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MEMORANDUM

FROM: Jay Schweikert, Policy Analyst
TO: Chair Mike Weissman, Vice Chair Leslie Herod, and Members of the House Judiciary Committee
RE: **HB1287, Civil rights and qualified immunity**
DATE: Thursday, March 5, 2020

Members of the Committee:

On Thursday, March 5, 2020, you will consider House Bill 20-1287, "A Bill For an Act Concerning Enforcement of Colorado Constitutional Rights in Colorado State Courts." This bill, as amended, would allow a person to bring a civil cause of action in Colorado state court against a state actor who infringes that person's rights, privileges, or immunities under Article II of the Colorado State Constitution. A key provision of this bill states that "Neither qualified immunity, nor a defendant's good faith but erroneous belief in the lawfulness of his or her conduct, is a defense to liability pursuant to this section." As you consider this issue, it is crucial to consider some important facts about qualified immunity, and in particular, the devastating effect that qualified immunity has had on the ability of individuals to vindicate their civil rights and on accountability for state agents, especially members of law enforcement.

Qualified immunity is a judicial doctrine invented by the U.S. Supreme Court, which applies to civil rights lawsuits brought under 42 U.S.C. § 1983 ("Section 1983"). Section 1983 is structurally similar to House Bill 20-1287, in that it creates a cause of action in federal court for individuals whose federally protected rights are violated by state actors. Although Section 1983 says nothing about any immunities, qualified or otherwise, the Supreme Court has nevertheless held that state and local officials cannot be held liable under this statute, even when they act unlawfully, unless their actions violated "clearly established law."[1] And Although qualified immunity only formally applies to Section 1983, many states have effectively imported a similar or identical version of the federal doctrine to apply to state-law claims against state officials.[2]

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

[2] *See Youngblood v. Clepper*, 856 S.W.2d 405, 407 (Tenn Ct. App. 1993).

***First*, the "clearly established law" standard is an undue and substantial hurdle for civil rights plaintiffs with valid constitutional claims.** This is because the Supreme Court has repeatedly insisted that "clearly established law must be 'particularized' to the facts of the case."[3] In practice that means, 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*.

In fact,, 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 whether the relevant case law happens to include prior cases with fact patterns that closely match their own. Perhaps most disturbingly, the doctrine can actually 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.

Although the Supreme Court has always purported to say that an exact case on point is not strictly necessary,[4] it has also stated that "existing precedent must have placed the statutory or constitutional question beyond debate."[5] 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." For example, in *Baxter v. Bracey*,[6] 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.[7]

This minor factual distinction was enough to immunize the officer and deny compensation to the injured plaintiff. The *Baxter* court granted 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."[8] In other words, prior case law holding unlawful the use of police dogs

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[3] *White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

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

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

[6] 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).

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

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

against non-threatening suspects who surrendered by *laying on the ground* did not "clearly establish" that it was unlawful to deploy police dogs against non-threatening suspects who surrendered by *sitting on the ground with their hands up*.

Second, **qualified immunity does not merely harm the *victims* of police misconduct—it also hurts the law enforcement community itself, 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, and it cannot be done safely and effectively without the trust and cooperation of communities. Unsurprisingly then, public perception of accountability is absolutely essential to police effectiveness.[9]

Yet in the wake of many high-profile police shootings, particularly of unarmed individuals, public confidence in law enforcement has been plummeting. Indeed, by 2015, Gallup reported that public trust in police officers had reached a twenty-two-year low.[10] Although only a small proportion of officers are involved in fatal encounters in any given year,[11] that fraction still generates a huge number of fatalities in absolute terms. For example, between 2015 and 2017, police officers fatally shot nearly a thousand Americans each year,[12] with tens of thousands more wounded.[13] And the widespread prevalence of cell phones, combined with the ability to share videos on YouTube and social media, means that footage of police shootings are being documented and shared like never before.[14]

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. Even police officers share this assessment—in a 2017 survey of over 8,000 officers, 72% disagreed with the statement that "officers who consistently do a poor job are held accountable."[15]

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[9] *See generally* Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* (2008).
[10] Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015).
[11] Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015).
[12] Julie Tate et al., *Fatal Force*, Washington Post Database (last updated Mar. 31, 2019)
[13] Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017).
[14] *See generally* Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, WASH. POST (Dec. 13, 2015)
[15] Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).

The antidote to this crisis is exactly the sort of robust accountability that Section 1983 and similar state-level civil rights acts are 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 one Judge Don Willett of the Fifth Circuit, "perhaps the most diverse amici ever assembled" [16] —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.[17]

***Third*, although qualified immunity was largely intended to spare government agents from having to endure the time and expense of litigation, recent empirical scholarship demonstrates that qualified immunity has actually failed at its own goal**. In a 2017 study, Professor Joanna Schwartz demonstrated that qualified immunity is far more likely to be raised at the summary judgment stage of a trial, *after* discovery has already occurred.[18] This means that, even if a case is ultimately dismissed on the basis of qualified immunity, the defendants still had to answer discovery requests, sit for depositions, etc.

Moreover, at least in the federal system, defendants are permitted to appeal denials of qualified immunity before a case even goes to trial, in contravention of the normal rule that parties may only appeal final judgments. Again, the nominal purpose of this rule is to spare defendants entitled to immunity from having to go to trial in the first place, but the practical effect is usually *increased* litigation costs for all involved. As one federal judge recently explained, "[a]dditional expense and burden result because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a

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

[17] *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).

[18] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 1 (2017).

trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal."

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In summation, both at the federal level and in state systems that have adopted the doctrine, qualified immunity has eviscerated the remedial and deterrent effects of civil rights statutes, undermined police-community relations, and even failed at achieving its own practical objectives. I hope you will consider these features of the doctrine as you decide whether to enact a civil rights law for Colorado that explicitly negates the availability of any such doctrine.