens and ran into a nearby house and waited in the basement until the coast was clear. Officer Spencer Harris and Officer Brady Bracey arrived on the scene with the canine unit and quickly searched the nearby House. Once the dogs signaled that Mr. Baxter was present, the officers told Mr. Baxter to get out. Mr. Baxter surrendered to the police officers, but one of the officers released his dog anyway and apprehended Baxter with a bite on his arm and was arrested. Mr. Baxter brought a civil rights lawsuit but could not overcome the defense of qualified immunity.<sup>33</sup>

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<sup>33</sup> *Baxter v. Bracey*, 751 Fed. App'x. 869 (6<sup>th</sup> Cir. 2018) *cert. denied*, 140 S. Ct. 1862 (2020).