

May 10, 2021

The Honorable Charles Schumer
Majority Leader
U.S. Senate
Washington, DC 20004

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, DC 20004

Re: End qualified immunity to ensure meaningful accountability measures in the Senate version of the Justice in Policing Act of 2021.

Dear Senate Majority Leader Schumer and Senate Minority Leader McConnell:

The 89 undersigned organizations that seek to advance civil rights and government accountability urge you to end qualified immunity and restore the full force of our civil rights laws that provide accountability when government officials deprive individuals of their rights.

The Fourteenth Amendment was added to the Constitution against the backdrop of police and mob violence directed against African Americans. The authors of the Fourteenth Amendment detailed the need for universal guarantees of liberty and equality, and they laid out, often in gruesome detail, a campaign of unending violence against African Americans perpetrated by police and white mobs. The Fourteenth Amendment was designed to put an end to such police violence and killings. The Amendment's authors recognized that African Americans could not take their place as equal citizens in our nation if the states and their officers were free to brutalize them.¹ The Reconstruction-era Congress wrote 42 U.S.C. § 1983 to enforce the Fourteenth Amendment's promise of liberty and equality by holding police and other state actors accountable for violating the constitutional rights of the public they swear to protect.² The text of Section 1983 is as clear as can be: it makes officials acting under color of state law categorically liable for constitutional violations and provides no immunities from suit. Rather than heeding this text, the Supreme Court has interpreted Section 1983 to give officers sweeping immunity from suit, even when they engage in brutal conduct, disproportionately harming the marginalized communities the Fourteenth Amendment was meant to protect.

In 1967, the U.S. Supreme Court created from whole cloth the legal doctrine of qualified immunity, which shields government officials from civil liability when they violate people's constitutional rights in all but the rarest cases, creating a sweeping defense that does not exist in the text of our laws. Under the doctrine of qualified immunity, as it currently exists, government officials cannot be held personally liable unless they have violated a constitutional right that was "clearly established" at the time of the violation.³ In practice, it has become very difficult to meet this standard, because plaintiffs are often required to identify prior case law involving nearly identical fact patterns. Even in cases in which the defendant's actions were obviously wrong, the plaintiff is often denied relief and the government official escapes accountability.

¹ David H. Gans, *"We Do Not Want to be Hunted": The Right To Be Secure and Our Constitutional Story of Race and Policing*, Constitutional Accountability Center (July 23, 2020), [https://www.theconstitution.org/think tank/racistpolicing/](https://www.theconstitution.org/think-tank/racistpolicing/).

² *Id.*

³ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The judge-made qualified immunity doctrine leaves a gaping hole in federal civil rights laws, frustrating congressional intent to hold government actors accountable for unconstitutional acts. As a result, instead of a system of remedies for misconduct, we have a system that breeds impunity. We cannot hope to rein in abuses of power if courts give the police and other state actors a free pass when they violate an individual's rights.

Furthermore, qualified immunity enables the abuses the Fourteenth Amendment was written to prevent and embeds systemic racism, anti-Blackness, and white supremacy into the law. The Reconstruction-era Congress wrote 42 U.S.C. § 1983 to not only make victims of state abuse whole, but to deter state and local governments from having practices that deprive individuals of their rights. With qualified immunity shielding their officers from verdicts to pay, indemnifying governments and their agencies have little to no incentive to reform unconstitutional practices or to invest in proper training. When applied to instances of police misconduct and abuse in particular, qualified immunity disproportionately harms Black people, who are more likely to be stopped without cause and killed by police than white people.⁴ Qualified immunity closes the courthouse doors to the very people that Congress most wanted to protect when it created Section 1983.

Qualified immunity doctrine must end without exception. Ending qualified immunity would ensure government accountability, encourage courts to play their historic role of redressing abuse of power, remedy and deter wrongdoing by those sworn to uphold the law, help victims obtain justice, and create an incentive for governments to properly train, equip, and staff their departments.

On March 3, the U.S. House of Representatives passed H.R. 1280, the George Floyd Justice in Policing Act, which would end qualified immunity for state and local law enforcement.⁵ But H.R. 1280 is only a half measure, and half measures on qualified immunity will not do when attempting to hold police and other state actors accountable for unconstitutional acts. Half measures would in fact *insert* qualified immunity into Section 1983 at the worst possible moment. In the courts, plaintiffs victimized by abuse of power *right now* correctly point out that the defense should be curbed because it does not exist in the text of the statute. Writing the defense into law for officers other than law enforcement threatens to frustrate many challenges at the Court and codify the doctrine for a huge number of public officials. Furthermore, focusing only on the problem of immunity for law enforcement raises the public policy question of why it is appropriate for certain governmental officials to get away with *depriving people of their constitutional rights*, but not others? This is not how the Constitution is meant to work. The rights of our national charter are meant for *all* to enjoy, and when they are violated, recourse must be had.

Qualified immunity reaches further than the realm of policing and unfairly insulates from accountability a wide range of other government officials. This includes, but is not limited to, school officials, caseworkers, social workers, detention and correctional facility staffers, probation officers, and government employers. Unfortunately, this has impeded redress in thousands of cases in which state officials violate constitutional rights in horrific circumstances, the following of which is a very small sample:

⁴ *Qualified Immunity*, Equal Justice Initiative (last visited May 4, 2021), <https://eji.org/issues/qualified-immunity/>.

⁵ 167 Cong. Rec. H1070-71 (daily ed. Mar. 3, 2021).

- The Supreme Court granted qualified immunity to school administrators who subjected a 13-year-old Arizona girl to a strip search of her bra and underpants because they baselessly believed she had pain relief pills.⁶
- The Fourth Circuit granted qualified immunity to members of the Buchanan County Department of Social Services after they unlawfully conspired to prevent a woman from being hired for a non-political job because of her affiliation with the Republican Party.⁷
- The Fifth Circuit granted qualified immunity to a correctional officer who had sprayed a Texas prisoner in the face with a chemical agent without reason, violating the prisoner's Eighth Amendment rights.⁸
- The Second Circuit granted qualified immunity to prison officials who, in violation of the Constitution, had kept a pretrial detainee in solitary confinement for more than a year simply because the detainee asked a question about commissary access.⁹

Due to the immense harm that qualified immunity has caused, this judge-made doctrine must be ended across the board to ensure government accountability and encourage courts to play their historic role of redressing abuse of power, as Section 1983 intended. **It should not be codified into law by removing, reforming, or modifying the immunity for some government actors but not for all.**

Last year, nearly 500 civil rights organizations [called](#) on Congress to *end* the defense, not reform it, and certainly not insert it into Section 1983.¹⁰ **We call on you again to end qualified immunity, make victims whole, and reinstate the promise of liberty, equality, and accountability made to the American people when Congress passed Section 1983.**

If you have any questions about the content of this letter, please contact the Constitutional Accountability Center's Director of Policy, Kristine Kippins, at kristine@theusconstitution.org.

Sincerely,
 A Little Piece of Light
 Active Advocate
 African American Ministers In Action
 Alliance for Justice
 American Atheists
 American Civil Liberties Union
 American Friends Service Committee
 Americans for Democratic Action (ADA)
 Amnesty International USA
 Autistic Self Advocacy Network

⁶ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

⁷ *Fields v. Prater*, 566 F.3d 381 (4th Cir. 2009).

⁸ *McCoy v. Alamu*, 950 F.3d 226 (5th Cir. 2020).

⁹ *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017).

¹⁰ Letter from The Leadership Conference on Civil and Human Rights et al., to Speaker Pelosi et al., (June 1, 2020), http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorities_Final_6.1.20.pdf.

BACC
Bend the Arc: Jewish Action
Black With No Chaser
Blacks in Law Enforcement of America
Center for Civilians in Conflict (CIVIC)
Center for Disability Rights
Center for LGBTQ Economic Advancement & Research (CLEAR)
Civil Rights Corps
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Constitutional Accountability Center
DC Democratic Caucus for Returning Citizens
Defending Rights & Dissent
Demand Justice
Disability Rights Education and Defense Fund
Drug Policy Alliance
Earthjustice
Equal Justice Society
Equity and Transformation
Ex-Incarcerated People Organizing (EXPO)
Faith Action Network - Washington State
Freedom From Religion Foundation
Friends Committee on National Legislation
Girls Inc.
Government Information Watch
Hispanic Federation
Human Rights Campaign
Human Rights Watch
Immigrant Legal Advocacy Project
Impact Fund
Innocence Project
Interfaith Action for Human Rights
Jewish Council for Public Affairs
Justice Action Center
Labor Council for Latin American Advancement
Lambda Legal
Law Enforcement Action Partnership
Lawyers for Good Government (L4GG)
LGBT Bar Association of New York
LivableStreets Alliance
Lovelace Consulting Services, Inc. (LCSI)
Mayers Strategic Solutions, LLC
Muslim Advocates
National Advocacy Center of the Sisters of the Good Shepherd
National Association of Social Workers
National Council of Churches
National Disability Rights Network (NDRN)
National Employment Law Project
National Equality Action Team (NEAT)

National Immigration Project
National Network for Immigrant & Refugee Rights
National Organization for Women
National Partnership for Women & Families
Natural Resources Defense Council
NETWORK Lobby for Catholic Social Justice
New Athens Creative, Inc.
Oasis Legal Services
Open Society Policy Center
People For the American Way
People's Parity Project
Project On Government Oversight
Protect Democracy
Public Justice
Restore The Fourth
Sanctuary DMV
Southern Border Communities Coalition
Southern Coalition for Social Justice
SPLC Action Fund
Students for Sensible Drug Policy
The Black Police Experience
The Center for HIV Law and Policy
The Center for Popular Democracy
The Daniel Initiative
The Daniel Initiative S.E.T. Project
Ujima, Inc: The National Center on Violence Against Black Women
Unitarian Universalist Service Committee
Veracity Entertainment, LLC
Voices for Progress
Vote Huntsville
Wisconsin Transit Riders Alliance

Cc: Chairman Dick Durbin, Ranking Member Chuck Grassley, Senator Cory Booker, Senator Tim Scott, members of the U.S. Senate Committee on the Judiciary, U.S. Senate, Representative Karen Bass