



## National Police Accountability Project

A Project of the National Lawyers Guild

**SUPPORT FOR HB 702** – 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 Law and Procedure Committee** – Monday, April 25, 2022

Chairman Miller and Members of this Committee,

Thank you for the opportunity to provide testimony on this important 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 702, a bill that will provide victims of civil rights abuses with a path to sue law enforcement officers 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 a victim of police misconduct to not only show that their constitutional rights were violated, but also prove that the violation was of “clearly established” law.<sup>1</sup> The Supreme Court has interpreted the “clearly established” law requirement to mean a plaintiff must typically be able to identify a case from the Fifth Circuit Court of Appeals or Supreme Court with nearly identical facts in order to recover.<sup>2</sup>

There are many cases in Louisiana’s federal circuit where an officer’s patently unconstitutional conduct was shielded by qualified immunity because no prior defendant had been sued for similar behavior. In fact, the

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<sup>1</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)

<sup>2</sup> *Id.*



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Fifth Circuit grants qualified immunity more than any other federal court of appeals.<sup>3</sup> The following recent cases highlight how qualified immunity operates in practice:

- *Ramirez v. Guadarrama*—In March, the Fifth Circuit held that police officers were entitled to qualified immunity when they killed a suicidal man by tasing him when he was covered in gasoline even though they acknowledged before discharging the taser that doing so would likely set him on fire.<sup>4</sup> The court reasoned that even though the Fifth Circuit had previously found tasing violated the Fourth Amendment in three other factually similar cases, it had never decided a case where the person was covered in gasoline and suicidal, noting the “granularity involved in the qualified immunity analysis” made the prior cases too factually dissimilar to eliminate qualified immunity.<sup>5</sup> In short: qualified immunity protected officers who set a man on fire to prevent him from being set on fire.
- *Estate of Jesse Aguirre Jr. v. City of San Antonio*—The Fifth Circuit found five police officers were entitled to qualified immunity where they killed a plaintiff through positional asphyxia by holding him face down on pavement with his hands cuffed behind his back and his legs restrained for approximately five-and-a-half minutes until he stopped breathing.<sup>6</sup> The Court found the officers were entitled to qualified immunity even though it acknowledged that the officers had indications that the plaintiff was in medical distress and noted that it “may have been objectively unreasonable for them to be indifferent to the serious [health] threat.”<sup>7</sup>

And outside the Fifth Circuit, in another recent case, *Jessop v. City of Fresno*, a court granted immunity to police officers who stole over \$225,000 in cash and rare coins while executing a search warrant. The court said that while “the theft [of] personal property by police officers sworn to uphold the law”

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<sup>3</sup> Andrew Chung, et. al., *Shot by cops, thwarted by judges and geography*, Reuters, Aug. 25, 2020, <https://www.reuters.com/investigates/special-report/usa-police-immunity-variations/>

<sup>4</sup> *Ramirez v. Guadarrama*, 20-1055 (5th Cir. 2021)

<sup>5</sup> *Id.*

<sup>6</sup> *Estate of Jesse Aguirre v. City of San Antonio*, 17-51031 (5th Cir. 2021)

<sup>7</sup> *Id.*



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may be “morally wrong,” the officers could not be sued for the theft because the Ninth Circuit had never specifically decided “whether the theft of property” violates the Fourth Amendment.<sup>8</sup>

There are dozens of other equally ludicrous and unjust outcomes that have resulted from the doctrine of qualified immunity.

Although qualified immunity began as an element of judge-created federal law, Louisiana state courts have imported qualified immunity for state constitutional claims.<sup>9</sup> While the Louisiana 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 702 will do just that.

A common concern about qualified immunity reform is that it will lead to a significant increase in crime because officers will be reluctant to do their jobs out of fear of litigation. However, that has not been the case in Colorado. An examination of data from Denver and Colorado Springs shows that violent crime rates have remained consistent the rates of similarly-sized cities in states that have not enacted qualified immunity reform.<sup>10</sup>

Opponents of ending qualified immunity have also warned that removing the defense will result in an explosion of lawsuits and expensive verdicts. This argument again ignores the fact that other states provide similar causes of action without bankrupting government entities.

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<sup>8</sup> 936 F.3d 937 (9th Cir. 2019)

<sup>9</sup> *Moresi v. Dep't of Wildlife & Fisheries*, 567 So. 2d 1081 (La. 1990)

<sup>10</sup> *Statistical Report on Colorado's Qualified Immunity Reform and Crime Rates*, December 2021, <https://www.nlg-npap.org/wp-content/uploads/2022/04/Colorado-Crime-Report-Qualified-Immunity.pdf>.



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Louisiana would not be the first state to eliminate strict immunity defenses for state court actions. Montana,<sup>11</sup> Colorado,<sup>12</sup> and New Mexico<sup>13</sup> have all rejected qualified immunity defenses for state constitutional actions against

law enforcement officers. The changes contemplated by HB 702 are not unprecedented and other states have managed the costs of increasing access to justice.

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. Qualified immunity shifts these costs to the victims.

We urge you to pass HB 702 and remove the immunities that undermine police accountability. Please do not hesitate to contact me at [legal.npap@nlg.org](mailto:legal.npap@nlg.org) if you have any questions.

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<sup>11</sup> *Dowd v. Caraway*, 58 P.3d 128, 131 (Mont. 2002)

<sup>12</sup> COLO. REV. STAT. ANN. § 13-21-131 (2020)

<sup>13</sup> New Mexico Civil Rights Act, 2021Bill Text NM HB 4