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.

[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.

[9] *Ibid.*
[10] *Ibid.*