From: Jim Kaitschuk
To: Sheley, Karen; Johnson, Crystal
Cc: EXT Jim@ilsheriff.org
Subject: [External] Task Force Constitutional Rights and Remedies Request
Date: Tuesday, November 23, 2021 1:19:27 PM
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November 23, 2021

Senator Elgie Sims, Co-Chair
Representative Justin Slaughter, Co-Chair
Karen Sheley, Legal Counsel
Task Force on Constitutional Rights and Remedies

Subject: Recommendations

Co-Chairs Sims and Slaughter-

Thank you for continuing the dialogue on this essential issue. We have discussed the impacts that changes to this doctrine will have a chilling effect on law enforcement and the communities they serve.

We strongly believe that the issues in discussion are significantly impacted by the recently passed and signed HB 3653, Safe-T Act. This Act has still not fully gone into effect and won't until January 1, 2023. This Act makes it much easier to punish bad officers. This Act will generate body camera footage and other evidence that will be impactful in examining the conduct of officers. This Act empowers the Attorney General to investigate and take action against departments/agencies that act in an inappropriate and unconstitutional manner.

We do not believe that the Safe-T Act should be the end of important conversations about police and their interactions with their communities, but we do believe this Act needs time to become fully effective in order for us to understand the full impact and effects on those interactions. We believe that to further upend law enforcement by pursuing a major change to a doctrine created under federal law and made available to all public employees, including elected officials, threatens the effective roll out of the most important instance of police reform in the nation.

Thank you for the opportunity to weigh in on this important issue.

Regards,

Jim Kaitschuk,

Jim Kaitschuk
Executive Director

phone: 217-753-2372
email: Jim@ilsheriff.org
401 E. Washington, Suite 1000
Springfield, IL 62701

November 29, 2021

RECOMMEDNATIONS TO THE ILLINOIS TASK FORCE ON CONSTITUTIONAL RIGHTS AND REMEDIES

The meetings of the task force have made clear that there are two schools of thought that we must choose between. The first insists that we maintain a status quo that has failed for decades. The second seeks a change to the law that several other states have already implemented or are investigating. As Professor Joanna Schwartz explained, the continued existence of qualified immunity and other statutory blanket protections for police has harmed communities, deprived victims of police misconduct relief, and 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. In recent months, the Supreme Court has repeatedly affirmed grants of qualified immunity to police who have committed monstrous acts against ordinary citizens, including theft, assault resulting in paralysis, and even killing people.

Accordingly, **we ask that the Task Force recommend that the Illinois Assembly enact legislation 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 blanket protections to accountability, and thus should provide that no immunities, like qualified or tort immunity, would be a defense to liability. By enacting such a law, which Colorado and other states already have done, Illinois would be taking a practical and effective first step towards incentivizing police to conform their behavior to constitutional standards.

There is already bill before the Illinois Assembly that would achieve these important goals, and the Task Force should recommend that the Illinois Assembly pass that bill – HB 1727, the Bad Apples in Law Enforcement Accountability Act (the "Bad Apples Act") – into law. While this law creates no new rights, it is modeled after the Civil Rights Act of 1871 and Colorado's Enhance Law Enforcement Integrity Act, which went into effect more than one year ago. HB 1727 would authorize Illinoisans to bring lawsuits against police officers who violate their constitutional rights, and would not allow qualified immunity to be invoked as a defense in such lawsuits. The bill, as drafted, already speaks to the most significant concern identified by law enforcement advocates during the task force meetings, i.e., it allows courts to dismiss – and sanction – individuals and lawyers who bring frivolous claims. It also does not make police "personally liable" for damages, as some opponents of ending qualified immunity have falsely claimed. More than one year after Colorado ended qualified immunity protection for police, the "parade of horribles" law enforcement advocates identified during the task force's meetings have not come to pass – to the contrary, in a short time, police culture and performance has already greatly improved across Colorado.

Effective legislation can take many forms, but any legislation the Task Force recommends must have at least the following three components: (1) it must authorize lawsuits against police for constitutional violations, (2) it must preclude reliance on qualified immunity or blanket statutory protection for police, and (3) it must allow recovery of damages suffered as a result of the constitutional violation.

* * *

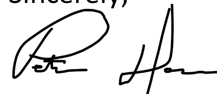
There are many myths and misconceptions about qualified immunity, and this confusion was visibly exploited by the doctrine's defenders at times during the task force meetings. However, the meetings also made clear that qualified immunity serves as a blunt instrument wielded by law enforcement in civil courts to evade accountability and to continue to propagate a toxic police culture that prioritizes individual "bad apples" over our collective constitutional rights as citizens. Even law enforcement members of the task force were shocked to learn how qualified immunity routinely shields police from accountability, as in:

- *Baxter v. Bracey:* Qualified immunity for police officers who deployed a police dog to maul a suspect who had already surrendered and was sitting on the ground with his hands up.
- *Corbitt v. Vickers*: Qualified immunity for 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 even the deputy sheriff conceded posed no threat to anyone.
- *Jessop v. City of Fresno*: Qualified immunity for police officers stole more than $225,000 in cash and rare coins while executing a search warrant.
- *Ramirez v. Guadarrama*: Qualified immunity for police officers who ignited a man by tasing him, even after they saw him douse himself with gasoline and were indisputably aware that "If we tase him, he's going to light on fire." (The man burned to death after they tased him, 85% of his body burned.)

It is difficult to find a lawyer. It is difficult to prove a police officer violated someone's constitutional rights. It is difficult to prove damages. It is difficult to win on appeal. All of those things must happen for a victim of police misconduct to get a remedy for unconstitutional police conduct even if the Bad Apples Act were already law. All the Bad Apples Act does is do what the vast majority of Illinoisans and Americans believe is right: people should be able to sue police officers and hold them accountable for excessive force and other constitutional violations. It gives victims of the most egregious police misconduct the chance – and only the chance – to get justice in *civil* court. People who have been harmed by serious police misconduct deserve the chance to have their cases decided based on the merits, not an almost insurmountable hurdle that favors police. Passing HB 1727 means recognizing that the people's interest in an accountable police force is more important than shielding a handful of rogue police officers – the bad apples we hear so much about – from lawsuits.

Thank you for allowing us to participate in this important discussion, and we are hopeful the task force does what is right and strongly endorses passage of HB 1727 to the full Illinois Assembly.

Sincerely,



Peter H. Hanna
Legal Advisor, ACLU of Illinois

City of Highland
Broadway, PO Box 218
Highland, IL 62249

To: Chairman Slaughter, Chairman Sims, Honorable Members of the Task Force on Constitutional Rights and Remedies

From: Chris Conrad-City Manager, Member representing Illinois Association of Chiefs of Police

Date: October 19, 2021 (revised version)

Re: Recommendation for consideration including alternative considerations

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I want to thank the Chairs, members, staff and all the panelists for their time, presentations and expertise on the topic of Qualified Immunity.

It is my hope that, as I have requested, staff provide data regarding how many cases in Illinois the issue of Qualified Immunity have impacted a victim's ability to seek redress from the government. In order to make an educated recommendation and avoid any unintended consequences, I believe it is important to know the actual scope of the problem in order to recommend a solution that fits the problem.

Law enforcement officers in Illinois are taught from their earliest days in the academy how to protect citizens, including those we arrest, in the safest way possible for all concerned. Officers are taught to consider the safety of suspects, other officers, involved and uninvolved citizens, and their own personal safety. They are taught to make these decisions in split seconds, under duress, in sometimes extremely high-stress situations and all based only upon the information they know at the time. We show them case studies of when officers get it wrong, stressing the consequences for the officers, their communities, and the citizens they serve. We train officers this way so they stop and think before they act. We run them through numerous scenarios during the academy and in post-

academy training to hone their decision-making skills in stressful situations.

Even with all this training, police officers will make mistakes. The difference between police and most other professions is that when a cop makes a mistake, a bad guy goes free, a victim doesn't get justice, and in terrible but fortunately infrequent circumstances, someone can be hurt or dies.

The proponents of ending Qualified Immunity have done a fantastic job of highlighting examples of egregious errors where the courts have prevented cases from going forward because of Qualified Immunity. I believe most law enforcement professionals, and even most government officials for that matter, would agree that victims of egregious acts, errors and omissions should not be prevented from seeking compensation for their injuries.

The complex issue is how to protect the interests of all involved when an individual's rights are violated due to a good-faith mistake made by public employees doing very difficult jobs. How do we balance the interests of the citizen, the government actor, the government/community that employs them and the taxpayers who will ultimately pay the price? Sometimes an officer does everything correctly and in accordance with the law, the Constitution, and their training, but tragedy still occurs. Also, as helpful as video and body cameras can be, social media can portray a portion of an event in a way that skews the actual facts. How do we prevent government actors or government itself from being inundated with nuisance court actions based upon misinformation unless there is at least some minimum standard to rise above before starting litigation? Public funds and resources should be preserved for the public good, not wasted defending frivolous lawsuits.

I found Professor Schwartz's testimony enlightening for several reasons. I agree with her that the best way to reduce potentially negative impacts of the Qualified Immunity doctrine is to prevent

the incidents before they happen. Professor Schwartz pointed out this is primarily accomplished through training and accountability. What was not discussed is where does Illinois rank in training and accountability with regard to police? The proponents of diminishing or ending Qualified Immunity cited egregious cases in federal districts in other parts of the country, but did not cite a single 7th Circuit decision that upheld an egregious act as protected by Qualified Immunity. The only 7th Circuit case provided to the task force to date is *Taylor v. City of Milford*, where the 7th Circuit overturned a District Court finding of Qualified Immunity. So it begs the question as we study a solution for Illinois, does Professor Schwartz's research reflect national trends without looking specifically at the situation in Illinois?

What are we already doing in Illinois?

Training: Since 2014, Illinois has passed two major pieces of police and criminal justice reform legislation: the Police and Community Relations Improvement Act of 2015 and the most recent SAFE-T Act of 2021. If the best way to reduce the impact of the Qualified Immunity doctrine is train officers more, then should we not give this legislation time to work? This additional training is not yet a discussion topic of the Task Force, yet the experts are telling us it is vital in preventing these types of cases.

Below is a current list of mandatory post-academy training required of every Illinois law enforcement officer. The underlined items are areas of training added with the SAFE-T Act:

Minimum in-service training requirements, which a police officer must satisfactorily complete at least annually. Those requirements shall include courses addressing:

1. *law updates*
2. *emergency medical response*
3. *crisis intervention*
4. *officer wellness and mental health*

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Mandatory training to be completed every 3 years. The training shall consist of at least 30 hours of training, at least 12 hours of hands-on, scenario-based role-playing, every 3 years and shall include:

1. *At least 6 hours of instruction on use of force techniques, including the use of de-escalation techniques to prevent or reduce the need for force whenever safe and feasible.*
2. *At least 6 hours of training focused on high-risk traffic stops.*
3. *Specific training on the law concerning stops, searches, and the use of force under the Fourth Amendment to the United States Constitution.*
4. *Specific training on officer safety techniques, including cover, concealment, and time.*
5. *Cultural competency, including implicit bias and racial and ethnic sensitivity.*
6. *Constitutional and proper use of law enforcement authority.*
7. *Procedural justice.*
8. *Civil rights.*
9. *Human rights.*
10. *Trauma informed response to sexual assault.*
11. *Reporting child abuse and neglect.*
12. *The psychology of domestic violence (change from 5 years to 3 years for consistency).*

Accountability: Through both laws, we in Illinois have implemented more provisions for police accountability than most other states.

1. *Anonymous complaints- we allow citizens to make anonymous, unaccountable accusations against our police officers, and we then keep those records regardless of the findings.*
2. *Duty to render aid; duty to intervene*
3. *Codified Officer Misconduct as a Class 3 felony.*
4. *Implemented a body worn camera mandate*
5. *Implemented state -level pattern and practice option for investigations that includes civil penalties.*
6. *Monthly reporting requirements on dispatched mental health crisis calls, incidents of use of force, and deaths in custody.*
7. *Codified and changed use of force*
8. *Provided whistleblower protections*
9. *Prevented the destruction of documents of complaints against officers regardless of the outcome of any investigation.*
10. *Implemented additional requirements for police officer certification to include, verification of compliance and individual training officer requirements and duties*

on the department ranging from documentation and reporting to mandatory background investigations.

11. *Mandatory reporting to ILETSB by the agency (Chief) upon learning of potential decertification conduct, and mandatory investigations of all complaints, including anonymous complaints.*

It is apparent we in Illinois have already taken the recommendation of Professor Schwartz and implemented significant new requirements for the training of Illinois Law Enforcement and put in place substantial and overlapping methods of accountability.

In addition, I want to mention that I was present at the Illinois Municipal League Annual Conference last month when Chairman Slaughter and Chairman Sims heard numerous comments and concerns from Illinois municipal leaders about the difficulties they are facing in the recruitment and retention of police officers. Fewer candidates are applying, and a significant number of those possess less education and are less qualified than applicants in the past. Members of the Illinois Association of Chiefs of Police reported in their Membership Survey in September 2021 that "recruitment and retention" is their number one challenge statewide. We can debate the reasons why this is happening, but the fact is this is happening, and it is creating a staffing crisis in police departments.

Illinois municipal leaders also expressed concern about the increases in costs of maintaining police departments due to the numerous unfunded mandates implemented through the reform legislation. Professor Schwartz testified to the task force that as long as indemnity is maintained, the increased cost of diminishing Qualified Immunity will be borne only by the governments who employ the government actors, confirming an increased cost of doing business for the local governments.

How can we as responsible Task Force members recommend removing or diminishing Qualified Immunity without:

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Highland, IL 62249

1. Knowing the actual scope of the problem in Illinois;
2. Taking into account increased costs on local governments;
3. Giving time to measure changes such as increased training and added accountability?

To do so would be to denigrate a profession of public servants that is demonstrably suffering from negative media portrayal on a national scale.

Recommendation:

It is the recommendation of the Illinois Association of Chiefs to that the Task Force follow the data before taking any immediate action to address qualified immunity in Illinois:

1. The Task Force must report the actual number of cases in Illinois Federal District Courts that involve a granting of Qualified Immunity. This will be important in reporting the actual scope of the Qualified Immunity issue in Illinois.
2. Include data from ILETSB on the number of officers in the State of Illinois and the estimated number of contacts per day or arrests per year made by those police officers to demonstrate what percentage of the time Qualified Immunity is actually needed and implemented in the grand scheme of Illinois law enforcement.
3. Acknowledge the current morale issues among Illinois Law Enforcement and the impact media coverage on police misconduct and proposed reform has had on police morale, recruitment, and retention.
4. Highlight for the Governor, the General Assembly, and our fellow citizens the reasonable and rational steps we are already taking in Illinois to train and hold our police officers accountable for their actions. Report how these steps are protecting the constitutional rights of our citizens.

As the late Charles Gruber, an expert on use of force and retired chief of Quincy, Elgin, and South Barrington often said, police officers on a daily basis are the first defenders of civil rights in Illinois.

We believe we can show the country that Illinois is on the leading edge in both training and accountability, something our legislators, citizens and police officers can all be proud of.

As an alternative, should the Task Force elect to move forward with addressing or diminishing Qualified Immunity at this time, we make the following suggestions:

1. Acknowledge that Qualified Immunity as now discussed is largely a federal issue and cannot be “eliminated” by state action.
2. Encourage Congress to consider codifying in federal law some of the reasonable applications of qualified immunity by the U.S. Supreme Court, first in *Saucier v. Katz*, 533 U.S. 194 (2001). Maintain in law a way to hold police agencies accountable without making an officer liable for committing an act that he/she did not know was wrong or unconstitutional.
3. Obtain the data on the actual number of Section 1983 cases in Illinois that are disposed of because of Qualified Immunity. We cannot formulate a remedy without knowing the actual problem. At this point we appear to have a solution in search of a problem.
4. If the Task Force decides to attempt to diminish Qualified Immunity in Illinois, follow the lead of New Mexico and remove state-level qualified immunity for all government employees and entities. None of the experts who testified provided any testimony to the benefit of limiting new restrictions to law enforcement only.
5. Understand that removing indemnity serves only to punish individual government actors and does not actually make victims whole. Removing indemnity would exacerbate the

current problems with recruitment and retention. To be consistent with the concept of procedural justice advanced by Professor Smith, just as it is unfair to have someone subjected to a civil rights violation go without a remedy, it is also unfair to impose an individual financial liability on a government actor who did not know his or her actions were improper.

6. Follow the recommendation of the Honorable Judge Crowder (Retired) in setting up a special court to hear these specific cases in which a person was denied a remedy because of a federal court determination that Qualified Immunity could be invoked. Judge Crowder suggested something similar as a Worker's Comp process; an alternative for qualified immunity could also exist in the Court of Claims.
7. Set parameters for entry into this special process. For instance, to understand the scope of what the court would be dealing with, limit it to claims that have been barred due to Qualified Immunity in federal court. Also, consider limiting this option to excessive use of force cases, to make it clear that this is not available to anyone who has a complaint against law enforcement and other government actors no longer protected by qualified immunity.
8. Set reasonable limits on recovery. This will require plaintiffs' attorneys to do a cost-benefit analysis before starting litigation and would be necessary to prevent unscrupulous lawyers from filing frivolous claims, thus driving up costs for municipalities or the state.
9. To prevent crippling increases in liability on municipalities, make this a state program with state funding. This would help preserve public funds/resources for the greater public good rather than to benefit the few.

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Broadway, PO Box 218
Highland, IL 62249

We understand the pressure on some task force members to find a remedy for those subjected to constitutional rights violations, even when those violations were the result of good-faith mistakes. We want to be clear that we agree it is improper to violate a person's constitutional rights. We respectfully ask the Task Force to take into account not just the impact for the victims, but also the impact on our public servants, our governments, the services they provide and our citizen taxpayers that fund them.

Respectfully submitted,

Christopher Conrad

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 EAST 60TH STREET | Chicago, Illinois 60637
PHONE (773) 702-9611 | FAX (773) 702-2063
E-MAIL futterman@uchicago.edu
www.law.uchicago.edu

Craig B. Futterman
Clinical Professor of Law

To: Illinois Legislative Task Force on Constitutional Rights and Remedies

From: Craig B. Futterman,[1] University of Chicago Law School

Date: November 27, 2021

Subject: Task Force Recommendations

I. RECOMMENDATION

The Task Force on Constitutional Rights and Remedies should recommend that the General Assembly pass H.B. 1727, the Bad Apples in Law Enforcement Accountability Act ("Bad Apples Act").[2] In addition, the Task Force should consider two amendments to this legislation: first, a provision allowing for punitive damages against individual officers; and second, a provision applying the law to certain other public employees in addition to peace officers. (I'm not making a specific recommendation about whether to apply this bill to other public employees, or to which types of employees the law should apply, but this is a topic worthy of discussion and consideration by the General Assembly.)

The Legislature should pass the Bad Apples in Law Enforcement Accountability Act for three reasons. *First and foremost*, it would provide a real remedy to victims of constitutional violations in Illinois, as contemplated by the Illinois Constitution.[3] *Second*, it would promote accountability and prevent constitutional violations in Illinois by imposing civil liability upon public employers when their employees violate the Illinois Constitution and by creating incentives for police departments and other local governmental bodies to ensure that their employees comply with the Constitution.

[1] University of Chicago law students, Vatsala Kumar and Katherine Koza, provided substantial assistance in preparing these recommendations to the Task Force.
[2] *See* H.B. 1727, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021). The Bad Apples in Law Enforcement Accountability Act seeks to create a five-year statute of limitations, but the Task Force may wish to consider a two statute of limitations instead, because it would align with the statute of limitations in most Illinois personal injury and tort claims. *See, e.g.*, 735 ILCS 5/13-202 ("Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . . .").
[3] ILL. CONST. art. I, § 12 (1970) ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

Third, this legislation would promote trust between community members and police officers, which in turn improves officer effectiveness in protecting public safety throughout Illinois.

II. REASONING

The primary basis for my recommendation is straightforward: Illinois residents should have redress when their most fundamental rights are violated.

a. Qualified immunity has denied court access to Illinois residents who have suffered constitutional violations.

Qualified immunity is an affirmative defense created by federal judges, which has denied the opportunity for a remedy to thousands of victims of federal civil rights violations. The United States Supreme Court has held that qualified immunity protects "all but the plainly incompetent" defendants, and those who "knowingly violate the law."[4]

When courts evaluate qualified immunity, they consider two questions. First, was there a constitutional violation?[5] This question applies to all constitutional cases, irrespective of qualified immunity, so it does not bear on our analysis here. Qualified immunity's true impact lies in its second question: did the defendants violate a "clearly established" right?[6] In practice, this frequently results in courts asking whether a case with nearly identical facts has been previously decided by the governing federal circuit court of appeals (in Illinois, the Seventh Circuit) or United States Supreme Court; if it has not, the defendant is entitled to qualified immunity, even when the defendant has violated a person's constitutional rights.[7] This is a high bar. As a result, qualified immunity poses a major hurdle to individuals who have suffered civil rights violations because "it generally requires them to identify not just a clear legal *rule* but a prior case with functionally identical *facts*."[8] As explored below, this doctrine has denied Illinois residents who have had their constitutional rights violated their ability to have their case heard.

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[4] *Malley v. Briggs*, 465 U.S. 335, 341 (1986).
[5] *Saucier v. Katz*, 533 U.S. 194, 200 (2001).
[6] *Id.*
[7] *Id.*; *see also Pearson v. Callahan*, 555 U.S. 223 (2009).
[8] Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure,* CATO INST. (Sept. 14, 2020), https://www.cato.org/policyanalysis/qualified-immunity-legal-practical-moral-failure.

b. Qualified immunity has caused real harm to real people in Illinois.

As detailed in the memorandum my law students and I submitted to the Task Force last month,[9] qualified immunity has had a direct and harmful impact on individuals in Illinois. Tadeusz Glozek was killed as a result of a high-speed car chase where the officer did not use his lights or sirens, but qualified immunity prevented his family from getting any redress.[10] Lemia Britt's private photos were taken from her cell phone by an officer and placed on his own phone for his pleasure, but qualified immunity denied her any justice from this violation.[11] Terrell Eason was shot by officers *six times* and killed simply because he was fleeing and had a gun, but qualified immunity denied his estate a trial or remedy.[12] The Duran family and their guests were subjected to false arrests and excessive force during a Baptism party, but qualified immunity denied them their day in court.[13] Sharnia Phillips was forced from her home in the middle of the night while officers ransacked her home pursuant to a wrong warrant, but qualified immunity prevented her from pursuing justice for the officers' illegal search and invasion of privacy.[14] Robert Bills, a fifth-grader, was interrogated daily for five days—and forced to give a false confession—about a fire he did not start, but qualified immunity denied him justice.[15] Patrick Dockery was Tased four times for patting an officer on the shoulder, but qualified immunity denied him any redress for this excessive force.[16] James White was tackled and severely injured by officers in his own home because he denied them access without a warrant, but qualified immunity denied him his day in court.[17] Regina Warlick was arrested as a result of a wrong warrant and planted evidence, but qualified immunity denied her justice.[18] Jonathan

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[9] *See* Memorandum from Craig B. Futterman, Vatsala Kumar, & Katherine Koza, University of Chicago Law School, to the Illinois Constitutional Rights and Remedies Task Force, regarding The Application of Qualified Immunity in Illinois (Oct. 27, 2021).

[10] *Magdziak v. Byrd*, 96 F.3d 1045 (7th Cir. 1996); *Magdziak v. Byrd*, No. 94-C-1876, 1995 WL 704394 (N.D. Ill. Nov. 29, 1995).

[11] *Britt v. Anderson*, 21 F. Supp. 3d 966 (N.D. Ill. 2014).

[12] *Eason v. Lanier*, No. 18-CV-05362, 2021 WL 4459469 (N.D. Ill. Sept. 29, 2021).

[13] *Duran v. Sirgedas*, 240 F. App'x 104 (7th Cir. 2007); *Duran v. Town of Cicero*, No. 01-C-6568, 2005 WL 2563023, at *1 (N.D. Ill. Oct. 7, 2005).

[14] *Phillips v. City of Chicago*, No. 18-cv-0316, 2021 WL 1614503 (N.D. Ill. Apr. 26, 2021).

[15] *Bills by Bills v. Homer Consolidated School Dist. No. 33-C*, 967 F. Supp. 1063 (N.D. Ill. 1997).

[16] *Dockery v. Blackburn*, 911 F.3d 458 (7th Cir. 2018); *Dockery v. City of Joliet*, No. 13-C-4878, 2017 WL 1179955 (N.D. Ill. Mar. 29, 2017).

[17] *White v. Stanley*, 745 F.3d 237 (7th Cir. 2014); *White v. Stanley*, No. 11-C-50057, 2013 WL 1787556 (N.D. Ill. Apr. 25, 2013).

[18] *Warlick v. Cross*, 969 F.2d 303 (7th Cir. 1992).

Catlin was brutally handcuffed by plainclothes officers who did not identify themselves, but qualified immunity denied him the right to pursue excessive force and false arrest claims.[19] Catherine Brown was cursed at, maced, kicked, arrested, and threatened with a gun while her children sat in the car, but qualified immunity denied her the right to seek justice.[20] Andy Thayer and Bradford Lyttle were falsely arrested for participating in a peaceful rally, but qualified immunity denied them a trial or remedy.[21] Rosalyn Graham was detained and interviewed for several hours while trying to purchase a gun, but qualified immunity denied her any Fourth Amendment redress.[22]

These cases represent only a small sample of the countless individuals who have been impacted by qualified immunity. The real number of individuals impacted is unknowable, as many individuals do not even get to file a claim, let alone obtain redress for the violations against them. Over the past twenty-plus years that I have directed the Civil Rights and Police Accountability Project at the University of Chicago Law School, civil rights practitioners and victims have regularly shared stories with me of cases that they did not bring because of qualified immunity, despite the existence of serious constitutional violations and harm. While I am unable to quantify the number of times Illinois attorneys reject meritorious claims for these reasons, I can confidently state that that these rejections occur numerous times every month. Civil rights attorneys also routinely complain about the costs and delays imposed by qualified immunity that prevent them from bringing meritorious cases, because defendants can repeatedly appeal orders denying qualified immunity on an interlocutory and piecemeal basis, increasing plaintiffs' cost and time investments for years before they may finally secure their right to a trial.[23]

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[19] *Catlin v. City of Wheaton*, 574 F.3d 361 (7th Cir. 2009).
[20] *Brown v. Morsi*, No. 15-CV-4127, 2018 WL 3141761 (N.D. Ill. June 26, 2018).
[21] *Thayer v. Chiczewski*, 705 F.3d 237 (7th Cir. 2012); *Thayer v. Chiczewski*, No. 07-CV-1290, 2007 WL 1369041 (N.D. Ill. Mar. 7, 2007).
[22] *Graham v. Blair*, Nos. 10–cv–772, 10–cv–780, 2011 WL 6888528, at *1 (S.D. Ill. Dec. 28, 2011). As explained in our October 27, 2021 memo to the Task Force, we present these examples based on the facts alleged by the civil rights plaintiffs, just as courts are required to do when evaluating a defense motion to dismiss or for summary judgment on the basis of qualified immunity. *See Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).
[23] *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

c. Qualified immunity exacerbates the problem of police accountability in Illinois, erodes public trust in the police, and harms public safety, by sending a message that the police are above the law.

The role of police officers is unique, in that they have the awesome powers—to arrest people, to take their freedom, to use force, and even to kill people—in order to protect and serve the people of Illinois. With great power comes responsibility and accountability to the public. However, qualified immunity protects officers who have violated the Illinois Constitution, and has exacerbated Illinois's challenges with police accountability.

Chicago's long history of systemic police abuse, including a period of documented torture, ultimately led to a civil rights investigation by the United States Department of Justice (DOJ), which found in its 2017 report that the Chicago Police Department (CPD) "has engaged in a pattern or practice of unreasonable force" disproportionately borne by Black and Brown Chicagoans, tolerated racially discriminatory conduct, and has maintained dysfunctional systems of accountability that have not only hurt people, but also undermined police legitimacy.[24] This report resulted in a federal Consent Decree between the State of Illinois and City of Chicago that mandates numerous changes to CPD policies and practices to remedy these violations and "to foster public trust."[25] Despite the Consent Decree, CPD has continued to lag in its reforms, denied the reality of ongoing abuse, and resisted change.[26]

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[24] C.R. Div. & U.S. Atty's Off., U.S. Dep't of Just., *Investigation of the Chicago Police Department* 15, 46-47 (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download.

[25] Consent Decree at ¶ 421, *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Jan. 31, 2019), ECF No. 703.

[26] *See generally* Independent Monitoring Report 3 (Amended), *State of Illinois v. City of Chicago*, No. 17-cv-6260 (N.D. Ill. Apr. 8, 2021), ECF No. 942 (detailing CPD's progress under the consent decree as of December 2020 and showing that CPD was not in compliance for 120 of 274 paragraphs); *see also, e.g.*, Madeline Buckley, *Chicago Police Leaders Acknowledge Missing Consent Decree Deadlines While Promising to Speed Up Reforms*, CHI. TRIB. (Sept. 8, 2021), https://www.chicagotribune.com/news/breaking/ct-chicago-police-report-progress-consent-decree-20210908-saitpybrrjdbplk2uyusjeucve-story.html ("[T]he monitor's report also shows that . . . [CPD] was still out of compliance in nearly 40% of the paragraphs included in [the most recent] period."); David Greising, *The Data Doesn't Lie: Traffic Stops Reveal Age-Old Biases in Chicago Policing*, BETTER GOV'T ASS'N (Oct. 29, 2021), https://www.bettergov.org/news/greising-the-data-doesn-t-lie-traffic-stops-reveal-age-old-biases-in-chicago-policing; N'dea Yancey-Bragg & Grace Hauck, *Police Don't All Act 'The Same Way': White Officers Use Force More Often, Chicago Police Study Finds,* USA TODAY (Feb. 11, 2021), https://www.usatoday.com/story/news/nation/2021/02/11/chicago-police-study-white-cops-more-likely-arrest-use-force/4439259001; *Accountability Dashboard*, CHI. POLICE DEP'T (Nov. 21, 2021), https://home.chicagopolice.org/statistics-data/data-dashboards/accountability-dashboard.

Problems with police accountability and racial bias extend beyond Chicago. Just last year, the Illinois Department of Transportation found that police throughout the state of Illinois pulled over Black people 2.76 times as often as White people, and Hispanic or Latino individuals 1.413 times as often as Whites.[27] Across Illinois, Black individuals are ticketed and searched more often than White individuals, but are less likely to have illegal drugs or contraband.[28] The disparities are even worse for pedestrian stops: statewide, police stop Black pedestrians *twenty-one* times more often than White pedestrians.[29] And police departments throughout Illinois continue to grapple with misconduct and lack of accountability.[30]

Chicago police have also shown general resistance to reforms and persistent bias in recent history. *See, e.g.*, Gregory Pratt & Madeline Buckley, *Chicago Police Leader Resigned Over 'Inability' of Department Brass 'To Even Feign Interest' in Reform, Then Accused Officials of Retaliation*, CHI. TRIB. (Nov. 11, 2021), https://www.chicagotribune.com/news/breaking/ct-chicago-police-consent-decree-reforms-resign-lightfoot-20211111-pdniyih24rgobpw6bmjogwgf4a-story.html; Fran Spielman, *Reform Bill Hands 'Keys to the Criminals,' Chicago Police Union President Says*, CHI. SUN-TIMES (Jan. 14, 2021), https://chicago.suntimes.com/2021/1/14/22231554/police-reform-bill-catanzara-chicago-crime-misconduct-body-cameras (describing the Fraternal Order of Police (FOP) president John Catanzara's criticism of the SAFE-T Act); Mitch Dudek et al., *Police Bodycam Video Shows Officer Shoot Anthony Alvarez As He Ran From Cops With a Gun In His Hand*, CHI. SUN-TIMES (Apr. 28, 2021), https://chicago.suntimes.com/news/2021/4/28/22407717/anthony-alvarez-chicago-police-shooting-bodycam-video-released-lightfoot-family-call-peace ("Fraternal Order of Police President John Catanzara said the shooting was justified. 'It's a 100% good shooting,' he said . . . ."); Emanuella Evans & Adeshina Emmanuel, *Analysis: Here's How Chicago's Most Powerful Police Union Preserves Tradition of Problematic Leadership*, INJUSTICE WATCH (Sept. 13, 2021), https://www.injusticewatch.org/news/2021/analysis-heres-how-chicagos-most-powerful-police-union-maintains-tradition-of-problematic-leadership.

[27] Ill. Dep't of Transp., *Illinois Traffic and Pedestrian Stop Study: Part I – Executive Summary and Appendices* 7–8 (June 24, 2021), https://idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2020/FINAL--Part%20I%20Executive%20Summary%202020%20Traffic%20Stops--6-24-21.pdf. In Chicago, this disparity is even more heightened: officers stop Black drivers seven times more often than White ones. Rachel Murphy, *Illinois Traffic Stops Still Disproportionately Targets Black Drivers*, ACLU (Aug. 25, 2021), https://www.aclu-il.org/en/news/illinois-traffic-stops-still-disproportionately-targets-black-drivers.

[28] Kristin Crowley, *13 Investigates: Traffic Stop Study to Track Racial Profiling May Miss the Mark*, 13 WREX (Feb. 10, 2021), https://www.wrex.com/news/13-investigates/13-investigates-traffic-stop-study-to-track-racial-profiling-may-miss-the-mark/article_080f2c0b-9925-5e2d-9b6b-bbef37bba2c4.html (noting that in Freeport, Winnebago, Ogle, Rockford, Belvidere, and others, officers pulled over, ticketed, and searched Black drivers at a far higher rate, but that Black drivers in those areas were less likely to have illegal drugs or weapons than white drivers).

[29] Ill. Dep't of Transp., *Illinois Traffic and Pedestrian Stop Study: Part II Pedestrian – Detailed Tables* 1 (June 24, 2021), https://idot.illinois.gov/Assets/uploads/files/Transportation-System/Reports/Safety/Traffic-Stop-Studies/2020/FINAL--Illinois%20Traffic%20and%20Pedestrian%20Stop%20Study%202020%20-%20Part%20II%20Pedestrian--6-24-21.pdf.

[30] *See, e.g.*, Gloria Casas, *Elgin Police Task Force Discusses Cop's Post About 'How Cops Should Truly Be,' Decides to Tackle Use of Force Policies First*, CHI. TRIB. (Oct. 2, 2021), https://www.chicagotribune.com/suburbs/elgin-courier-news/ct-ecn-elgin-citizen-police-task-force-meets-st-1003-20211002-aqhjcrhdgncppfxlqvxh6aobpy-

The DOJ has long recognized that "trust and effectiveness in combating violent crime are inextricably intertwined."[31] By allowing officers to escape liability when they violate the Constitution, qualified immunity erodes public trust in the police and undermines public safety.[32] In contrast, by holding police accountable when they violate the Illinois Constitution, passing the Bad Apples in Law Enforcement Accountability Act would generate trust and enhance officers' ability to do their jobs. When people see that police are held accountable when they violate the law, they "are more likely to obey the law; they are more likely to trust law enforcement; and they are more likely to work together with law enforcement to improve public safety, such as reporting crime, serving as witnesses, identifying safety concerns, and cooperating with the police in investigations."[33]

III. ADDRESSING TASK FORCE CONCERNS ABOUT REMEDYING CONSTITUTIONAL RIGHTS

a. Officers are indemnified and do not pay out for violations.

Some Task Force members have raised concerns that police officers will face financial hardship and will leave the force if the General Assembly establishes a remedy for victims when officers violate their Constitutional rights. Those concerns are unfounded. Under Illinois law, public agencies must indemnify their employees and pay compensatory damages and any attorneys' fees

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story.html; James Fuller, *Elgin Task Force Finds Obstacles to Creating Direct Police Accountability to Civilians*, DAILY HERALD (Nov. 5, 2021), https://www.dailyherald.com/news/20211105/elgin-task-force-finds-obstacles-to-creating-direct-police-accountability-to-civilians?utm_source=ourcommunitynow&utm_medium=web; Kallie Cox & William Freivogel, *Records Show Illinois Fails to Hold Police Accountable for Misconduct*, PULITZER CTR. (Oct. 19, 2021), https:/
/pulitzercenter.org/stories/records-show-illinois-fails-hold-police-accountable-misconduct; Sundiata Cha-Jua, *Changing Champaign's Police-Hiring Policy*, NEWS-GAZETTE (Aug. 15, 2021), https://www.news-gazette.com/opinion/columns/real-talk-changing-champaigns-police-hiring-policy/article_cd2faf78-b277-58e6-8c1a-0a5c34b748d2.html; Steven Spearie, *Allegations Against Officer Mark 'A Sad Day for Springfield Police Department,'* STATE J.-REG. (Feb. 25, 2021), https://www.sj-r.com/story/news/2021/02/25/accused-springfield-police-officer-appears-briefly-court/6813017002; Andy Grimm, *State AG Launches Investigation into Joliet Police Department*, CHI. SUN-TIMES (Sep. 8, 2021), https://chicago.suntimes.com/politics/2021/9/8/22662670/joliet-police-department-investigation-state-attorney-general-kwame-raoul.

[31] U.S. Dep't of Just., *supra* note 24, at 1–2.

[32] S*ee id.* (public trust in the CPD "has been broken by systems that have allowed CPD officers who violate the law to escape accountability. This breach in trust has in turn eroded CPD's ability to effectively prevent crime"); *see also* Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 155–56 n. 105 ("Chicago data… reveal that police are least successful in addressing crime in the areas they have the least trust.").

[33] Futterman et al., *supra* note 32, at 206–08; *see also* Tracey L. Meares & Peter Neyroud, *Rightful Policing*, NAT'L INST. OF JUST. (Feb. 2015), https://www.ojp.gov/pdffiles1/nij/248411.pdf; TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

awarded when police officers or other public employees hurt people while acting within the scope of their employment.[34] Passing the Bad Apples in Law Enforcement Act would not change the fact that in Illinois, government bodies—not officers—pay compensatory damages when they are awarded.[35]

Nonetheless, I recommend that the Task Force consider imposing some financial consequence directly upon individual officers in the form of punitive damages, in the limited circumstance in which a jury finds that an officer willfully and wantonly violated a person's rights. This would require an amendment of the Illinois Bad Apples Act, because the current bill does not authorize punitive damages.

Punitive damages in Illinois are paid by the individual offender and not the municipality,[36] and may be granted only if the offender acted with "fraud, actual malice, deliberate violence or oppression," or "willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others."[37] Everyone should agree that officers should face individual responsibility when they *maliciously* violate a person's rights. If an officer abuses and disgraces their badge by acting so far outside the bounds of human decency as to intentionally and maliciously harm people, the imposition of punitive damages against them sends the unmistakable message to the police and public that this is not who we are. Allowing punitive damages in these limited instances is good for both the public and police.

b. Qualified immunity is unnecessary to insulate officers from liability for genuine split-second decisions.

Notwithstanding the doctrine of qualified immunity, police officers are already protected from constitutional liability when they make reasonable split-second decisions to use force based on the circumstances at the time. The United States Supreme Court has long recognized that, under the

[34] 745 ILCS 10/9-102.
[35] Officers outside Illinois would similarly face no financial consequences should qualified immunity be abolished elsewhere, because "they are virtually certain not to pay anything from their own pocket" since governments pay approximately 99.98% of the amounts that plaintiffs recover. Joanna Schwartz, *Ending Qualified Immunity Won't Ruin Cops' Finances. It Will Better Protect the Public.*, USA TODAY (Oct. 14, 2021), https://www.usatoday.com/story/opinion/2021/10/14/qualified-immunity-reform-police-accountability/6001696001; Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).
[36] 745 ILCS 10/2-302 ("[N]o local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.").
[37] *Loitz v. Remington Arms. Co.*, 138 Ill. 2d 404 (1990) (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978)).

Fourth Amendment to the U.S. Constitution, officers' decisions may not be judged after the fact by armchair quarterbacks, but must be judged from the perspective of a reasonable officer on the scene based on the totality of the circumstances at the time that the officer made the decision to use force.[38] Officers do not need qualified immunity to insulate themselves from civil liability for reasonable decisions made under stressful, evolving circumstances.

Because a number of Task Force members have raised concerns about protecting police officers from the consequences of difficult split-second decisions, it is also important to note that the frequency of true split-second decisions has been overstated. As an empirical matter, it is rare that external factors make it *necessary* for officers to make split-second decisions to use force. As Professor Michael Avery recognized nearly twenty years ago, "Reliance on the need for split-second decisions is highly questionable when the actions of the officers have created or enhanced the likelihood of a need for rapid action."[39] When police departments train their officers to properly assess situations, to take tactical positions to maximize safety and the opportunity to develop a sound response, and to de-escalate conflict, officers can usually avoid the need for split-second decisions to use force. In practice, split-second decision making is "often compelled by a specific officer's behavior and also lacks support in policing best practices."[40] Additional psychological and scientific research "calls into question the wide-spread acceptance of the maxim that police officers are often forced to make split-second decisions."[41]

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[38] *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (stating that the reasonableness calculus must account for "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

[39] Michael Avery, *Unreasonable Seizures of Unreasonable People*, 34 COLUM. HUM. RTS. L. REV. 261, 321 (2003); *see also id.* at 266 ("Sound training minimizes the need for split-second decisions. Untrained officers, or those who forget or disregard their training, are far more likely to exacerbate the tensions inherent in confrontations with emotionally disturbed people and are thus more likely to escalate the risk of a violent outcome.")

[40] Erik Zimmerman, *The Incompatibility of the Police Use of Force Objective Reasonableness Standard and Split-Second Decision Making*, CRIM. JUST. (forthcoming 2022); *see also* Jamie Kalven & Eyal Weizman, *How Chicago Police Created a False Narrative After Officers Killed Harith Augustus*, INTERCEPT (Sept. 19, 2019), https://theintercept.com/2019/09/19/harith-augustus-shooting-chicago-police/ ("The critical point, though, is that it was not criminal activity by Augustus, but aggressive and inept policing that produced the split second in which an officer responded with deadly force . . . .").

[41] Zimmerman, *supra* note 40 ("Policing researchers have shown through empirical studies that there are concrete steps – such as how an officer points the muzzle of their weapon when confronting someone – that can significantly decrease the chances of making an incorrect split-second decision." (citing Paul L. Taylor, *"Engineering Resilience" Into Split-Second Shoot/No Shoot Decisions: The Effect of Muzzle-Position*, 24 POLICE Q. 185

c. The SAFE-T Act and other reforms do not address this particular issue.

Another recurring theme has been that the Task Force should wait and see how the SAFE-T Act and other recent reforms (such as body cameras, additional training, etc.) play out before passing legislation along the lines that I have recommended. This is a false comparison: the SAFE-T Act and the Bad Apples in Law Enforcement Accountability Act address two entirely different issues and are not equivalent. While I hope and expect that the SAFE-T Act will prevent some constitutional violations, the SAFE-T Act itself does not address *what happens when officers commit constitutional violations*. Nothing in the SAFE-T Act or other recent reforms provides Illinois residents with a remedy when police violate their state constitutional rights. The Bad Apples in Law Enforcement Accountability Act would fill this gap.

IV. CONCLUSION

The crux of the matter the Task Force is considering is simple: when police violate a person's constitutional rights in Illinois, should there be a remedy? This is an easy answer—yes.

(Sept. 2020); B. Keith Payne, *Weapon Bias: Split-second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCH. SCI. 287 (2006))).

The Task Force should recommend that the General Assembly pass the Bad Apples in Law Enforcement Accountability Act.

The Act would allow individuals to bring lawsuits in Illinois state court against peace officers for violating their constitutional rights, without qualified immunity as a defense. It would allow attorney costs and fees to be awarded, and it requires local governments to publicly disclose judgments and settlements awarded.

There are three reasons the Task Force should recommend passing the Bad Apples Act.

First and foremost, the Act would provide a real remedy to victims of constitutional violations, as the Illinois Constitution contemplates.

- The Illinois Constitution says that every person shall have a remedy for all injuries they receive.
- Qualified immunity has prevented people in Illinois from obtaining this remedy. It has caused real harm to people in Illinois and has stopped them from pursuing justice.
- The total number of impacted individuals is unknowable, because many people do not even get to file a claim. Attorneys and victims often do not bring cases because of qualified immunity, and qualified immunity imposes costs and delays, as Ms. Wang mentioned, that discourage bringing these claims.
- The Bad Apples Act would eliminate these barriers to justice.

Second, the Act would promote accountability and prevent constitutional violations.

- By imposing civil liability on employers when their employees violate the Constitution, this Act would incentivize those employers to make sure their employees comply with the Constitution.

Finally, this legislation would also promote trust between the community and police officers, which would make it easier for officers to do their important jobs.

- Police officers have incredible powers so that they can protect and serve the public, and with these powers comes responsibility and accountability.
- Illinois has a long history of police abuse statewide. This, in combination with the fact that officers are not held accountable for constitutional violations, erodes public trust in the police and undermines public safety.
- People are more likely to obey the law, trust law enforcement, and work with law enforcement when they see that police are being held accountable. This means that police can more effectively do their jobs because the public will support them.

I also want to address a few concerns that the Task Force has raised.

- First, officers will not face ANY financial hardship as a result of the Bad Apples Act. Illinois state law says that public agencies have to indemnify their employees from compensatory damages, so police *will not pay out* for those damages.

- However, Illinois does allow for punitive damages if a jury has found that a public employee *willfully and wantonly* violated a person's rights.
- We should consider an amendment to the Bad Apples Act that aligns with this and allows for some limited damages, because officers who act with malice should face individual responsibility for their actions.

- Next, Qualified immunity is unnecessary to protect officers who are making genuine split-second decisions.
    - Under the *Graham v. Connor* standard of the Fourth Amendment, officers' actions must be judged from the perspective of a reasonable officer on the scene and based on the totality of the circumstances at the time. This means that officers are already protected from constitutional liability when they make reasonable split-second decisions.
- Finally, the Task Force should not wait to see how the SAFE-T Act and other reforms play out before acting.
    - The SAFE-T Act and the Bad Apples Act address two entirely separate issues.
    - We hope the SAFE-T Act will prevent constitutional violations, but the Bad Apples Act addresses *what happens when officers do commit those violations.*

The question here is simple: when police violate a person's constitutional rights in Illinois, should there be a remedy? The answer is an easy yes.

Recommendations

A. Recommendation 1:

A mandatory reporting database for all settlement agreements and civil litigation involving law enforcement officers and agencies should be statutorily created. Under this proposed statue, all settlement agreements entered into by law enforcement agencies, on the behalf of their officers, or by individual officers shall annually be reported to the Illinois Law Enforcement Training and Standards Board (ILETSB). The details of settlement would minimally include a description of the alleged law enforcement conduct, the alleged harm, any remedial actions taken by the agency, and the value of any payments made by parties.

In addition to settlement agreements, law enforcement agencies would be required to report the disposition of any civil litigation decided during each calendar year. The details of litigation would minimally include whether a claim of qualified immunity was raised, granted, or denied during the litigation. Failure to submit an annual report would result in fines or other administrative actions taken against law enforcement agencies and/or officers. The ILETSB would be required to promulgate administrative rules to govern the reporting databases as well as fines or actions taken to address noncompliance.

Details to support the recommendation:

Compelling information has not been presented to the Task Force demonstrating the doctrine of qualified immunity represents a significant barrier to remedies when valid constitutional claims are brought in Illinois courts. Arguments both for and against the application of qualified immunity have been mostly anecdotal, emotional or off point. Therefore, a formal reporting structure should be created and enforced so the extent of any unaddressed constitutional violations can be better understood.

The practice of defining and studying similar issues has proven effective in the past. For example, the Traffic and Pedestrian Stop Statistical Study (TPSSS), first passed in 2003 and currently codified at 625 ILCS 5/11-212, provided compelling data to the Illinois law enforcement community and led to significant changes to address biased-based policing. As with the initial bill creating the TPSSS, the proposed reporting database should be mandated for an initial period of 4 years in order to collect enough information to better understand whether qualified immunity negatively impacts plaintiffs' rights in Illinois.

Party/parties supporting this recommendation:

This recommendation has only been discussed internally at the Illinois State Police

Resources/References (Websites, Supporting Advocacy Groups, Data, etc.):

N/A

B. Recommendation 2:

If the Task Force determines a mechanism is immediately required to permit individuals to seek remedies for alleged constitutional violations, then consideration should be given to existing Illinois statutes, agencies and commissions. The Illinois Human Rights Act currently secures and guarantees certain rights under sections of the Illinois Constitution of 1970. *775 ILCS 5/1-102(F)* By expanding the Illinois Human Rights Act's authority over additional Sections and Articles of the Illinois Constitution, both administrative and civil remedies could be made available to individuals alleging harm.

The Illinois Department of Human Rights (IDHR) and Illinois Human Rights Commission's (IHRC) current roles could be adopted to investigate and adjudicate alleged violations. For example, the IHRC's existing authority for limited civil penalties could be applied to additional violations by government entities. *775 ILCS 5/8-109.1* Also, the Illinois Human Rights Act currently contemplates circuit court actions under certain circumstances for alleged violations. Most importantly, the Act also provides safeguards for both individuals and government entities. *775 ILCS 5/10-102*

Details to support the recommendation:

The only recommendation for a change to Illinois law presented to the Task Force was HB1727 – The Bad Apples in Law Enforcement Accountability Act of 2021. This bill simply creates an immediate civil cause of action which would likely result in an undue amount of spurious litigation filed in Illinois circuit courts. Due to the current lack of data demonstrating individuals' rights are being negatively impacted by qualified immunity, providing direct and unregulated access to the circuit courts would be inappropriate.

Conversely, by making slight adjustments to the Illinois Human Rights Act a more measured and validated approach to addressing violations of rights could be developed. The General Assembly explicitly empowered the Illinois Human Rights Act to oversee the implementation of constitutional guarantees. This Act's framework, as well as the IDHR and IHRC's role and authority, should be thoroughly evaluated before further burdening the circuit courts with direct access as contemplated by HB1727.

Party/parties supporting this recommendation:

This recommendation has only been discussed internally at the Illinois State Police

Resources/References (Websites, Supporting Advocacy Groups, Data, etc.):

N/A

Illinois Qualified Immunity Court Case Analysis

Prepared by: ICJIA, Center for Justice Research and Evaluation

Introduction

In the 2021 Illinois SAFE-T Act, ICJIA is assigned to provide technical assistance to the Constitutional Rights and Remedies Task Force.[1] This task force is to develop and propose policies and procedures to review and reform constitutional rights and remedies, including qualified immunity for police officers. We were asked to examine the outcomes of court cases in Illinois regarding qualified immunity. Qualified immunity is a type of legal immunity protecting a government official from lawsuits. Using Lexis-Nexis, we identified 146 United States District Court cases in Illinois between January 2021 and October 2021 that referenced qualified immunity and examined a random sample of 110 cases.

The sample only includes reported cases. For that reason, this analysis cannot address lawsuits that were not filed due to concerns about the defense, nor lawsuits that were settled prior to filing motions on qualified immunity.

Methodology

In order to determine an appropriate sample size for the total number of Illinois Federal Court cases (N = 146), a sample size formula was used. This formula is based on three criteria: the confidence level, sampling error, and degree of variability.[2] The confidence level is the degree to which we can be confident the sample is representative of the population, typically set at the 95% confidence (i.e., we can be 95% confident the sample is representative of the population).[3] The sampling error, or level of precision, is the range around the confidence level and is usually set at ± 5% (i.e., the confidence level is 95%, ± 5%).[4] Finally, the degree of variability refers to the degree to which a population's attributes vary. Because we do not know the attributes of the population, we must assume that the population has the highest possible degree of variability of 50% in order to provide a more conservative sample size.[5] The formula for calculating sample size is:

$$n = \frac{N}{1 + N(e)^2}$$

Where n is the sample size, N is the population size, and e is the level of precision.[6] Based on the population size, an assumed 95% confidence level and sampling error of ± 5%, and an assumed degree of variability of 50% the sample size formula is:

$$n = \frac{146}{1 + 146(.05)^2}$$

$$n = 107$$

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The minimum number of cases necessary for analysis was 107 cases. A random number generator[7] was used to create a random sequence of numbers between 1-146. Each case was assigned a number based on their alphabetical order. In total, the first 110 cases in the random sequence were reviewed. We coded the cases based on the decision regarding qualified immunity (e.g., whether the case did not address qualified immunity, the defendants were granted qualified immunity as a defense, denied qualified immunity, the court decided on other grounds, whether there were multiple claims and the court denied in part and granted in part qualified immunity, or decided some on other grounds etc.).

Results of Analysis

Table 1 displays the results of the analysis. The most common decision regarding qualified immunity was denial, which was decided roughly twice as often as the next most common decision (decided on other grounds). In sum, about 20% of cases included a decision in which qualified immunity was granted.

Table 1
Qualified Immunity Court Cases by Decision

Decision	Total (%)	
	n	*%*
Decided on other grounds	23	20.9
Denied and decided on other grounds	3	2.7
Denied	47	42.7
Granted and decided on other grounds	1	0.9
Granted	17	15.5
Granted and denied	4	3.6
Did not address QI	15	13.6
Total	110	100

[1] Reichert, J., Zivic, A., & Sheley, K. (2021). *The 2021 SAFE-T Act: ICJIA roles and responsibilities.* Illinois Criminal Justice Information Authority.
[2] Israel, G. D. (1992). *Determining sample size (Fact Sheet PEOD-6).* University of Florida.
[3] Israel, G. D. (1992). *Determining sample size (Fact Sheet PEOD-6).* University of Florida.
[4] Israel, G. D. (1992). *Determining sample size (Fact Sheet PEOD-6).* University of Florida.
[5] Israel, G. D. (1992). *Determining sample size (Fact Sheet PEOD-6).* University of Florida.
[6] Israel, G. D. (1992). *Determining sample size (Fact Sheet PEOD-6).* University of Florida.
[7] Random.org. (n.d.) *Random sequence generator.* https://www.random.org/sequences/

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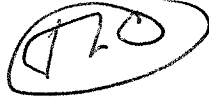
MEMORANDUM

TO: Senator Elgie Sims. Co-Chair
Representative Justin Slaughter, Co-Chair
Karen Sheley, Legal Counsel
Task Force on Constitutional Rights and Remedies

FROM: Tamara L. Cummings

RE: Recommendations 

DATE: November 24, 2021

Illinois recently passed a behemoth of a bill, HB 3653 S.A. 2 (amended by HB 3443). This law represents the most massive and comprehensive effort to reform the nature and culture of law enforcement in the country. Many provisions of the law are specifically aimed at improving police training and accountability, two of the goals repeatedly raised during Committee discussions, by both proponents and opponents of changes to qualified immunity. Any changes to qualified immunity at this time would not only be premature but would also undermine the hard work and efforts that lead to the passage of the HB 3653 S.A. 2 and its amendments. The sweeping provisions of the Act either just took effect in July of 2021 or will not take effect until January of 2022 or even later. Illinoisans have not yet realized the full impact and effects of the law on not only the nature of policing but on community relations with the police. In short, we recommend that no changes be made to qualified immunity and that we instead focus on monitoring the progress of this legislation.

Specific provisions that took effect on July 1, 2021 include:

The Attorney General Act which allows the Attorney General to investigate and pursue civil actions for constitutional violations;
Requirement that all records related to discipline be permanently maintained;
Extensive increase in mandatory training requirements;
Limitations on ability to review bodycam footage after a deadly force situation;
Additional reporting on mental health crises and use of force;
New restrictions on an officer's ability to use force;
Prohibition against chokeholds;
Creation of affirmative duties to intervene and to render aid;
Creation of a new felony entitled Law Enforcement Misconduct;
Specific requirements for no-knock warrants.

In addition, a new process called "Discretionary Decertification" will take effect on January 1, 2022, which will greatly increase the ability to permanently decertify officers accused of certain offenses.

Also, beginning January 1, 2022 and continuing through 2025, all municipal and county law enforcement agencies will be required to have body worn cameras.

These are just a some of the many provisions recently enacted or soon to take effect. Proponents of this legislation described it as a "bold momentous transformational initiative that makes Illinois a national leader in criminal justice reform..." Only time will tell if that is the case. Law Enforcement needs time to

adapt and train under the new law, and we need time to evaluate its impact. If it truly has the impact intended by the bills' sponsors, then the concerns raised by opponents to qualified immunity may be alleviated without the erosion of a well-established, age-old doctrine which gives ALL government officials, not just police officers, breathing room to make reasonable mistakes.

Illinois Association of CHIEFS OF POLICE

A proposed resolution for consideration by the Task Force on Constitutional Rights and Remedies:

Police: First protectors of civil rights in Illinois

Whereas, there are nearly 900 law enforcement agencies in Illinois, and

Whereas, these 900 Illinois agencies employ over 32,000 full-time law enforcement officers, and

Whereas, these Illinois agencies and officers responded to an estimated 14 million calls for service in 2019, which is one call every two seconds every day of the year on average, and

Whereas, the high volume of calls and requests for service signifies a high level of confidence in Illinois law enforcement by the citizens they serve, and

Whereas, Illinois law enforcement officers are trained to be mindful of the constitutional and civil rights of the citizens they serve when responding to these calls, and

Whereas, the number of complaints and allegations about a violation of rights is very small compared to the number of calls for service, therefore, be it

RESOLVED, that the Task Force on Constitutional Rights and Remedies recognizes Illinois law enforcement officers as the first-line protectors and defenders of the civil rights of citizens and individuals in Illinois, and

THEREFORE, BE IT FURTHER RESOLVED, that the task force commends Illinois Law Enforcement Officers for responding on average more than 38,000 times a day, and consistently demonstrating the high level of dignity and respect that emanates from the rights guaranteed to them by the United States and Illinois constitutions.

Drafted by Ed Wojcicki, Executive Director

November 27, 2021

Chicago-Kent College of Law

ILLINOIS TECH

Carolyn Shapiro
Professor of Law and
Associate Dean
Phone: 312.906.5296
cshapiro1@kentlaw.iit.edu
kentlaw.iit.edu

To: Members of the Task Force on Constitutional Rights and Remedies

From: Professor Carolyn Shapiro

Re: Recommendations

Date: November 29, 2021

I submit these recommendations for the Task Force's consideration. To begin, I identified a series of factors and principles of particular importance and relevance to legislation related to constitutional rights and remedies that the Illinois General Assembly might consider.[1] I want to emphasize that Illinois cannot simply eliminate qualified immunity, which is a federal judge-made doctrine. Instead, if the State believes that qualified immunity and other doctrines are problematic because too many constitutional violations go uncompensated, the State can create its own cause of action for the violation of constitutional rights, with its own elements, limitations, and available remedies.

I recommend the creation of a state law cause of action for violation of constitutional rights, with no qualified immunity, but with both indemnification of officials and *respondeat superior* for their employers, and with available attorneys fees. For one model statute, please see Appendix B of Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U.L. Rev. 737 (2021). My recommendations leave many details unaddressed, including but not limited to the availability of and indemnification for punitive damages, whether the cause of action would cover violations of the state constitution, the federal constitution, or both, and whether a finding of such a violation should trigger other administrative and/or disciplinary actions, such as review of officer certification. I would recommend that any such cause of action apply to all government officials, not just law enforcement, and that the *respondeat superior* extend to the State of Illinois as well as to municipalities.

[1] I have not, for example, included discussion of the textualist and originalist arguments related to qualified immunity or of the widespread criticism that qualified immunity impedes the development of constitutional law nationally.

Chicago-Kent College of Law
ILLINOIS TECH

Carolyn Shapiro
Professor of Law and
Associate Dean
Phone: 312.906.5296
cshapiro1@kentlaw.iit.edu
kentlaw.iit.edu

Factors and Principles

(1) Under current law, an unknown number of people whose federal and state constitutional rights are violated by state and local officials obtain no compensation. although the number of such uncompensated rights-violations are unknown, there are unquestionably some.[2] Such unidentified and uncompensated violations are problematic, not only for the individuals whose rights are violated but for the public and for governments' ability to accurately identify and respond to systemic problems and problematic officials.

(2) The reasons the number of such individuals is unknown include:
   a. Courts can dismiss claims on qualified immunity without deciding whether the individual's rights were violated.
   b. Some such individuals are unable to find legal representation in part because of the litigation uncertainty and expense posed by qualified immunity.[3]
   c. Although municipal defendants are not entitled to qualified immunity, under federal law, there is no *respondeat superior* liability.[4] And the State of Illinois is immune from liability under the Eleventh Amendment.

[2] Courts have the discretion to conclude that a plaintiff's constitutional rights were violated (taking allegations and inferences in the plaintiff's favor) even when qualified immunity precludes any remedy. *Pearson v. Callahan*, 555 U.S. 223 (2009). *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 335-36 n.126 (2020) (collecting cases in which courts have exercised this discretion). Professor Craig Futterman, Vatsala Kumar, and Katherine Koza submitted a memo to the Task Force detailing the application of qualified immunity in Illinois. In several of those cases, a court or jury concluded that a constitutional violation had occurred or likely had occurred. Nonetheless, qualified immunity precluded any remedy.

[3] Qualified immunity is a complex doctrine. Additionally, defendants can raise qualified immunity repeatedly during the same case and are entitled to an interlocutory appeal every time it is denied. A single case could therefore involve repeated qualified immunity appeals, with all the time and expense that requires. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 60 (2017).

[4] Municipalities can be found liable only where an official policy or practice is the "moving force" behind a constitutional violation. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978).

Carolyn Shapiro
Professor of Law and
Associate Dean
Phone: 312.906.5296
cshapiro1@kentlaw.iit.edu
kentlaw.iit.edu

d. Illinois does not provide a general cause of action for violation of state constitutional rights.[5]

(3) In part because of the current public attention focused on police conduct and reform, qualified immunity has emerged as one factor in a belief among some people that police officers are often not held to account for misconduct. As Professor Fred Smith indicated in his testimony, a belief that some government officials are able to violate people's constitutional rights with impunity can lead to alienation between communities and government generally, and between communities and law enforcement in particular. This alienation, in turn, may make police work harder, more dangerous, and less effective.

(4) Qualified immunity likely contributes to the belief that officers are not held accountable for constitutional violations because the doctrine is designed to cause precisely that outcome in at least some cases.

(5) As other Task Force members have pointed out, both the SAFE-T Act and the Chicago Police Department consent decree require changes, including in training and discipline of police officers. It is too soon to know what effect those changes will have.

(6) Indemnification is important to officials, the public, and plaintiffs alike. It is important to officials for obvious reasons, allowing them to do their jobs without fear of personal financial ruin. It is important to the public to the extent that fear of personal liability can overdeter officials (and in particular police officers) from protecting themselves and others. And it is important to plaintiffs because without indemnification, plaintiffs who prove that their rights have been violated may nonetheless be unable to recover damages from individual officials.

(7) Were Illinois to create a cause of action for violations of constitutional rights, without qualified immunity, we cannot know the consequences with certainty. Some considerations:

[5] *See Shevlin v. Rauner*, No. 3:18-CV-02076-NJR-RJD, 2019 WL 1002367 (S.D. Ill. 2019). *See also* Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/101 *et seq*.

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Professor of Law and
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kentlaw.iit.edu

a. Empirical research, including research conducted by Joanna Schwartz, has found that only a relatively small percentage of section 1983 cases are dismissed due to qualified immunity. But the available evidence suggests that while there might be some increase in the number of cases filed in the absence of qualified immunity, that increase is unlikely to be enormous.[6] Any increase would be offset in whole or in part to the extent that the SAFE-T Act and the Chicago Police Department consent decree reduce police misconduct.
b. Costs due to the increase in the number of cases brought would be offset in part because eliminating qualified immunity would streamline litigation.
c. Some fear that there would be a significant increase in the number of judgments paid by individual officials and municipalities. Such an increase, however, would illuminate the extent to which constitutional violations have gone uncompensated and unpublicized. State and local governments alike should have an interest in exposing such information and then working to address it.
d. Some fear that there would be a significant increase in the number of nuisance lawsuits brought and/or in the number and amount of settlements. The ordinary methods courts use to address frivolous lawsuits would remain available. Increased settlements likely would track the increased lawsuits discussed above.

[6] *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309 (2020).

LAW OFFICES

ASHER, GITTLER & D'ALBA, LTD.

SUITE 720
200 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60606

TELEPHONE (312) 263-1500
FACSIMILE (312) 263-1520

www.ulaw.com
www.worker-rights.com

November 22, 2021

Senator Elgie Sims, Co-Chair
Representative Justin Slaughter, Co-Chair
Task Force on Constitutional Rights and Remedies

Subject: Recommendations

Dear Co-Chairs Sims and Slaughter:

When the Chicago Police Department federal consent decree was approved by United States District Court Judge Robert W. Dow, Jr. in State of Illinois v. City of Chicago, Case No. 17-cv-6260, (N.D. Ill. 1/31/19), [Doc.703-1], a number of significant changes were introduced into the operations of the Chicago Police Department ("CPD") that are still being implemented. These are evolving changes that will take time and constitute sufficient reasons for the Task Force not to take action now in removing or otherwise limiting qualified immunity.

Among the more notable changes are:

1. New methods of community policy;
2. The creation of crisis intervention teams and related training to assist citizens who are having mental issues that lead to street level disturbances;
3. Use of force methods and training, including a requirement that each time an Officer points a firearm a record must be made by a report to the Office of Emergency Management and Communications;
4. Training of all Officers in a manner and concentration that have not been seen in the CPD;
5. Span of control and requirement that the City maintain an operating ratio of one sergeant for ten offices and to assure a continuity of supervision;
6. Wellness and support and FOP designated mental health ombudsman;
7. Accountability provisions for Officers' behavior on the street.

The Task Force on Qualified Immunity has been advised by its subject matter experts that a very important component of reforming a police department is training. In the past before the approval of the Consent Decree in the CPD, the training of Officers assigned to the patrol operations in the division known as District Law Enforcement was concentrated on the initial training of the Offices once they were hired and assigned to the police academy. Upon completion of that training and work with Field Training Officers, there was little if any additional training for the remaining time of an Officer's career in patrol work.

In January 2017, the U.S. Department of Justice published a highly critical report on the operations of the CPD and noted with particularly strong language the deficiencies in the CPD training of its Officers. Among the findings are:

> CPD's pattern of unlawful conduct is due in part to deficiencies in CPD's training and supervision. CPD does not provide officers or supervisors with adequate training and does not encourage or facilitate adequate supervision of officers in the field. These shortcomings in training and supervision result in officers who are unprepared to police lawfully and effectively; supervisors who do not mentor or support constitutional policing by officers; and a systemic inability to proactively identify areas for improvement, including Department-wide training needs and interventions for officers engaging in misconduct. Both at the outset and through the duration of their careers, CPD officers do not receive the quality or quantity of training necessary for their jobs. Pre-service Academy training relies on outmoded teaching methods and materials, and does not equip recruits with the skills, knowledge, and confidence necessary to serve Chicago communities. For example, we observed an Academy training on deadly force—an important topic, given our findings regarding CPD's use of force—that consisted of a video made decades ago, which was inconsistent with both current law and CPD's own policies. The impact of this poor training was apparent when we interviewed recruits who recently graduated from the Academy: only one in six recruits we spoke with came close to properly articulating the legal standard for use of force. Post-Academy field training is equally flawed. The Field Training Officer (FTO) Program, as currently structured, does not attract a sufficient number of qualified, effective leaders to train new probationary police officers (PPOs), has an insufficient number of FTOs to meet demand, and fails to provide PPOs with appropriate training, mentorship, and oversight. Investigation of the Chicago Police Department, U.S. Department of Justice p. 10, January 13, 2017. (Emphasis added).

The changes in the training of all Officers, not just the new recruits, have been dramatic and are ongoing. New training protocols have been required by the Consent Decree and are based on key paragraphs of the Consent Decree as follows:

> ¶ 265. CPD will enhance its recruit training, field training, in-service training, and preservice promotional training so that they are sufficient in duration and scope to prepare officers to comply with CPD directives consistently, effectively, and in accordance with the law, CPD policy, best practices, and this Agreement.

¶ 266. CPD training will reflect its commitment to procedural justice, de-escalation, impartial policing, and community policing.

Specific training objectives have been placed in the Consent Decree between ¶¶ 265 and 329, and requirements that will evolve in stages of training based upon the creation of a training plan that is to be established under the Training Oversight Committee. Training under this plan is to include:

1. In-service training consisting of mandatory and elective courses;

2. Modification of the Field Training Officer program which was underpopulated by veteran Officers and to assure that one Field Training Officer will only be responsible for the training of one Probationary Police Officer;

3. Develop and integrate concepts of procedural justice, de-escalation techniques, impartial and community policy;

4. Selection and evaluation of instructors;

5. Training evaluation;

6. Maintenance of training records;

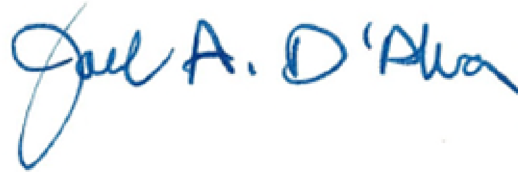
7. Provide for a dramatic increase in in-service training-16 hours each year in 2018, 24 hours each year in 2019, 32 hours each year in 2020 and 40 hours each year by the end of 2021 and thereafter. This regimen is to include a combination of mandatory and elective courses including training on use of force. One of the more remarkable findings of the Department of Justice is that only one in six of the CPD recruits would correctly articulate the legal standard for use of force.

It is important to note that these new training protocols will need to be incorporated into the daily regimen of Officers, and it will take a while for the Officers to be fully trained to meet then new constitutional policing requirements of the Consent Decree. It is for this reason that that adoption of a policy to eliminate qualified immunity is premature. A new regimen of training for Officers will likely lead to significant changes in how Officers interact with citizens on the street, and it is in Chicago where the largest number of policing problems seem are be occurring.

Supervision of police officers is likely to be improved due to the training that the Officers are now receiving for the first time since they left the initial training phase of their careers and the new supervisory ratio that has been required to be fully implemented by January 31, 2022. Consent Decree, ¶365. The new span of control provision is a staffing level for one sergeant, a field supervisor, for 10 Officers each duty shift. Unity of command is a requirement designed to assure that the Officers have consistent supervisors, rather than have a rotation of different supervisors. Both the span of control and the unity of command are operation concepts designed to assure that Officers are supervised by the same and uniform command, where the idea is to have better policing. This is an evolving technique that is not going to be fully in effect under the

Consent Decree until the beginning of 2022 and is an additional reason that changes in the CPD need time to evolve and changes to the concept of qualified immunity are premature.

Respectfully submitted,



Joel A. D'Alba

JAD:bhg

cc: Joseph Andruzzi
Donna Dowd
Jason Lee
Ryan Hagerty