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

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:

---

[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—

[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

---

[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]

---

[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

[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.

---

[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).