May XX, 2021

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

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

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

Dear Senate Majority Leader Schumer and Senate Minority Leader McConnell:

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

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

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

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[1] David H. Gans, *"We Do Not Want to be Hunted": The Right To Be Secure and Our Constitutional Story of Race and Policing*, Constitutional Accountability Center (July 23, 2020), https://www.theusconstitution.org/think_tank/racistpolicing/.
[2] *Id*.
[3] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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

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

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

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

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

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[4] *Qualified Immunity*, Equal Justice Initiative (last visited May 4, 2021), https://eji.org/issues/qualified-immunity/.
[5] 167 Cong. Rec. H1070-71 (daily ed. Mar. 3, 2021).

- The Supreme Court granted qualified immunity to school administrators who subjected a 13-year-old Arizona girl to a strip search of her bra and underpants because they baselessly believed she had pain relief pills.[6]

- The Fourth Circuit granted qualified immunity to members of the Buchanan County Department of Social Services after they unlawfully conspired to prevent a woman from being hired for a non-political job because of her affiliation with the Republican Party.[7]

- The Fifth Circuit granted qualified immunity to a correctional officer who had sprayed a Texas prisoner in the face with a chemical agent without reason, violating the prisoner's Eighth Amendment rights.[8]

- The Second Circuit granted qualified immunity to prison officials who, in violation of the Constitution, had kept a pretrial detainee in solitary confinement for more than a year simply because the detainee asked a question about commissary access.[9]

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

Last year, nearly 500 civil rights organizations called on Congress to *end* the defense, not reform it, and certainly not insert it into Section 1983.[10] **We call on you again to end qualified immunity, make victims whole, and reinstate the promise of liberty, equality, and accountability made to the American people when Congress passed Section 1983.**

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

Sincerely,
Constitutional Accountability Center
[Organizations]

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

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[6] *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).
[7] *Fields v. Prater,* 566 F.3d 381 (4th Cir. 2009).
[8] *McCoy v. Alamu,* 950 F.3d 226 (5th Cir. 2020).
[9] *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017).
[10] Letter from The Leadership Conference on Civil and Human Rights et al., to Speaker Pelosi et al., (June 1, 2020), http://civilrightsdocs.info/pdf/policy/letters/2020/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorites_Final_6.1.20.pdf.