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Illinois Senate Executive Committee
Subject Matter Hearing: On: (HB 163 SA 2)

Testimony on Qualified Immunity
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Chairperson Hunter and Members of the Senate Executive Committee:

My name is Peter Hanna, and I am a Legal Advisor with the ACLU of Illinois. I am grateful for your leadership in recognizing the urgent need for meaningful police and criminal justice reform, and for introducing House Bill 163, which would deliver several much-needed reforms to policing in Illinois.

My focus will be on qualified immunity, a doctrine that undermines police accountability, eviscerates public trust in law enforcement, and denies victims of egregious civil rights abuses redress. For far too long, qualified immunity has played a corrosive role in policing, enabling a small minority of police to engage in unconstitutional conduct with impunity.[1] The General Assembly has a chance to change that, and it should.

I want to emphasize, at the outset, that eliminating qualified immunity and other state immunities, alone, will not be enough to achieve meaningful police reform. We also need a state use of force law that establishes clear, objective, statewide guidelines on police use of force; we need to limit the use of military style equipment and tactics in interactions with communities; we need use of force and use of military style equipment and tactics reporting; and we need to eliminate the affidavit requirement for investigating police complaints. House Bill 163 is a strong step towards achieving these, and many other important and necessary goals for reforming our policing and criminal legal system.

In its call to ensure that qualified immunity does not stand in the way of holding police accountable for harming members of the public, the ACLU of Illinois is joined by organizations from across the ideological spectrum, including the Cato Institute, the Law Enforcement Action Partnership, and the National Organization of Black Law Enforcement Executives. Giving people a path to seek redress when their civil rights are violated is not a partisan issue.

In the context of state tort lawsuits, qualified immunity and absolute immunity under the Tort Immunity Act (concepts that are sometimes conflated) operate to immunize public officials, including and especially police, from liability for violating a person's rights. In federal litigation, qualified immunity refers to the judge-made doctrine that shields public officials from liability in civil rights lawsuits brought under 42 U.S.C. § 1983 ("Section 1983"). In all cases, whether brought in state or federal court, qualified immunity creates an often insurmountable barrier to justice for people whose

[1] Confusion around the doctrine of qualified immunity is sometimes exploited to obfuscate the doctrine's role and impact. On pages 4-7 of this testimony, I include a short section addressing some of the common misconceptions around qualified immunity, and explain why they do not withstand scrutiny.

rights have been violated, and it enables a small minority of police to engage in unconstitutional conduct against residents with limited consequences or ramifications. You can fix this problem.

We call upon the Illinois General Assembly to enact House Bill 163, which includes a measure that would allow a person to bring a cause of action in Illinois state court against peace officers who, while on duty, violate that person's rights under the Illinois Constitution, including Art. I, Section 6, which protects against use of force violations. Such a law should be free of barriers to accountability, and thus should provide that no immunities, like qualified or absolute immunity, would be a defense to liability. By passing this law, accusations of constitutional violations can be assessed on their merits and on a case-by-case basis, leading to more just and equitable outcomes for Illinois. By enacting such a law, which Colorado did more than six months ago, we would be taking a practical and effective first step towards incentivizing police to conform their behavior to constitutional standards.

The Policing Crisis

Police in America kill 1,000 people every single year. Indeed, even in a year where cities have been locked down for long stretches at a time, police remain on track to meet that grim milestone again in 2020, having killed more than 800 people this year. The number of Americans killed by police is but a fraction of the tens of thousands who are beaten and brutalized by law enforcement officers each year, and the millions arrested and jailed annually. It sadly comes as no surprise that a disproportionate number of people harmed by police or incarcerated are Black Americans and other people of color. This injustice, among many others, has fueled the national outrage we feel when we see, again and again, egregious and unacceptable police uses of force repeated with little or no accountability of any kind.

There can be no true reform until we acknowledge the difficult, but plainly obvious truth: our system of policing and criminal justice has failed. It has failed the victims of police misconduct who cry out daily for accountability. It has failed to fulfill the most fundamental promises of equal justice under the law found in the U.S. and Illinois Constitutions. And it also has failed every single police officer who serves the public professionally, dutifully, and constitutionally, yet cannot gain the public's trust due to the unconstitutional actions of a small number of unaccountable police. We have accepted this pernicious system and its iniquities at an incalculable cost. Much of that cost has fallen squarely on the most vulnerable in our society, those who consistently, historically, and very clearly have been the most common victims of our broken system. House Bill 163 contains several important steps that Illinois should now take.

Section 1983

It is also clear that far too many instances of inexcusable police misconduct and violence arise from violations of constitutional rights. More than a century and a half ago, another legislative body, also grappling with rampant civil rights violations, sought to develop a statutory mechanism for vindicating civil rights. Recognizing that a right without a remedy is hardly a right at all, in April 1871 the Reconstruction Congress passed "[a]n act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication." Later codified as 42 U.S.C. § 1983, the act provided, for the first time, a means to hold public officials, including police, accountable for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," and empowered victims of civil rights abuses to recover legal, equitable, and other appropriate relief. Since Section 1983 was enacted, many states, including Massachusetts, Maine, New Jersey, and most recently, Colorado, have adopted laws modeled after Section 1983, which similarly recognize a private right of action to vindicate *state* constitutional rights.

Qualified Immunity

Section 1983 (and similar state laws) does not create any new rights. Instead, it provides a vehicle for enforcing rights created by the U.S. Constitution. There are already high procedural barriers to bringing constitutional claims against police in federal court, and substantive constitutional law itself affords defendants in Section 1983 cases a panoply of potent tools for defeating Section 1983 claims. For example, in evaluating a Section 1983 claim alleging police use of excessive force, courts apply the Fourth Amendment objective reasonableness standard, i.e., courts determine whether a reasonable police officer would have used the same force applied by the police officer being sued. Federal courts are highly deferential to police discretion, as the Supreme Court has cautioned courts against applying "20/20 vision of hindsight in favor of deference to the judgment of reasonable officers on the scene." To be clear, any person bringing a Section 1983 claim must navigate an array of procedural and substantive obstacles to have any hope of prevailing.

Unfortunately, each putative Section 1983 plaintiff must also reckon with the doctrine of qualified immunity. In cases involving police, qualified immunity forecloses *any possibility of police liability* unless the victim can establish that the police violated "clearly established law." This exacting standard generally requires civil rights plaintiffs to identify not only a cognizable legal or constitutional basis for the asserted claim, but a prior case with facts that are essentially identical as well. Indeed, courts often point to minor and inconsequential factual distinctions (like the time of day) to avoid finding that "clearly established law" exists. Moreover, courts rarely make new "clearly established law" as cases are often dismissed on qualified immunity grounds without ever determining whether a constitutional violation occurred at all. As a result, whether a victim of civil rights violations can get redress for injuries under Section 1983 turns not on whether their rights were violated, nor even on how egregious the police officer's conduct was, but rather on whether a plaintiff can establish that a sufficiently identical constitutional violation occurred in a prior case that the court happens to agree is sufficiently similar to the facts at hand. One of the most jarring implications of qualified immunity is as counterintuitive as it is shocking: police who devise novel ways to violate a person's constitutional rights are afforded with the greatest degree of qualified immunity.

There is no dispute that the "clearly established" requirement has mutated a law intended to vindicate constitutional rights into a judicial rubber stamp for even the most egregious police misconduct. There is no dearth of examples of the inequitable and unjust outcomes that occur when qualified immunity is applied:

- In *Jessop v. City of Fresno*, a case in which police officers stole more than $225,000 in cash and rare coins while executing a search warrant, the Ninth Circuit held 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."
- The Eleventh Circuit in *Corbitt v. Vickers* concluded that a deputy sheriff in Georgia who accidentally shot a ten-year-old child lying on the ground – while repeatedly attempting to shoot a pet dog that posed no threat – was entitled to qualified immunity simply because there was no prior case with this particular set of facts.
- Finally, in *Baxter v. Bracey*, the Sixth Circuit granted immunity to officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. The plaintiff had successfully identified a prior case with nearly identical facts, in which the

Sixth Circuit had held that it was unconstitutional for police to deploy a dog against a suspect who had surrendered by lying on the ground. However, the Sixth Circuit was able to distinguish the circumstances because in the prior case, the suspect was lying on the ground, whereas Baxter was sitting on the ground with his hands up.

To law enforcement, this is not a "bug" of qualified immunity, it is a "feature." A feature that, in combination with inadequate use of force guidelines, meager data collection regarding uses of force, and ineffectual disciplinary procedures, places our highly militarized police force beyond accountability and above the law itself.

The applicable legal standard for federal qualified immunity and immunity afforded by state law differ. As one example, under the Illinois Tort Immunity Act, police enjoy blanket immunity against state law claims alleging failure to provide adequate police protection or service. But the end result is the same: people whose constitutional rights are violated by police typically have no redress in federal court because of qualified immunity or in state court under even broader immunities. And police remain unaccountable.

It would, of course, take an act of Congress or an improbable Supreme Court decision to materially alter the federal doctrine of qualified immunity, but it is within the Illinois General Assembly's power to provide the people of this state with a clear remedy in state court when police violate their civil rights. By adopting a state law equivalent to Section 1983 that is not neutralized by qualified immunity or hindered by even broader state immunities, this legislature can ensure police in Illinois act more justly and are accountable to the public. This is precisely the path Colorado has already taken, and it is a step on the right path for other states, like Illinois, that are pursuing meaningful police reform.

Common Misconceptions About Qualified Immunity Are Not Credible

Before concluding, I would like to address five common misconceptions about qualified immunity. These misconceptions, which unfortunately are sometimes exploited by qualified immunity's proponents, simply do not withstand scrutiny.

Misconception 1: Ending qualified immunity would negatively impact recruitment and retention of police officers.

This is demonstrably false. Every year, thousands of people become doctors, nurses, emergency responders, and lawyers, and go on to provide vital services in our society. All of these professions perform vital services in our society, and none of them is entitled to a blanket promise of immunity should their actions lead to the serious injury or death of an Illinois resident. The police officers we want to recruit and retain are not people who are drawn to the job by the promise of no accountability. Moreover, there simply is no evidence that holding police to the reasonable expectation (i.e., that they *may* be held accountable for violating a person's constitutional rights) will materially hurt recruiting or retention. Stories and anecdotal evidence of police attrition or reduced recruitment in Colorado, for example, confuse correlation with causation. Moreover, law enforcement recruiting is down *nationwide* due to a number of factors, ranging from the deadly pandemic, to public perception about police changing, to widespread and unpredictable unrest from groups across the ideological spectrum. Simply put, the idea that eliminating qualified immunity, alone, would make retention and recruiting significantly more difficult is unfounded, if not spurious.

Misconception 2: Police need immunity to protect their personal assets; without qualified immunity, police will be personally liable and could lose their homes.

This is a non-issue as police are virtually always indemnified for alleged misconduct. In the largest study of its kind, Professor Joanna Schwartz showed that governments paid approximately 99.98% of all dollars that civil rights plaintiffs recovered in lawsuits against police officers. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). Eliminating qualified immunity would not subject individual defendants to massive personal liability, but it would ensure that victims of unconstitutional misconduct can at least have an opportunity to obtain a remedy in court. It is notable that, although people defending qualified immunity often invoke the specter of widespread personal liability for police as the most critical issue, few of qualified immunity's proponents are ever able to provide evidence of even a *single case* where a police officer faced personal liability for their actions. And few who oppose House Bill 163 can rebut the self-evident argument that numerous other privately-employed professionals who work on matters of life-and-death do their jobs lawfully without any form of immunity.

Instead, opponents of House Bill 163 will speculate that the cost of civil rights claims would grow too high without qualified immunity, but these claims too ignore reality. Indeed, today, with qualified and other immunities well in place in Illinois, the City of Chicago *still paid more than $500 million in police-related settlement fees* over the past decade. The correct inference to draw is the same inference qualified immunity's defenders refuse to acknowledge: with qualified immunity, there is no accountability; without accountability, cities and municipalities are forced to pay exorbitant settlement fees whenever an unaccountable officer commits another grave violation of a person's constitutional rights.

Without qualified immunity, police departments will have to apply and execute their own policies more rigorously; they will need to consider questions of discipline more thoroughly and effectively; and, they will need to train a police force that understands that they could be accountable for violations of a person's constitutional rights. These are all desirable results that we could achieve by providing a meaningful mechanism, like the state cause of action contemplated in House Bill 163, for people to vindicate their constitutional rights when police violate those rights.

Misconception 3: Qualified immunity is needed to protect good cops making split-second decisions.

This also is false, as qualified immunity as nothing whatsoever to do with any legal or substantive assessment of a police officer's decisionmaking. We all recognize that policing is one of the most difficult and demanding jobs, and our courts are highly deferential to police discretion when considering constitutional claims against them. In fact, the Supreme Court has cautioned courts considering excessive force claims against applying "20/20 vision of hindsight in favor of deference to the judgment of reasonable officers on the scene." Good cops making split-second decisions are not protected by qualified immunity, they are protected by high procedural and substantive barriers to establishing a constitutional violation occurred at all. Again, qualified immunity has nothing to do with evaluating whether a police officer's judgment or conduct were "reasonable" in light of constitutional standards.

Proponents of qualified immunity often falsely suggest that without qualified immunity, police would be paralyzed to make various split-second decisions. The argument is flatly wrong. Our legal standards for determining whether a constitutional violation occurred in the first place are already highly deferential to on-the-spot police decision-making. Opponents of eliminating qualified immunity often cite the majority opinion of Chief Justice Rehnquist in *Graham v. Connor*, 490 U.S. 386 (1989) to falsely suggest that Graham showed that qualified immunity was needed to protect split-second decisionmaking. However, "qualified immunity" is not even mentioned in the majority opinion at all. Instead, the Supreme Court in *Graham* made clear that the Fourth Amendment's "unreasonableness" standard must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" and cannot be judged with "the 20/20 vision of hindsight." The Supreme Court expressly held that under the Fourth Amendment – having absolutely zero to do with qualified immunity – "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." *Id.* at 392. Qualified immunity is entirely unnecessary to ensure that police can make split-second decisions, because that protection is already fully baked into our Fourth Amendment jurisprudence. If we ended qualified immunity tomorrow, that protection would remain untouched.

Misconception 4: Police will be "apathetic" without qualified immunity.

This claim suggests that police are so cowardly or violent that they will simply cease performing their duties if they are actually held accountable for violating people's constitutional rights. It is astonishing to hear qualified immunity's defenders assert that it is absolutely necessary that police officers must be held to a lower standard of accountability than ordinary citizens (and all other professions) in order for us to expect them to perform the job they are paid to perform. Such a claim is not only shocking, devoid of any evidentiary support, but insulting to all law enforcement officers who took an oath to uphold our laws and Constitution, the vast majority of whom would continue protecting the public faithfully, dutifully, and professionally even in the absence of qualified immunity.

Like other defenses of qualified immunity, almost every defense is predicated on fear: fear that ending qualified immunity will expose police to personal liability (false), hamper police ability to make split-second decision (false), and render a trained and armed police force apathetic to the needs of the community they serve (also false). Qualified immunity is one of numerous barriers to establishing civil liability, but it is the most unjust and harmful of those barriers. Those who defend qualified immunity ignore that we want our police to expect to face legal consequences when they violate constitutional rights. It is precisely the fact that they rarely ever do face consequences – civil or criminal or even career-related – that requires the Illinois General Assembly to take action and pass a law like Section 1983 unhindered by unfair immunity defenses like qualified immunity. Eliminating qualified immunity will not make police apathetic – a police officer who is apathetic about serving the public does not belong on the police force – rather, it will encourage police officers to think twice before taking the types of actions that could violate constitutional liberties. We have already seen the limits of influencing police through policy requirements and measures that fall short of creating

real accountability. It is time to embrace real accountability for police, and that requires an end to qualified immunity.

Misconception 5: Without qualified immunity, frivolous lawsuits against police will increase.

The existence of qualified immunity today does nothing to discourage frivolous lawsuits against police. Indeed, in the most comprehensive study of the role qualified immunity plays in civil rights litigation (a study that included a review of more than 1,000 separate Section 1983 cases brought against law enforcement nationwide, *see* Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127 (2017)), qualified immunity resulted in the dismissal of just 0.6% of the 1,183 cases assessed before discovery, and resulted in the dismissal of just 3.2% of the cases before trial. This comes as no surprise to most litigators – as one district court judge opined, "the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court." *Turner v. Weikal*, No. 12-CV-915, 2013 WL 3272481, at *3 (M.D. Tenn. June 27, 20130. Professor Schwartz's research showed that litigation around the issue of qualified immunity, including motion practice and interlocutory appeals of qualified immunity denials, often greatly drove up the cost of litigating constitutional civil rights claims, prolonged cases, and complicated what otherwise could have been a simple determination: did the police officer violate the person's constitutional rights, and if so, was that violation justified under the circumstances?

In addition, there are already ample safeguards against frivolous lawsuits against police. And lastly, by its very nature as an affirmative defense, qualified immunity is only implicated only when the underlying constitutional claim has merit, i.e., in non-frivolous lawsuits.

Conclusion

Reconstruction is often called America's unfinished revolution. While it introduced momentous amendments to the U.S. Constitution and landmark legislation that would change the course of history, the failure of Reconstruction to achieve equal protection under the law still resonates across our society, and nowhere more loudly than in our policing and criminal justice systems. There is no single reform nor combination of reforms that can undo the costs of multi-generational institutionalized inequity and injustice. However, one of the first steps we must now take is holding police accountable when they violate a person's constitutional rights. That step is not possible, and equality under the law forever out of reach, so long as qualified immunity remains a harmful and unfair barrier to redressability for victims and accountability for police.

In debates about the law that would later become Section 1983, a member of the Reconstruction Congress from Kansas, David Perley Lowe, urged his colleagues to support the law in terms that seem as timely then as they do now. Lowe warned that failure to take decisive action would only mean more "lynchings" that would go unpunished, as "[i]mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." If there were to be no remedy for the civil rights violations, Lowe implored "if the rights of citizenship may be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our civil Government a failure." Police who violate an individual's rights under the Illinois Constitution should be accountable.

The Illinois Constitution gives us rights, and it is high time we have a remedy, too. I urge the Assembly to pass a state law analogous to Section 1983, unshackled by immunities that undermine police accountability, that authorizes causes of action against police who violate an individual's civil rights.

Thank you.

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