

To: Senate Judiciary Committee
From: Jay Diaz, General Counsel, ACLU of Vermont
Re: S. 254
Date: 1/20/2022



Thank you for the opportunity to testify on S. 254, an act relating to creating a private right of action against law enforcement officers for violating rights established under Vermont law. For fifty-five years, the ACLU of Vermont has worked for justice in our courts and in our communities, and that has included extensive litigation and policy reform efforts to improve police oversight and accountability in this state. We are proud to support this legislature's continuing and ongoing efforts in this regard, of which S.254 is the next logical step.

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The ACLU strongly supports this bill as introduced because it will provide access to justice for victims of constitutional or civil rights violations, improve communities' trust in law enforcement and the judicial system, and incentivize better law enforcement policy, training, and supervision at all levels of government. For all of these reasons, the ACLU supports the bill's elimination of qualified immunity as a legal defense for law enforcement officers who have violated someone's constitutional or civil rights.

Background

When a Vermont police officer violates someone's rights, the victim should be able to get the justice they deserve. But qualified immunity can effectively prevent victims from having their day in court, even in cases of extreme police misconduct.

Qualified immunity is a legal doctrine created by the U.S. Supreme Court in 1967 and later adopted by the Vermont Supreme Court – it has never before been considered by the Vermont legislature. The doctrine applies to all government officials, including law enforcement officers.

When a government official asserts qualified immunity, even where a court agrees that a victim's rights were violated, the plaintiff must additionally show a violation of "clearly established" statutory or constitutional rights – by providing a statute or earlier court case that is "particularized to the facts of the case."¹

Thus, unless a victim can point to a previous case with virtually identical facts, they can be denied legal relief on that basis alone. Furthermore, when qualified immunity is at issue, courts regularly skip over deciding whether a victim's rights were violated – regardless of the egregiousness of the conduct

¹ *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal quotation marks omitted)).

– and can dismiss the case solely on the basis of minor distinctions from existing caselaw. Even where identical cases have occurred, the cases must be formally published decisions of an appellate court, further limiting a victim’s ability to access justice.

Qualified immunity poses a barrier to victims of police misconduct and perpetuates a system that deprives those victims of access to justice, while also undermining police accountability and eroding public trust.

Our analysis of key provisions in S.254 appears below. As you consider this bill, there are several reasons we urge you to support it:



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Access to Justice

Qualified immunity creates an unreasonable and often insurmountable barrier for victims to access to justice. Under this doctrine, it is common for courts to hold that government agents violated someone’s rights, but that the illegality of their conduct was not well-established enough for the victim to be made whole.¹ Take, for example, the following Vermont cases²:

- *Kent v. Katz*³: A trooper put a suspect in an aggressive rear wrist lock, so aggressive that the trooper broke his wrist. The jury agreed that the officer used objectively excessive force in violation of Mr. Kent’s constitutional rights, but the jury still granted qualified immunity because the trooper “believe[d] his use of force was legal.” Even where a jury finds a constitutional rights violation, qualified immunity can prevent meaningful redress.
- *Keene v. Schneider*⁴: Troopers were permitted to enter Mr. Keene’s home. They questioned him in his living room about a possible DUI. Troopers decided to arrest him on suspicion of DUI (later dismissed by the State’s Attorney), and he refused to go with them. The troopers pepper sprayed him, took him to the floor, and repeatedly punched, elbowed, and kned him in front of his crying fourteen-year-old daughter. The district court denied qualified immunity, but the Second Circuit reversed, granting qualified immunity because the troopers’ actions did not violate clearly established law, without deciding whether the force was excessive.

² Although originating in New York City, *Cugini v. City of New York*, 941 F.3d 604 (Oct. 25, 2019), is another noteworthy example of how qualified immunity prevents access to justice. In *Cugini*, the Second Circuit agreed that an officer used excessive force when he put handcuffs on a suspect so tightly that she suffered permanent nerve damage in her wrist. Although several Second Circuit cases had already determined that “the use of excessive force in handcuffing was prohibited,” the Court said qualified immunity applied because the cases were unclear whether Ms. Cugini’s few cries of “ouch” and “ow” and other non-verbal indications of pain were sufficient to make the officer reasonable aware of her pain, despite that the officer responded to her initial cries by with the threat of “don’t make me hurt you” and further tightening her handcuffs.

³ 327 F. Supp. 2d 302 (2005).

⁴ 2:07-CV-79, 2009 WL 10702714 (D.Vt. Feb. 12, 2009), reversed by 350 Fed. Appx. 595 (2d Cir. 2009) (unpublished).

- *Winfield v. Trotter*⁵: Vermont Trooper opened and read Ms. Winfield’s mail during a warrantless search of her vehicle. The Second Circuit agreed that the trooper violated Ms. Winfield’s Fourth Amendment rights because “reading a person’s personal mail is a far greater intrusion than a search for contraband because it can invade a person’s thoughts.” Regardless, the Court reversed the lower court, finding qualified immunity for the trooper because it was not clearly established *with enough specificity* that reading someone’s mail during a warrantless consented-to general vehicle search violated the Fourth Amendment.



These are just a few of the many *published* cases in the Second Circuit and around the country where qualified immunity has prevented redress for victims whose constitutional or civil rights are violated.

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Of course, just as there are many unpublished cases, there are also many cases that never make it through the courthouse doors in the first place, due to qualified immunity. Vermont attorneys, already aware that there is no guarantee of attorneys’ fees for successful state civil and constitutional rights suits, are even less likely to bring suits involving qualified immunity because of the risk that their case will eventually be distinguished from controlling precedent and dismissed. The victims whose rights have been violated are left without recourse.

Police Accountability

Qualified immunity undermines the legislature’s work to increase police accountability and damages the credibility of our legal system. Many law enforcement leaders agree that qualified immunity is not necessary for them to do their job and in fact negatively impacts community trust on which policing is supposed to rely.

As Vermont recruits the next generation of law enforcement, the state should be embracing a culture of accountability. Ending qualified immunity will help accomplish that, not least by properly incentivizing cities and towns to prioritize good hiring, training, and oversight practices.

For all of these reasons, in a letter to Congress last year, members of the Law Enforcement Action Partnership (LEAP) wrote, “[W]e believe it is crucial to end a legal doctrine that has contributed to the erosion of public trust in the justice system and made all of us less safe: qualified immunity.”ⁱⁱ We encourage Vermont law enforcement to listen to these colleagues and to the overwhelming majority of Vermonters who are calling for an end to qualified immunity, an essential step toward increasing trust between police and the communities they serve.

⁵ 710 F.3d 49 (2013)



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Racial Justice

Qualified immunity is also a major barrier in the fight for racial justice. This legal doctrine perpetuates systemic oppression by disproportionately standing between BIPOC and their ability to access justice. Black people are overrepresented in Vermont’s criminal legal systemⁱⁱⁱ and are still unjustly stopped, searched, arrested, and subjected to more police violence at far greater rates than white people.^{iv}

Qualified immunity is another facet of systemic racism in our legal system and is simply incompatible with our state’s longstanding commitment to civil rights.

Broad Public Support

Recent polling shows nearly three in four Vermonters support eliminating qualified immunity for police in Vermont. That support extends across the political spectrum, including 85 percent of Vermont Democrats – more than half of whom say they “strongly” support ending qualified immunity for police – and 51 percent of Republicans.^v Further, 93 percent of Vermonters agree that when Vermont police violate someone’s rights, we need to make sure that families, victims, and survivors can access the justice they deserve.

Provisions of S. 254

Eliminating Qualified Immunity as a Defense for Law Enforcement Officers

S. 254 codifies a right to sue for civil and constitutional rights violations and eliminates qualified immunity as a defense to liability for law enforcement officer misconduct. The bill makes it clear that actions can be brought against an individual officer and removes an unreasonable barrier to justice for victims of police misconduct.

Attorney Fees

This bill ensures that when a victim substantially prevails in their claim, they are eligible for reasonable attorney’s fees and litigation costs. It also ensures that, when a judgment is entered in favor of a defendant, the court can award reasonable attorney fees and costs for frivolous claims.

This section strikes the right balance in ensuring that the cost of litigation is not a bar to legitimate claims, while also deterring plaintiffs from bringing illegitimate claims. Other states that have passed laws to end qualified immunity – including Colorado, whose law serves as the basis for S.254 – have not seen a wave of frivolous litigation.

Indemnification

As in the Colorado law, S. 254 requires employers to indemnify their officers for judgments against them arising from this law. An exception to this indemnification requirement arises when the employer determines that the

officer acted in bad faith. In this case, the employer can choose to make the officer personally liable for the lesser of five percent of the judgment or \$25,000. If this amount is not collectable from the officer, the employer is liable for satisfying that portion of the judgment to the victim.

The inclusion of personal liability for officers acting in bad faith both provides a deterrent for unlawful behavior, while ensuring that employing government entities shoulder the vast majority of the responsibility for making victims whole and improving internal training and accountability mechanisms.



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S.254 strikes the right balance of affording access to justice for victims while retaining appropriate defenses and protections for officers, the vast majority of whom will not be impacted negatively by this legislation. That has borne out in the experiences of other states who have acted to end qualified immunity, and it is time for Vermont to join them.

Conclusion

We appreciate the Judiciary Committee's work to improve access to justice and police accountability. This legislation is a necessary continuation of that work. Simply put, qualified immunity is incompatible with Vermonters' civil rights. We strongly support this bill that would remove an unjust barrier to victims of police misconduct, move us towards a law enforcement culture of systemic accountability, and help to build trust between law enforcement and the communities they serve.

ⁱ <https://www.aclu.org/cases/baxter-v-bracey>.

ⁱⁱ <https://lawenforcementactionpartnership.org/qualified-immunity/>.

ⁱⁱⁱ The Council of State Governments Justice Center, Justice Reinvestment II Working Group Report: Vermont (2021),

<https://www.vermontjudiciary.org/sites/default/files/documents/Vermont%20Justice%20Reinvestment%20II%20Working%20Group%20Report%20-%20January%202022.pdf>.

^{iv} See, S. Seguino & N. Brooks, Driving While Black and Brown in Vermont (January 9, 2017), https://www.uvm.edu/giee/pdfs/SeguinoBrooks_Police_Race_2017.pdf [<https://perma.cc/BEA6-6F7V>].

^v <https://www.acluvt.org/en/qualified-immunity-polling-results>.