MEMORANDUM

FROM: Jay Schweikert, Research Fellow
TO: Qualified Immunity Commission
RE: **Civil rights and qualified immunity**
DATE: Thursday, August 19, 2021

Members of the Commission:

On Friday, August 20, 2021, the Special Commission on Qualified Immunity will hear public testimony about the doctrine of qualified immunity.

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 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, the Massachusetts Supreme Judicial Court has interpreted Massachusetts's state civil-right act to also incorporate the doctrine of qualified immunity.[2]

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. It is also important to untangle some of the most common misunderstandings about the doctrine—most importantly, the myth that qualified immunity protects "good faith" decisions by public officials.

***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*.

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

[2] *See Rodriques v. Furtado*, 410 Mass. 878, 881 (Mass. 1991).

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

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." To give just a couple concrete examples:

- 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] 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."[8] 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 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***,[9] 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.'"[10] 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

[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).

[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).

[9] 878 F.3d 541 (6th Cir. 2017).

[10] *Id.* at 552-53 (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 17 (6th Cir. 2012)).

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."[11] 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."[12]

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 whether the relevant case law happens to include prior cases with fact patterns that 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. 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."[13]

There is no shortage of cases illustrating this point, but the following two are representative:

- ***Corbitt v. Vickers***:[14] 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

[11] *Id.* at 553.

[12] *Id.* at 558 (Clay, J., concurring in part and dissenting in part).

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

[14] 929 F.3d 1304 (11th Cir. 2019).

prior case law involved the "unique facts of this case."[15] 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."[16]

- ***Kelsay v. Ernst***:[17] 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."[18]

***Second*, 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

[15] *Id.* at 1316.

[16] *Id.* at 1323 (Wilson, J., dissenting).

[17] 933 F.3d 975 (8th Cir. 2019) (en banc).

[18] *Id.* at 980.

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.[19]
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 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 in *bad* faith, but where a court simply had yet to address that exact scenario.

For example, in a case called *Jessop v. City of Fresno*,[20] 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."[21] 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*,[22] 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.[23]

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[19] *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.").

[20] 936 F.3d 937 (9th Cir. 2019).

[21] *Id.* at 941 & n.1.

[22] 992 F.3d 1003 (10th Cir. 2021).

[23] *Id.* at 1021.

***Third*, 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.[24]

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.[25] Although only a small proportion of officers are involved in fatal encounters in any given year,[26] that fraction still generates a huge number of fatalities in absolute terms. For example, between 2015 and 2017, police officers fatally shot about a thousand Americans each year,[27] with tens of thousands more wounded.[28] 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.[29]

In the wake of George Floyd's death at the hands of Minnesota police—and the ongoing national turmoil his death has provoked—this issue has grown especially urgent. The shocking violence committed by Derek Chauvin and the stunning indifference of the other officers on the scene are the product of a culture of near-zero accountability, in which police simply do not expect to be held to account for their misconduct. Journalists

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[24] *See generally* Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* (2008).

[25] Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015).

[26] Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015).

[27] Julie Tate et al., *Fatal Force*, Washington Post Database (last updated Sept. 28, 2020).

[28] Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, Newsweek (Apr. 19, 2017).

[29] *See generally* Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, Wash. Post (Dec. 13, 2015)

and commentators of all stripes—including the New York Times,[30] Fox News,[31] Slate,[32] and Reason[33]—have all noted the direct connection between George Floyd's death and the doctrine of qualified immunity.

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."[34]

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.

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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 and undermined police-community relations. I hope you will consider these features of the doctrine as you listen to testimony about the effects of qualified immunity.

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[30] Editorial, *How the Supreme Court Lets Cops Get Away With Murder*, N.Y. Times, May 29, 2020.

[31] 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.

[32] 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.

[33] 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/.

[34] Rich Morin et al., Pew Research Ctr., *Behind the Badge* 40 (2017).