

## National Police Accountability Project

A Project of the National Lawyers Guild

**SUPPORT FOR HB1202** – Creating meaningful civil remedies for persons injured as a result of police misconduct

**Written Testimony** of National Lawyers Guild-National Police Accountability Project, Lauren Bonds, Legal Director

**Civil Rights and Judiciary Committee** – Tuesday, January 26, 2021

Chairman Hansen and Members of this Committee,

Thank you for the opportunity to provide testimony on this issue. The National Lawyers Guild National Police Accountability Project (“NPAP”) is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. We strongly support the passage of HB 1202, a bill that will provide victims of civil rights abuses with a path to sue police in state court without the shield of qualified immunity.

The doctrine of qualified immunity has created a nearly insurmountable barrier for communities to hold police officers civilly liable in federal court for civil rights violations. Qualified immunity, requires an individual to not only show that her constitutional rights were violated, but prove that the violation was of “clearly established” law. The Supreme Court has interpreted the “clearly established” law requirement to mean a plaintiff must be able to identify a case from the court of appeals or Supreme Court with nearly identical facts in order to recover. For instance, a federal appellate court found that an officer was entitled to qualified immunity where he sicced a police dog on a suspect who was sitting on the ground with his hands up in surrender. The court reasoned that a prior case holding it was unconstitutional to unleash a dog on a surrendered suspect who was lying down, as opposed to sitting, was too factually dissimilar. There are dozens of other equally ludicrous and unjust outcomes that have resulted from the doctrine of qualified immunity.



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Washington state lacks a mechanism to pursue the same causes of action against police officers that are available under Section 1983 and tort law equivalent actions such as false imprisonment and assault are limited by equally restrictive state law immunities.<sup>1</sup>

While the Washington legislature cannot eliminate qualified immunity in federal courts, it can provide people in this state with an alternative method to vindicate their rights in state court. HB 1202 will do just that.

A common concern about qualified immunity reform is cost. Opponents of ending qualified immunity have warned that removing the defense will result in an explosion of lawsuits and expensive verdicts. However, this argument is premised on a flawed understanding of the role qualified immunity plays in civil litigation and ignores the fact other states provide similar causes of action without bankrupting government entities.

Some cost concerns are based on the misconception that qualified immunity defeats a significant number of cases. While there are many heartbreaking examples of people being denied justice because of qualified immunity, some that you heard earlier today, the doctrine accounts for a small fraction of dismissals. UCLA Law Professor Joanna Schwartz studied civil rights cases in five federal district courts over a two-year period and found that qualified immunity only disposed of 3.2% of cases before trial.<sup>2</sup>

Additionally, concerns that eliminating qualified immunity will significantly increase insurance premiums are speculative. While it is difficult to project the precise impact, a recent study by the Insurance Law Center at University of Connecticut determined that removing qualified immunity would not compromise the insurability of municipal law enforcement agencies in the state because the cost of police liability is a fairly small portion of municipal policies.<sup>3</sup>

It is also important to note that Washington would not be the first state to eliminate strict immunity defenses for state court actions. Montana<sup>4</sup> and North Carolina<sup>5</sup> have both rejected

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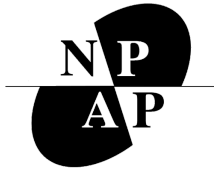
<sup>1</sup> *Guffey v. State*, 103 Wn. 2d 144, 690 P.2d 1163 (Wa. 1984)

<sup>2</sup> Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127 (2017)

<sup>3</sup> Peter Kochenburger & Peter Siegelman, *Preliminary report on insurance related issues*, UConn Insurance Law Center ((Jan. 5, 2021) available at [https://www.ctnewsjunkie.com/upload/2021/01/UCONN\\_Law\\_and\\_Logistics\\_Subcommittee\\_Section\\_41\\_Assessment\\_1.pdf](https://www.ctnewsjunkie.com/upload/2021/01/UCONN_Law_and_Logistics_Subcommittee_Section_41_Assessment_1.pdf)

<sup>4</sup> *Dowat v. Caraway*, 58 P.3d 128, 131 (Mont. 2002)

<sup>5</sup> *Craig ex. rel. v. New Hanover Co. D. of Educ.*, 1678 S.E. 2d 351, 352 (N.C. 2009)



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qualified immunity defenses for state constitutional actions against law enforcement officers. Colorado also recently created a state cause of action to challenge police misconduct while eliminating qualified immunity.<sup>6</sup> The changes contemplated by HB 1202 are not unprecedented and other states have managed the costs of increasing access to justice.

Additionally, HB 1202 has a significant built-in cost limitation. Successful lawsuits under HB 1202 will not expose law enforcement agencies to large verdicts that include punitive damages. This bill limits recovery to actual damages and provides for reasonable attorney's fees. Actual damages in police misconduct cases can sometimes result in significant verdicts, but far more often these violations do not translate to large recoveries.

Qualified immunity operates as an almost absolute shield from liability. Forcing Washington communities to contend with qualified immunity will not save costs but shift them to victims of police misconduct. Victims of police brutality experience tangible consequences. For instance, they may have medical costs, be forced to miss work, or navigate emotional trauma from their experiences. Barring their suits through the doctrine of qualified immunity forces these victims to bear the cost of police misconduct rather than the officers and law enforcement agencies responsible for their suffering.

We urge you to pass HB 1202 and remove the immunities that undermine police accountability. I am happy to answer any questions.

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<sup>6</sup> S.B. 20-217, 74th Gen. Assembly, (Colo. 2020)