REPORT ON LEGISLATION
BY THE CIVIL RIGHTS COMMITTEE

A.710-A **M. of A. Hunter**
S.182-A **Sen. Jackson**

AN ACT to amend the civil rights law, in relation to providing a cause of action for deprivation of rights

THIS LEGISLATION IS SUPPORTED

The Civil Rights Committee ("Committee") of the New York City Bar Association ("City Bar") writes to express its support of S.182-A (Sen. Jackson)/ A.710-A (AM Hunter), which creates a remedy for the violation of New Yorkers' rights protected by the State and Federal Constitution, and helps ensure accountability for public employees who violate those rights. Throughout this memo, we refer to the proposed legislation as the Jackson-Hunter bill.

The Jackson-Hunter bill brings state civil rights law more in line with existing federal law, and creates important reforms—especially to the doctrine of qualified immunity—that the City Bar has already endorsed on the federal level.[1] For the reasons set forth below and in the City Bar's report in support of similar reforms at the federal level (the "Floyd Act Report"), we endorse the Jackson-Hunter bill and urge its passage.

I. BACKGROUND

Congress passed 42 U.S.C. § 1983, the Civil Rights Act of 1871 (then the Ku Klux Klan Act of 1871), during the post-Civil War Reconstruction era.[2] Section 1983 promised relief for those who have experienced "the deprivation of any rights, privileges, or immunities secured by

[1] *See* Report in Support of Federal Police Reform Efforts: The George Floyd Justice In Policing Act and Justice In Policing Act, NEW YORK CITY BAR ASSOCIATION, Feb. 2021 (the "Floyd Act Report"), *available at:* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/george-floyd-justice-in-policing-act-federal-police-reform. (All websites last accessed on April 20, 2023).

[2] Sheldon Nahmod, Article, *Section 1983 is Born: The Interlocking Supreme Court Stories of Tenney and Monroe*, 17 Lewis & Clark L. Rev. 1019, 1021 (2013), *available at:* https://law.lclark.edu/live/files/16439-171art1nahmod (citing Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13) (explaining that the § 1983 was first interpreted by the Supreme Court in *Tenney v. Brandhove* (341 U.S. 367 (1951)) and *Monroe v. Pape* (365 U.S. 167, 169 (1961)).

the Constitution and laws" by any person acting under color of law.[3] As a result, citizens who have experienced a deprivation of rights by an actor with authority under a governmental entity have standing to seek damages from those individual actors, who will be held personally liable.[4]

The statute remained largely dormant until 1951 when, in *Tenney v. Brandhove*, the United States Supreme Court interpreted Section 1983 for the first time, followed by its decision in *Monroe v. Pape* in 1961.[5] Shortly thereafter, in 1967, the Supreme Court recognized "qualified immunity" as a defense to § 1983 claims brought against police officers,[6] and further developed the defense in 1982. In *Harlow v. Fitzgerald*, the Supreme Court clarified that government officials (not just law enforcement officers) can invoke qualified immunity as a defense, and set forth the following standard: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[7] The Court further explained that the defense of qualified immunity could be revoked if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury…."[8]

The Court justified its creation of this defense—which is nowhere to be found in the text of the statute—as necessary to balance two competing interests: the need to hold government officials accountable for violations of constitutional rights against the need to protect those officials from "harassment, distraction, and liability when they perform their duties reasonably."[9] In the years since, courts have dramatically expanded the applicability of the qualified immunity defense. As a result, under the doctrine developed by courts since *Harlow*, it is nearly impossible to hold a government officer accountable for violating a person's constitutional rights unless an appellate court has already explicitly ruled that the specific actions undertaken by the officer were unconstitutional.[10]

The central focus of the qualified immunity doctrine is the "clearly established law" standard. As one commentator noted: "The crucial takeaway from decades of Supreme Court jurisprudence is that 'clearly established law' cannot be defined at a high level of generality;

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[3] 42 U.S.C. § 1983.

[4] *See* 42 U.S.C.S. § 1988.

[5] *See* Nahmod, *supra* note 2, at 1021.

[6] *Qualified Immunity*, NAT'L CONF. OF STATE LEGIS.S, https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx. *See also Pierson v. Ray*, 386 U.S. 547, 554 (1967) (stating that judges enjoy absolute immunity and "excusing [police officers] from liability for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional"). *See generally* § 1983, *supra* note 3 (stating justices enjoy absolute immunity "unless a declaratory decree was violated, or declaratory relief was unavailable.")

[7] *See Harlow v. Fitzgerald*, 457 U.S. 800, 814–15 (1982).

[8] *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). *See id.* at 818 (stating "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.")

[9] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

[10] *See* Floyd Act Report at 4.

instead, the law must be 'particularized' to the facts of the case."[11] Although the Supreme Court has said that it "does not require a case directly on point for a right to be clearly established,"[12] it has also stated that "existing precedent must have placed the statutory or constitutional question *beyond debate*,"[13] and the lower courts typically require that the particular facts mirror those of a prior case in a relevant jurisdiction before they will find that the law was "clearly established."[14] In practice, this means that if the facts of a case do not match the facts of prior precedent, the case will be dismissed on qualified immunity grounds.[15] For example, in *Baxter v. Bracey*, the petitioner stated that he was already surrendering and had his hands raised when a police officer ordered a police dog to attack and apprehend him; the circuit court nonetheless found that such conduct did not violate a "clearly established" right.[16] The circuit court essentially required—and the Supreme Court did not dispute—that, in order to hold the officer accountable under Section 1983, there had to have been a finding by a prior appellate court that ordering a police dog to attack a suspect who was surrendering by raising his hands is unconstitutional.

Further compounding the problem of developing "clearly established law" is that courts have the discretion to grant dismissal on qualified immunity grounds without first determining the threshold question of whether the defendant violated a person's constitutional rights,[17] which, in turn, stymies development of the law.[18]

Moreover, courts have shifted in their assessments on how a "reasonable officer" would behave. While the Supreme Court's original construction provided qualified immunity to an officer so long as his actions did not violate clearly established rights "of which a reasonable person would have known,"[19] that doctrine has shifted over time, "virtually always in favor of the government,"

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[11] Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#doctrinal-problems-qualified-immunity (citing *Malley v. Briggs*, 475 U.S. 335, 342 (1986)) (last visited July 12, 2021).

[12] *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

[13] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added).

[14] *See* Schweikert, *supra* note 11.

[15] *See id.* (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)).

[16] *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

[17] *Compare Saucier v. Katz*, 533 U.S. 194 (2001) (requiring lower court to make initial determination as to whether a constitutional right was violated and then, if so, whether qualified immunity applies) *with Pearson v. Callahan*, 555 U.S. 223 (2009) (court reversed its prior decision in *Saucier* and held that lower courts have discretion to grant qualified immunity without first deciding whether constitutional right was violated).

[18] *See* Schweikert, *supra* note 11 ("The practical result of this discretion is that qualified immunity not only denies justice to victims whose rights have been violated, but it also stagnates the development of the law going forward. After all, if courts refuse to resolve legal claims because the law was not clearly established, then the law will never become clearly established"), *citing Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) ("This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation…. Continuing to resolve the question at the clearly established step means the law will never get established").

[19] *Harlow*, 457 U.S. at 814-15.

as Professor Scott Michaelman explains.[20] "The construct of 'a reasonable officer,' by which the reasonableness of a defendant's conduct was to be judged, became 'any reasonable officer' or 'every reasonable official'—thus implying that in order for a plaintiff to overcome qualified immunity, the right violated must be so clear that its violation in the plaintiff's case would have been obvious not just to the average 'reasonable officer' but to the least informed, least reasonable 'reasonable officer.'"[21]

This continually shifting doctrine complicates litigation. Furthermore, a defendant denied dismissal on qualified immunity grounds may bring an interlocutory appeal, which drives up litigation costs.[22] The circular and confounding nature of the qualified immunity doctrine, along with the high cost of litigating these cases, means that even meritorious claims often are dismissed or not raised at all, which, in turn, may allow state actors to continue to engage in actions that violate constitutional rights.[23]

II. THE CITY BAR SUPPORTS QUALIFIED IMMUNITY REFORM

In February 2021, the City Bar endorsed passage of the George Floyd Justice in Policing Act ("Floyd Act"), with suggestions for amendments (hereinafter "the Floyd Act Report").[24] The City Bar endorsed the Floyd Act's qualified immunity reform, which eliminates the following as a defense in any civil rights litigation against a police or corrections officer brought under 42 U.S.C. § 1983:

> (1) The defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time the conduct was committed; or (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at this time, the state of the law was otherwise such that the

[20] Scott Michelman, *The Branch Best Suited to Abolish Qualified Immunity*, 93 Notre Dame L. Rev. Vol. 1999, 2004 (2018), *available at:* http://ndlawreview.org/wp-content/uploads/2018/08/7-Michelman.pdf.

[21] *Id.*

[22] *See* Schweikert, *supra* note 11.

[23] *Id.* ("In some cases, even when potential clients have a strong argument on the merits, experienced civil rights attorneys may nevertheless recognize that the limited case law in their jurisdiction will preclude them from being able to identify 'clearly established law.'")

[24] *See* Floyd Act Report at 2 (Note: the report addresses the George Floyd Justice in Policing Act of 2020 (H.R. 7120) ("Floyd Act"), which was passed by the House of Representatives in June 2020, was reintroduced as H.R. 1280, and was passed by the House again in March 2021. The Justice In Policing Act (S. 3912) was referred to the Senate Judiciary Committee but was not advanced and has not been reintroduced. Although the report addresses the Floyd Act, there are many functionally identical provisions in the Justice In Policing Act, such that, "insofar as the bill language is the same, our support and suggestions with respect to the Floyd Act apply equally to S.3912.")

> defendant could not reasonably have been expected to know whether his or her conduct was lawful.[25]

As described above and in the Floyd Act Report, qualified immunity reform is necessary because, under existing qualified immunity doctrine, "it is practically impossible to hold a law enforcement officer accountable for violating the individual rights of a citizen unless a court has previously ruled that the specific actions in question were unconstitutional. If a court has not so ruled, the defense of qualified immunity often protects the law enforcement officer by default, even in some plainly egregious circumstances."[26] Eliminating the nearly impermeable defense of qualified immunity is therefore essential to addressing police misconduct and holding officers accountable for civil rights violations. Even without the blanket defense of qualified immunity, defendants could still invoke the procedural and substantive defenses available to them, including, for example: statute of limitations, failure to state a claim, and good faith.

While proponents of the qualified immunity defense raise various rationales for retaining it, we submit that they are outweighed by the reasons for eliminating it—and, in fact, arguments for removing the defense have received support across ideological lines.[27] For example, proponents have argued that eliminating the qualified immunity defense will lead to under-enforcement of the law, as police officers will hesitate to engage in (or avoid altogether) situations where they may need to use force to protect themselves or the public.[28] Indeed, the Supreme Court stated as much in *Harlow:* "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[29] Such concerns, however, are belied by empirical evidence: There is no reason to believe that, if not for the qualified immunity defense, police officers—fearing the costs of potential litigation—would hang back and allow violent crimes to occur, because police officers are almost always indemnified by their employers.[30] In fact, "one empirical analysis concluded that during the relevant period of study, 'governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.'"[31]

Others argue that eliminating qualified immunity will lead to unwarranted and costly litigation against police officers and municipalities. However, this argument is unpersuasive. To the extent that law enforcement officers may fear being sued and having to engage in discovery and sit for depositions in which they have to explain their actions, such concerns will increase

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[25] Text of H.R. 1280 *available at:* https://www.congress.gov/bill/117th-congress/house-bill/1280/text#toc-H5A0B5A5505624C60B7132DBF904D86E8; text of S. 3912 *available at:* https://www.congress.gov/bill/116th-congress/senate-bill/3912/text#toc-id3A8D7923B2E24607A2C849679CAA6CEE.

[26] Floyd Act Report at 4.

[27] *Id*. at 5, *citing e.g.,* Brief for the Cross Ideological Groups as Amicus Curiae for the Petitioner, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

[28] *See e.g.,* Aaron L. Nielson and Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 1854 Notre Dame L. Rev. 93 (2018), *available at:* https://scholarship.law.nd.edu/ndlr/vol93/iss5/3/.

[29] *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949)).

[30] As discussed further below, the Jackson-Hunter bill provides for employer indemnification of employees for actions forming the basis of a civil rights lawsuit.

[31] Floyd Act Report at 6, *citing* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 885 (2014).

accountability and deter police misconduct.[32] The possibility that such lawsuits will not be summarily dismissed on qualified immunity grounds may also lead police departments to increase training and institute policies to reduce the use of excessive force.[33] Moreover, the fear that eliminating qualified immunity will lead to a proliferation of meritless lawsuits is unfounded: such suits are still subject to pleading and process requirements, and must set forth appropriate causes of action.[34] Rather than subjecting police departments to a flood of unwarranted litigation, "they will simply have to substantiate their claims for dismissal rather than rely on qualified immunity as a catch-all, overly restrictive shield."[35]

III. THE CITY BAR ENDORSES THE JACKSON-HUNTER BILL'S OTHER REFORMS

In addition to reforming qualified immunity, the Jackson-Hunter bill includes several other important provisions. These reforms create parallel state law remedies that mirror or enhance existing federal remedies.

Section 1 amends the Civil Rights Act to create a remedy for the violation of a person's rights under the Federal and State Constitutions,[36] correcting case law allowing for suits over New York State constitutional violations in only extremely limited circumstances. If this bill is enacted, it would enable civil rights litigants to bring an action in state court rather than having to bring a § 1983 action in federal court; it would also mean that, even if the Floyd Act does not pass, the qualified immunity defense could provide an officer with immunity only from a federal § 1983 claim.[37]

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[32] *See id.* at 6.

[33] *See id.*

[34] *See id.* at 6; *see also* Fed. R. Civ. P. 8(a), 12(b).

[35] *Id*. at 6.

[36] *See id.*

[37] A state official charged under the Jackson-Hunter law with violating a person's federal constitutional rights might argue that, notwithstanding the express language of the statute, qualified immunity applies as a bar, under the federal preemption doctrine, at least as to the federal constitutional claims. Federal preemption of state laws generally occurs in one of three ways: "where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Quigley v. Village of East Aurora*, 193 A.D.3d 207, 210-11 (3d Dep't 2921); *see also Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 356 (2005) (describing different forms of preemption as "express preemption" where Congress explicitly declares that a federal law is intended to supersede state law, and "implied preemption" which includes "field preemption" and "conflict preemption" where "a state statute is void to the extent that it actually conflicts with a valid federal statute").

It is not the purpose of this report to draw any conclusions on how courts would interpret this question, were it ever presented. However, we note that qualified immunity is a judicially-created defense specific to Section 1983 cases, while the expressed justification for the Jackson-Hunter Bill is to create a *new* cause of action for violations of state and federal constitutional rights, with broader protections than provided by federal law. Prior cases suggest that it is within New York's power to do so: "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S.

Section 1 also specifies that a civil action may be brought by either the victim or by the state Attorney General.[38] This reform is parallel to Section 103 of the Floyd Act, which makes it easier for state attorneys general to bring civil suits in federal court challenging a pattern of conduct depriving a person of their civil rights.[39] We endorse this provision for the same reasons that we endorse it in the Floyd Act, *viz.*, state attorneys general have an interest, on behalf of individual victims as well as the broader public, in bringing suits for legal or equitable relief or other proper redress to challenge individual acts by government officials, as well as broader patterns and practices within agencies or other government organizations, that deprive civilians of their civil rights.[40] Enabling the state attorney general to bring such suits—whether or not the individual whose rights have ostensibly been violated also brings suit—furthers the purposes of the act by holding state actors accountable for civil rights violations whether or not individual victims are able (financially or otherwise) to pursue their claims.

Section 5 of the Jackson-Hunter bill requires public entities to indemnify public employees for the actions forming the basis of a civil rights lawsuit—ensuring that plaintiffs can actually recover any compensation awarded to them.[41] Some critics may argue that broad availability of indemnification effectively gives police officers permission to engage in misconduct—even without the protections of the qualified immunity defense.[42] But as noted in the Floyd Act Report, "indemnification practices can actually serve to incentivize police departments to hire, train, and terminate individual police officers in a manner that prevents civil rights violations. The presence of heightened, ubiquitous indemnification would not stifle the deterrent effect of eliminating the qualified immunity defense, but serve to enhance it."[43]

In addition, Section 7 of the Jackson-Hunter bill corrects a quirk in state law that had granted corrections officers special immunity from suit in state court for constitutional violations pursuant to subdivision one of section twenty-four of the Correction Law.[44] The bill repeals that immunity and brings corrections officers onto equal footing with other public entity employees.

264, 280 (2008) (holding that states could provide broader post-conviction relief than that available under federal statutes).

[38] *See id.*

[39] *See* H.R. 1280, *available at*: https://www.congress.gov/bill/117th-congress/house-bill/1280/text#toc-H5A0B5A5505624C60B7132DBF904D86E8.

[40] *See* Floyd Act Report at 7.

[41] *See* A.710-A *available at:* https://www.nysenate.gov/legislation/bills/2023/A710; S.182 *available at:* https://www.nysenate.gov/legislation/bills/2023/s182.

[42] *See* Floyd Act Report at 6, *citing e.g.*, Daniel Epps, "Abolishing Qualified immunity Is Unlikely to Alter Police Behavior," N.Y. Times (June 16, 2020) ("There are good arguments for getting rid of this immunity, or at least seriously restricting it. But abolishing it is unlikely to change police behavior all that much.").

[43] *See* Floyd Act Report at 6, note 24.

[44] *See* A.4331 *available at:* https://www.nysenate.gov/legislation/bills/2021/A4331; S.1991 *available at:* https://www.nysenate.gov/legislation/bills/2021/s1991 ("The immunity granted pursuant to subdivision one of section twenty-four of the Correction Law shall not extend to actions brought pursuant to this section").

IV. CONCLUSION

As explained above and in the City Bar's Floyd Act Report, police and corrections officers must be held accountable for unlawful actions that violate people's civil rights. The Jackson-Hunter bill is an important step forward in the effort to ensure meaningful protection of the rights of civilians in New York. We respectfully urge its swift passage.

Civil Rights Committee
Kevin Jason, Co-Chair
Kathleen Rubenstein, Co-Chair
Ali Frick, Principal Drafter

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Contact
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org