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When civil rights litigants seek damages against state and local officials under 42 U.S.C. § 1983, a statute originally enacted in 1871 as part of the broad post-Civil War Reconstruction Acts, or against federal officials via *Bivens* actions,[1] there are many barriers to success.[2]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

[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.