Qualified Immunity: Rectifying a Detrimental Doctrine

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I. INTRODUCTION

On average, on-duty police officers shoot and kill one thousand individuals in the United States each year.[1] One in every one-thousand black men will be killed by law enforcement in their lifetime.[2] In nearly every instance, though, courts find that the officers responsible were legally justified in their actions.[3] But how do a majority of officers escape accountability for their egregious use of excessive force? The answer arises from the doctrine of qualified immunity. Qualified immunity provides officers with civil immunity in an attempt to reduce frivolous suits and protect officers from the burdens of litigation.[4] However, rather than fulfilling its purpose, qualified immunity has robbed victims of meaningful opportunities to seek justice when officers violate their constitutional rights. In turn, officers are not held accountable for grievous acts, further distorting public trust in law enforcement and the justice system as a whole.

In response to these issues, many have urged courts, legislatures, and states to end qualified immunity.[5] Civil unrest is at an all-time high, especially amidst ongoing police violence, often caught on camera and spread by news

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1. Philip M. Stinson, *Charging a Police Officer in Fatal Shooting Case Is Rare, and a Conviction Is Even Rarer*, CRIM. J. FAC. PUBL'N (May 31, 2017, 8:18 PM), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1079&context=crim_just_pub [https://perma.cc/N332-RM95].
2. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, PNAS (Aug. 20, 2019), https://www.pnas.org/content/116/34/16793 [https://perma.cc/8NWZ-EHEL].
3. Stinson, *supra* note 1, at 80; Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S.U. L. REV. 283, 284–85 (2019).
4. Carlos, *supra* note 3, at 284–86.
5. *See infra* Part II.B.

and social media outlets nationwide.[6] While courts and Congress have yet to reexamine qualified immunity, Colorado became the first state to enact legislation that eliminates qualified immunity's applicability under state law.[7] It remains uncertain whether the Supreme Court, Congress, or other states will follow suit and enact change to address the ongoing injustices that qualified immunity causes.

This Comment argues that the doctrine of qualified immunity should be modified and that Colorado's new law, the Enhance Law Enforcement Integrity Act (SB20-217), sets a good example for future legislation both in Arizona and on the federal level because it increases police accountability and allows plaintiffs to vindicate their civil rights in court. Part II details the evolution of the doctrine of qualified immunity and the issues surrounding its controversial application in the courts. Part II also introduces Colorado's Enhance Law Enforcement Integrity Act, explaining how the new law changes the qualified immunity defense under state law to improve police accountability and aid plaintiffs in successfully bringing suit. Part III analyzes Supreme Court cases and concludes that the Court is unlikely to revisit qualified immunity anytime soon. Part III also examines the suitability of Colorado's new law in Arizona and within the federal legislature. Ultimately, Part III posits that Colorado's law should be implemented federally and in Arizona with minimal modifications. Part IV concludes that because the Supreme Court will not reexamine qualified immunity, Congress and Arizona should address the injustices resulting from it by replicating Colorado's SB20-217.

II. BACKGROUND

The qualified immunity doctrine has evolved over time as courts have revised its requirements in an attempt to further the doctrine's initial policy goals. This Part provides a comprehensive historical background on qualified immunity and explains how courts arrived at the modern-day standard. This Part also discusses how qualified immunity affects plaintiffs' ability to pursue their constitutional claims and how the defense impacts different communities and the legal system overall. Lastly, this Part introduces Colorado's new Enhance Law Enforcement Integrity Act, which provides an effective solution to the issues that qualified immunity creates. This Part

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6. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/D4GV-APRF].

7. *See infra* Part II.C.1.

illustrates that because other states, including Arizona, have not yet reexamined qualified immunity, they should replicate Colorado's new law.

A. What Is Qualified Immunity?

It is rare for the criminal justice system to hold law enforcement officers accountable for infringing on a citizen's constitutional rights.[8] From 2004 to 2017, only twenty-nine officers were convicted for their misconduct—the majority of which were only for nominal manslaughter charges.[9] During this time span, only one officer was charged with intentional murder and convicted.[10] While some officers face disciplinary action, such as suspension, it remains unlikely that officers will be terminated, even if convicted of a violent crime.[11] Furthermore, even those officers who are terminated are often reinstated later by the same department.[12]

In these cases where an officer has seemingly escaped accountability, citizens may take civil action to hold the officer accountable through 42 U.S.C. § 1983.[13] Under § 1983, any person who deprives a United States citizen of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[14] While this course of action could require the officer, or more often the municipality, to pay damages to the victim of the alleged misconduct, many officers immediately invoke the affirmative defense of qualified immunity, rendering § 1983 claims ineffective in too many cases.[15]

Qualified immunity is a judicial doctrine that gives government officers immunity in civil suits alleging constitutional violations.[16] Despite the unqualified statutory phrase, "shall be liable," the Supreme Court concluded that the Reconstruction Era Congress must have implicitly intended to retain a form of qualified immunity recognized for executive functions under common law.[17] The Court's "driving force" in creating qualified immunity was to protect officers from the burdens associated with discovery and trial.[18]

8. Stinson, *supra* note 1, at 80.
9. *Id.*
10. *Id.*
11. Carlos, *supra* note 3, at 285.
12. *Id.*
13. *Id.*
14. 42 U.S.C. § 1983.
15. Carlos, *supra* note 3, at 285.
16. *Id.* at 286.
17. *Id.* at 291–92.
18. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Qualified immunity provides immunity from suit—it is not merely a defense to liability.[19] Thus, courts prefer to resolve immunity ambiguities at the earliest possible stage in the case.[20] Otherwise, if a court erroneously permits the case to proceed to trial, the defendant essentially loses qualified immunity.[21] Courts have reiterated that qualified immunity balances the need to hold officers accountable for irresponsible conduct and the interest in protecting officers from "harassment, distraction, and liability when they perform their duties reasonably."[22]

Since its inception, the doctrine of qualified immunity has steadily evolved. In *Wood v. Strickland*, the Supreme Court required defendants invoking qualified immunity to prove two elements: that their conduct was objectively reasonable and that they had a "good-faith" belief that the alleged conduct was proper.[23] The objective element required a showing that the defendant had knowledge of "the basic, unquestioned constitutional rights of his charges."[24] An official could not justify violating a citizen's constitutional rights with his ignorance of well-established law.[25] The subjective element required the official to prove he acted under a sincere belief that his actions were justified and appropriate under the circumstances.[26] Thus, the plaintiff could defeat a qualified immunity defense if the officer "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."[27] The Court found that this standard did not place an unfair burden on officials who have assumed a position requiring a high level of sound judgment to fulfill their duties.[28] At the same time, the Court found that the standard respected the high value and importance of civil rights in the legal system.[29]

However, the Court in *Harlow v. Fitzgerald* found that the subjective, good-faith element was incompatible with qualified immunity's goal of preventing insubstantial claims from proceeding to trial.[30] The court reasoned

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19. *Id.*
20. *Id.* at 232.
21. *Id.*
22. *Id.* at 231.
23. 420 U.S. 308, 321 (1975).
24. *Id.* at 322.
25. *Id.* at 321.
26. *Id.*
27. *Id.* at 322.
28. *Id.*
29. *Id.*
30. 457 U.S. 800, 815–16 (1982).

that because questions of fact are not generally decided by the court on a motion for summary judgment,[31] an officer's subjective intent, which is a question of fact, should be resolved by a jury.[32] Litigating an officer's subjective intentions created substantial costs.[33] This litigation almost always required inquiry into the officer's values, emotions, and experiences, creating an extensive and burdensome discovery process.[34] Additionally, this process distracted officers from their governmental duties and deterred the public from assuming public service positions.[35] Officers were less comfortable performing their duties, and ordinary citizens were discouraged from assuming this burden.[36] On this reasoning, the *Fitzgerald* court held that allegations of malice may not subject governmental officers to the costs and burdens associated with trial or extensive discovery.[37] Instead, the Court gave officers immunity from civil suits unless their conduct violated a clearly established law.[38] With the subjective inquiry no longer relevant in the qualified immunity analysis, this objective standard protected officers from the burdens associated with trial because most cases could be decided as a matter of law at summary judgment in the absence of a genuine dispute.[39]

Under the objective standard, courts used a two-step process to determine whether an officer was entitled to qualified immunity.[40] This required the plaintiff to first prove that the officer violated a constitutional right.[41] Second, if the plaintiff satisfied the first requirement, the court determined whether the constitutional right was "clearly established" at the time of the alleged violation.[42] The right was clearly established if a reasonable officer would recognize that his conduct violated that right.[43] The Court reasoned that this two-step procedure was necessary to support "the law's elaboration from case to case."[44]

31. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact.").
32. *Fitzgerald*, 457 U.S. at 816.
33. *Id.*
34. *Id.* at 816–17.
35. *Id.* at 816.
36. *Id.*
37. *Id.* at 817–18.
38. *Id.* at 818.
39. *Id.*
40. Saucier v. Katz, 533 U.S. 194, 201 (2001).
41. *Id.*
42. *Id.*
43. *Id.* at 202.
44. *Id.* at 201.

However, the Court in *Pearson v. Callahan* held that this two-step process was no longer mandatory.[45] Courts now have discretion in determining whether to first address the first or second prong.[46] Thus, a court may solely examine whether the right was "clearly established" at the time of the alleged misconduct and grant qualified immunity if the right was not clearly established, without addressing whether the officer actually violated a constitutional right.[47] In modifying the standard, the Court reasoned that in some cases, litigants wasted scarce judicial resources where "it [was] plain that a constitutional right [was] not clearly established but far from obvious whether in fact there [was] such a right."[48] Instead of undertaking an "academic exercise" in determining whether such a right exists, a court may end its inquiry after determining that there was no clearly established constitutional right at the time of the offense.[49] Litigating unnecessary constitutional questions, the Court discussed, also wasted the parties' resources by forcing parties to assume additional litigation costs "when the suit otherwise could be disposed of more readily."[50]

B. Issues Created by Qualified Immunity in Practice

The Supreme Court intended the qualified immunity defense to protect officers who acted reasonably while making split-second decisions in dangerous situations from the burdens associated with trial.[51] However, in practice, qualified immunity has caused many consequences for victims and the legal system overall. As discussed in Subsection 1, these issues are partly created by the Court's tendency to apply the "clearly established" requirement too narrowly. In turn, as detailed in Subsection 2, the legal system has failed to hold officers accountable for egregious acts, closing courthouse doors to victims seeking redress for officers' violations of their constitutional rights.

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45. 555 U.S. 223, 236 (2009).
46. *Id.*
47. *See id.*
48. *Id.* at 236–37.
49. *Id.* at 237.
50. *Id.*
51. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989).

1. The "Clearly Established" Requirement Is Construed Narrowly

To overcome the qualified immunity defense, a plaintiff must establish that the defendant officer violated a clearly established constitutional right.[52] Courts apply this requirement strictly, reasoning that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[53] Thus, a law is clearly established only if it was "beyond debate" that the officer violated the law.[54] This requires existing precedent on point that would have put a reasonable officer on notice that his conduct was unlawful.[55] The precedent must be "particularized" to the facts at hand.[56] This narrow application essentially requires that *every* reasonable officer understands that the questionable conduct was unlawful.[57] Even if "we are morally outraged" or shocked by the misconduct, courts may grant qualified immunity "[because it] does not mean necessarily that the officials should have realized that [the conduct] violated a constitutional right."[58] In fact, qualified immunity applies "to all but the plainly incompetent or those who knowingly violate the law."[59]

Courts have expressed concern that qualified immunity no longer protects just those officers who acted in good faith.[60] They have noted that, instead, the doctrine "now protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.'"[61] For example, in *Sampson v. County of Los Angeles*, the plaintiff, who was obtaining legal guardianship of her niece, brought suit alleging that the social worker assigned to her case sexually harassed her.[62] The Ninth Circuit reluctantly affirmed the district court's grant of qualified immunity to the social worker.[63] It reasoned that the plaintiff's Fourteenth Amendment right to be free from sexual harassment by a social worker was not clearly established at

52. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).
53. *Id.* at 818.
54. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
55. *Id.*
56. White v. Pauly, 137 S. Ct. 548, 552 (2017) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
57. Jamison v. McClendon, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020).
58. *Id.* at 404–05 (quoting Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994)).
59. *Id.* at 404 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
60. *Id.* at 404–05.
61. *Id.* at 404.
62. Sampson v. County of Los Angeles, 974 F.3d 1012, 1015 (9th Cir. 2020).
63. *Id.* at 1016.

the time of the alleged misconduct.[64] In requiring specific precedent on point, the court was unable to hold the social worker accountable for his actions, even though he violated the plaintiff's basic human rights.[65]

The court reasoned that the constitutional right not to be sexually harassed in the workplace and in school was clearly established, but the right not to be sexually harassed by a public official providing social services was not because no precedent involved a social worker engaging in sexual harassment.[66] The only difference between this case and precedent was that the plaintiff's harasser was not a supervisor, classmate, coworker, or teacher.[67] The court emphasized that "the Supreme Court's exceedingly narrow interpretation of what constitutes a 'clearly established' right precludes us from holding what is otherwise obvious to us—that the right of private individuals to be free from sexual harassment at the hands of public officials" was clearly established.[68] Due to this narrow requirement, the court was unable to provide the plaintiff with any redress.[69]

Unfortunately, these outcomes have become increasingly prevalent in the legal system.[70] As Fifth Circuit Judge Don Willett noted, qualified immunity often amounts to "unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly."[71] In practice, it is insignificant whether an officer violated the plaintiff's constitutional rights if no case previously held the conduct to be unlawful.[72] Requiring plaintiffs to cite precedent that is almost *exactly* on point creates a "yes harm, no foul" system in which "victims [are] violated but not vindicated."[73] Judge Willett emphasized that this means officers are not held responsible for their wrongdoing.[74] Furthermore, Judge Willett noted that by only determining whether sufficient precedent exists, skipping the constitutional inquiry entirely, courts fail to scrutinize alleged misconduct.[75] This leads to "constitutional stagnation," with fewer courts *clearly* establishing law and

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64. *Id.*
65. *Id.*
66. *Id.* at 1023.
67. *Id.*
68. *Id.* at 1025.
69. *Id.*
70. Jamison v. McClendon, 476 F. Supp. 3d 386, 406–07 (S.D. Miss. 2020).
71. Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (emphasis omitted).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

answering constitutional questions.[76] In turn, courts may conclude that a law is not clearly established based solely on judicial silence.[77] When courts refrain from deciding constitutional issues, they perpetuate a cycle in which no law is "clearly established," and, as a result, officers continue to escape responsibility while victims lack any legal recourse.[78]

2. Qualified Immunity Hinders Plaintiffs from Vindicating Their Rights and Distorts Public Trust in Law Enforcement

Legal scholars and commentators often express concern that qualified immunity shuts courthouse doors to victims whose rights were infringed.[79] In fact, experts on qualified immunity have opined that recent developments in the doctrine illustrate there is little—if any—hope left for plaintiffs.[80] The possibility of qualified immunity disposing of the case in its earliest stages may encourage victims to never file suit or to settle prematurely.[81] Available evidence shows that only 1% of people who believe law enforcement violated their rights actually file suit.[82] In one study of sixty-seven qualified immunity appeals, 34.3% were withdrawn without decision, suggesting that many were settled while on appeal.[83] These settlements are often low and inexpensive for the defense.[84] Moreover, evidence shows that the qualified immunity defense often plays a substantial role in an attorney's decision on whether to take on a case.[85] Attorneys report that qualified immunity motions are difficult to overcome and create burdensome expenses that render cases too costly to pursue.[86] This contributes to plaintiffs' inability to pursue and prevail in their legal claim.[87]

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76. *Id.*
77. *Id.*
78. *Id.* at 479–80.
79. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–7 (2017).
80. *Id.* at 7.
81. *Id.* at 10.
82. *Id.* at 50; *see* MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC 19–20 (2005), https://bjs.ojp.gov/content/pub/pdf/cpp02.pdf [https://perma.cc/96BN-N3RE] (finding that of 664, 500 individuals against whom the police had used force, 87.3% (580,108) believed that the use of force was improper, but only 7,416 filed suit in court).
83. Schwartz, *supra* note 79, at 51.
84. *See id.* at 62 ("Some people who do file their cases may settle at a discount, not because their cases are weak but because they cannot afford to litigate qualified immunity in the district court or on interlocutory appeal.").
85. *Id.* at 50.
86. *Id.*
87. *Id.*

Further exasperating victims' inability to pursue their claims is research showing that nearly all Supreme Court qualified immunity claims are resolved in the same way—by granting qualified immunity to the officer.[88] As of 2018, in the thirty-five years since the *Harlow* Court implemented qualified immunity's modern objective standard, the Supreme Court found a clear violation of the law in only two of thirty qualified immunity cases.[89] These two cases, which occurred over a decade ago, involved an obvious mistake in a search warrant[90] and a violation of well-established, long-standing circuit precedent.[91] The Supreme Court has repeatedly reminded lower courts that clearly established law must be "understood concretely," oftentimes finding that lower courts failed to reach this understanding if they denied officers' request for qualified immunity.[92]

Exemplifying this is the Court's holding in *White v. Pauly*.[93] After officers who were sued for excessive force for shooting a man through his window were denied qualified immunity, they petitioned the Court for certiorari.[94] The Court held the officers did not violate any clearly established right and granted them qualified immunity.[95] In its opinion, the Court reasoned that it had "issued a number of opinions reversing federal courts in qualified immunity cases" due to the doctrine's importance to society overall.[96] The Court held that the lower court "misunderstood the 'clearly established' analysis" and relied on general statements of law that were not sufficiently analogous to the facts at issue in this case.[97] District Court Judge Carlton Reeves described this reversal as unforgiving, explaining that the Supreme Court was "chastising" the appellate court for denying the officers request for qualified immunity.[98] Lower courts, he explained, see these decisions and are deterred from finding a clear violation of established law.[99]

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88. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018).
89. *Id.*
90. Groh v. Ramirez, 540 U.S. 551, 564 (2004).
91. Hope v. Pelzer, 536 U.S. 730, 741–42 (2002). Two other cases also found for the plaintiffs but relied on reasoning outside of finding a violation of clearly established law. Baude, *supra* note 88, at 83.
92. Baude, *supra* note 88, at 83.
93. White v. Pauly, 137 S. Ct. 548, 552 (2017).
94. *Id.* at 549–51.
95. *Id.* at 551.
96. *Id.*
97. *Id.* at 552.
98. Jamison v. McClendon, 476 F. Supp. 3d 386, 405 n.138 (S.D. Miss. 2020).
99. *Id.* ("[L]ower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct." (quoting Baude, *supra* note 88, at 84)).

While the Supreme Court regularly reverses holdings that reject the qualified immunity defense, it almost never reverses holdings that grant officers qualified immunity.[100] This pattern has a significant impact on the public, insinuating that officers can act unreasonably without consequence.[101] In fact, close to half of Americans think that the majority of police officers believe they are above the law and that police are rarely held responsible for their misconduct.[102] Moreover, many notice a trend in which law enforcement officers are treated more favorably in the legal system than others—surely, no ordinary citizen expects to escape liability after violating another's constitutional rights simply because he or she was ignorant of the law.[103]

This differential treatment not only serves as a blockade to justice, but it also reduces police accountability and erodes trust between law enforcement and the communities they swear to protect.[104] This distrust in law enforcement, and in the legal system overall, also decreases public respect for both the police and the law.[105] Distrust in the law and law enforcement has been proven to increase crime and lawlessness.[106] Critics and scholars warn that Congress should be concerned about the effects of qualified immunity's failure to hold law enforcement officers accountable for their unlawful acts.[107] Thus, lawmakers need to address the "terrorism and oppression [that continue to occur] at the hands of law enforcement" without any consequence.[108] Otherwise, there may be a growing "threat of revolution and rebellion in America."[109]

C. Qualified Immunity in the States

Although the Supreme Court and Congress have refused to reexamine qualified immunity, state governments can take action to address state-level misconduct. As discussed below in Subsection 1, Colorado became the first state to eliminate qualified immunity for state law claims.[110] This landmark legislation increases accountability and aids plaintiffs in vindicating their

100. Baude, *supra* note 88, at 83.
101. Carlos, *supra* note 3, at 300.
102. *Id.*
103. *Id.* at 299–300.
104. *Id.* at 300.
105. *Id.*
106. *Id.*
107. *Id.* at 301.
108. *Id.*
109. *Id.*
110. *See infra* note 117 and accompanying text.

rights.[111] Subsection 2 details how other states have fallen short in addressing qualified immunity's consequences. Particularly in Arizona, Colorado's new legislation can serve as a great legislative example for state lawmakers.

1. Colorado Takes Action

Even though state governments cannot override federal qualified immunity, they can develop legislation to hold state officers accountable for violating state law.[112] Colorado did just this by passing SB20-217, also known as the Law Enforcement Integrity Act—a law enforcement reform bill.[113] This law includes a wide range of major police reform efforts, such as requiring officers to wear body cameras, banning chokeholds, and banning the use of deadly force for nonviolent offenses.[114] Most importantly for the purposes of this Comment, the law ensures that state officers will not escape liability for their unlawful conduct under the shield of qualified immunity by completely barring the defense in state constitutional claims.[115] Other states have placed limitations on granting qualified immunity in civil cases and have allowed plaintiffs to bring claims against government officials.[116] But Colorado is the first state to enact a law that eliminates qualified immunity under state law.[117]

SB20-217 permits individuals to bring claims against state officers who violate their constitutional rights under Colorado law.[118] Similar to § 1983, which allows individuals to sue in federal court when their rights under the federal constitution are violated, SB20-217 allows claims in state court that allege violations under Colorado's own Bill of Rights.[119] The law expressly mandates that "[q]ualified immunity is not a defense" to the civil action.[120] The law applies to all local law enforcement officers, sheriff deputies, and

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111. *See infra* Part II.C.1.

112. Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way To Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=5bcbbaa6378a [https://perma.cc/ZY4Z-PYNT].

113. *Id.*; Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms To Eliminate Qualified Immunity*, CATO INST.: CATO AT LIBERTY (June 22, 2020, 11:31 AM), https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity [https://perma.cc/J4CN-EYPG].

114. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

115. Sibilla, *supra* note 112.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. § 3 (Colo. 2020); *see also* COLO. REV. STAT. § 13-21-131(2)(b) (2021).

state patrol officers.[121] However, it does not apply to government officials who do not work in law enforcement or to state law enforcement officers who are not part of Colorado state patrol, exempting over 1,300 state law enforcement agents.[122] The law also does not apply to federal law enforcement agents.[123]

One of the main goals of qualified immunity is to protect officers from financial burdens associated with litigation and trial.[124] Some worried that barring the defense from state claims would expose officers to overwhelming financial liability.[125] To compensate for this concern, SB20-217 requires law enforcement agencies to indemnify their officers.[126] Officers are responsible for expenses only if they acted in bad faith or if the civil suit arose from conduct for which the officer was criminally convicted.[127] But even where officers acted in bad faith, they are only responsible for five percent of the judgment, or $25,000, whichever is less.[128] Additionally, officers who overcome frivolous lawsuits have the opportunity to recover attorneys' fees.[129] Bypassing qualified immunity while ensuring that the government fully pays out judgments against officers guarantees that victims are vindicated while also ensuring that good officers are not deterred from performing their essential job duties.[130] However, any officer found civilly liable for using excessive force or failing to intervene in the use of excessive force will have his certification permanently revoked.[131] The officer may have his certification reinstated only if a court later exonerates him.[132]

Colorado governor Jared Polis expressed that the state could not "wait any longer to knock down institutional racism."[133] Amidst nationwide civil unrest in response to the murder of George Floyd[134] and other black and brown victims at the hands of law enforcement, Colorado lawmakers strived to enact a law "that [will] not only protect civil rights, but will [also] help restore trust

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121. Sibilla, *supra* note 112.
122. *Id.*
123. *Id.*
124. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
125. Sibilla, *supra* note 112.
126. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. § 3 (Colo. 2020); *see also* COLO. REV. STAT. § 13-21-131(4) (2021).
127. Colo. S. 20-217 § 3; *see also* § 13-21-131(4) (2021).
128. Colo. S. 20-217 § 3; *see also* § 13-21-131(4) (2021).
129. Colo. S. 20-217 § 3; *see also* § 13-21-131(3) (2021).
130. Sibilla, *supra* note 112.
131. Colo. S. 20-217 § 2; *see also* COLO. REV. STAT. § 24-31-904 (2021).
132. Colo. S. 20-217 § 2; *see also* § 24-31-904 (2021).
133. Sibilla, *supra* note 112.
134. *See infra* notes 186–87 and accompanying text.

between law enforcement and the communities they serve."[135] Representative Leslie Herod, a sponsor of SB20-217 in the House, expressed dedication to "address[ing] the violence and brutality that Black and Brown communities have endured at the hands of law enforcement."[136] Because the Supreme Court and Congress have remained silent on the urgent need to revisit qualified immunity, state legislatures face more pressure than ever to hold officers accountable for their misconduct.[137] Colorado lawmakers hope this law will break down longstanding barriers for plaintiffs seeking redress.[138] Even more remarkable is that SB20-217 gained bipartisan support in just sixteen days.[139] This leads many to believe that Colorado's landmark law could be a great example for other states to follow in the near future.[140]

2. Other States Need Reform

Though Colorado has enacted legislation to modify qualified immunity, other states continue to look for ways to remedy ongoing civil unrest caused by officers' bad behavior and lack of accountability. For example, inspired by Colorado,[141] Massachusetts lawmakers passed a police reform bill, which Governor Charlie Baker signed into law at the end of December 2020.[142] The law bars the use of chokeholds, requires officers to intervene when another is using excessive force, and creates heightened certification processes for police officers.[143] However, U.S. Representative Ayanna Pressley cautioned that the reform bill "falls short" because it "does not go far enough" to adequately address qualified immunity.[144] Instead of eliminating qualified immunity for all state officers, the law only bars the defense for decertified

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135. Sibilla, *supra* note 112.

136. *Id.*

137. *Id.*

138. *Id.*

139. Alex Burness & Saja Hindi, *How Colorado Found the Political Will To Pass a Sweeping Police Reform Law in Just 16 Days*, DENVER POST (June 19, 2020, 8:26 PM), https://www.denverpost.com/2020/06/19/colorado-police-reform-accountability-bill/ [https://perma.cc/9MCK-DMGV].

140. Sibilla, *supra* note 112.

141. Cary Aspinwall & Simone Weichselbaum, *Colorado Tries New Way To Punish Rogue Cops*, MARSHALL PROJECT (Dec. 18, 2020, 4:00 PM), https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops [https://perma.cc/Q9RG-G3CC].

142. S. 2963, 191st Gen. Ct. (Mass. 2020).

143. *Id.*

144. Nik DeCosta-Klipa, *Ayanna Pressley Backs New Massachusetts Police Reform Bill—Even if It 'Falls Short'*, BOSTON.COM (Dec. 1, 2020), https://www.boston.com/news/politics/2020/12/01/ayanna-pressley-massachusetts-police-reform [https://perma.cc/3Z26-MP73].

officers.[145] Pressley expressed that "Massachusetts . . . missed an opportunity to lead by ensuring that those responsible for upholding the law are subject to it too."[146] She insists that the fight for bold legislation to address this shield from accountability will continue.[147]

Arizona has yet to enact legislation to address qualified immunity and hold officers responsible for their unlawful conduct. But police violence and misconduct remain an ongoing state-wide issue and hotly debated topic. Since 2011, at least 498 law enforcement officers have been involved in shootings in just Maricopa County, fifty-five of which occurred in 2020 alone.[148] However, only three Maricopa County officers have faced charges in connection with an on-duty shooting since 2010.[149] Even more concerning are cases where officers shot people who were not carrying deadly weapons, or where officers were involved in multiple shootings without facing serious repercussions.[150]

Dylan Liberti was one of these victims—shot and killed by Scottsdale police.[151] An officer shot Liberti after he called police because he was struggling with his mental health.[152] Liberti had not committed any crimes prior to calling the police and was cooperative until the officers became physical with him.[153] This physical struggle ensued after officers ordered Liberti to sit down onto hot pavement; minutes later he was dead.[154] No officers faced criminal charges following the shooting.[155] In a civil suit against the city, the Ninth Circuit affirmed the lower court's grant of qualified immunity, barring the Liberti family's claims against the city and its

145. *Id.*

146. *Id.*

147. *Id.*

148. Emily Wilder, *Family of Scottsdale Man Killed by Police Brings Case Against Officers, City to Supreme Court*, AZCENTRAL.COM (Jan. 20, 2021, 7:33 PM), https://www.azcentral.com/story/news/local/scottsdale/2021/01/20/family-dylan-liberti-man-killed-scottsdale-police-2016-petitions-supreme-court-abolish-qualified-imm/4219601001/ [https://perma.cc/V9EZ-YCLR].

149. *Id.*

150. Uriel J. Garcia & Bree Burkitt, *Every 5 Days, an Arizona Officer Shoots Someone, a Republic Analysis Finds*, AZCENTRAL.COM (Jan. 30, 2020, 6:51 PM), https://www.azcentral.com/in-depth/news/local/arizona-investigations/2019/06/19/arizona-phoenix-police-shootings-officers-record-levels/3029860002/ [https://perma.cc/2NKH-G8MY].

151. Wilder, *supra* note 148.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

officers.[156] The Liberti family has now petitioned the Supreme Court to review the decision and abolish qualified immunity.[157]

Liberti's case is not an isolated incident in Arizona. In 2018, Phoenix police attempted to arrest Alexandre Andrich, who was suspected of trespassing.[158] However, the officer managed to place only one of Andrich's wrists in handcuffs before he escaped.[159] Another officer fatally shot Andrich, claiming he feared for his safety.[160] The officer alleged the partially applied handcuffs were a weapon.[161] These cases emphasize an ongoing issue in Arizona—officers use deadly force when there are other means available to subdue citizens without taking their lives.[162] Even worse, officers shoot Black and Native American individuals in Phoenix at a disproportionate rate.[163]

Police misconduct is not improving Arizona. And families like the Liberti and Andrich families are most times left without any legal remedy or justice for their loved one's death. In fact, Arizona has had considerably more police violence than the majority of other states in the country.[164] In response to public outrage concerning this violence, Phoenix Police Chief Jerry Williams released a memo that documents enhancements the Department made in an effort to "build trust and transparency with the community."[165] These enhancements include, among other things, more body-worn cameras and improved training.[166] But there is no mention of reexamining qualified immunity or ways to hold officers accountable for egregious misconduct.[167] Phoenix City Councilmember Carlos Garcia expressed that community members are no longer surprised that "despite all [of] the scrutiny from [the]

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156. *Id.*
157. *Id.*
158. Garcia & Burkitt, *supra* note 150.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. Eric Schaal, *15 States Where Cops Kill the Most People in America*, SHOWBIZ CHEATSHEET (Dec. 4, 2017), https://www.cheatsheet.com/culture/states-where-cops-kill-the-most-people-in-america.html/ [https://perma.cc/X74A-4EAE]; Nohelani Graf, *Are Phoenix Police Officers the Most Violent in the Country?*, ABC15 (Sept. 25, 2018, 12:53 PM), https://www.abc15.com/news/region-phoenix-metro/central-phoenix/are-phoenix-police-officers-the-most-violent-in-country [https://perma.cc/EJ6Y-F4W2] (describing Arizona police as the deadliest force in America).
165. *Police Chief Outlines Changes Made To Enhance Public Trust*, CITY OF PHX. (June 9, 2020, 10:00 AM), https://www.phoenix.gov/newsroom/police/1328 [https://perma.cc/JUL3-UVUP].
166. *Id.*
167. *Id.*

community[,] Phoenix PD continues to respond violently to calls."[168] Colorado's new law, as analysts predict, may set a good example for the Arizona Legislature to bridge the gap between the community and law enforcement.[169]

III. ANALYSIS/REMEDIES

Taken together, the case law and legal scholarship discussed thus far illustrate the inequitable impact that qualified immunity has on communities across the country. However, Colorado's Enhance Law Enforcement Integrity Act addresses these issues and provides victims with an opportunity to seek justice when an officer violates their basic civil rights.[170] This Part evaluates whether the Supreme Court will reexamine qualified immunity in the near future, ultimately finding it unlikely. Therefore, this Part posits that Colorado's new law should be replicated both at the federal and state level. If Congress enacts similar legislation, the nation would benefit from widespread reform and victims everywhere would have legal recourse. Colorado's law would also be a great example for legislation in Arizona by addressing ongoing civil unrest and a need for justice reform.

A. The Supreme Court is Unlikely to Take Action

The Supreme Court has power to reexamine qualified immunity and address the injustices it has produced. This Section discusses how the Supreme Court has remained virtually silent in the ongoing debate on whether qualified immunity should be modified or abolished. This Section also examines where the Court's Justices stand on this issue and whether there may be hope in the future for the Court to break its pattern of inaction.

1. The Court Has Repeatedly Declined Opportunities To Reexamine Qualified Immunity

Despite ongoing debate and criticism concerning the doctrine of qualified immunity, the Supreme Court has continued to apply the doctrine

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168. Allyson Chiu, *Protest Erupts in Phoenix After Viral Video Shows Police Fatally Shooting Man in Parked Car*, WASH. POST: MORNING MIX (July 6, 2020), https://www.washingtonpost.com/nation/2020/07/06/phoenix-protest-police-shooting/ [https://perma.cc/NU9N-G4PQ] (detailing public rage in response to Arizona officers shooting and killing a man who was sitting in his parked car).

169. Sibilla, *supra* note 112.

170. *See id.*

strenuously. In June 2020, the Court declined to hear eight cases involving qualified immunity, refusing to reconsider cases in which lower courts granted the defense to officers accused of unconstitutional misconduct.[171] In one case, *Baxter v. Bracey*, officers caught the plaintiff in the act of breaking into a house.[172] Officers released a dog to apprehend him, but the plaintiff maintained that he had surrendered before the officers released the dog.[173] He sued the officers, alleging excessive force and failure to intervene in violation of the Fourth Amendment.[174] However, the Sixth Circuit granted the officers qualified immunity, finding an absence of any clearly established right.[175] In June, the Supreme Court denied certiorari.[176] In another case, an officer shot a ten-year-old boy while pursuing an unarmed suspect, who wandered into the victim's yard.[177] Five other children were also in the yard, along with the family's pet dog.[178] An officer attempted to shoot the pet dog, although it was not posing any threat, but missed the dog and instead shot the ten-year-old victim.[179] The Eleventh Circuit Court of Appeals granted the officer qualified immunity because the officer violated no clearly established right.[180] The Supreme Court declined to hear the case.[181]

Again, in October 2020, the Supreme Court declined to review additional cases involving qualified immunity.[182] One case involved a plaintiff's appeal of a ruling that granted qualified immunity to officers who beat him while arresting him for murder.[183] In another case, officers did not permit lifeguards to retrieve a man for two and a half minutes after he entered a pool while

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171. Nick Sibilla, *The Supreme Court Refuses To Hear Challenges to Qualified Immunity, Only Clarence Thomas Dissents*, FORBES (June 15, 2020, 1:30 PM), https://www.forbes.com/sites/nicksibilla/2020/06/15/supreme-court-refuses-to-hear-challenges-to-qualified-immunity-only-clarence-thomas-dissents/#462b0a867fad [https://perma.cc/322N-86BE].

172. Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Corbitt v. Vickers, 929 F.3d 1304, 1323–24 (11th Cir. 2019) (Wilson, J., dissenting).

178. *Id.* at 1324.

179. *Id.*

180. *Id.* at 1323 (majority opinion).

181. Corbitt v. Vickers, 141 S. Ct. 110 (2020) (mem.); Melissa Quinn, *Supreme Court Rejects Cases Challenging Qualified Immunity for Police Officers*, CBS NEWS (June 15, 2020, 9:57 AM), https://www.cbsnews.com/news/supreme-court-qualified-immunity-police-officers-rejects-cases/ [https://perma.cc/L68R-ABBR].

182. Jordan S. Rubin, *Supreme Court Won't Review Police Immunity Doctrine*, BLOOMBERG L. (Oct. 5, 2020, 7:31 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-wont-review-police-immunity-doctrine [https://perma.cc/UYB4-R5UY].

183. *Id.*

suffering a mental health breakdown, and he nearly drowned.[184] The petitioners urged the Court to revisit qualified immunity because it "contributes to a culture of American law enforcement that tolerates and facilitates police misconduct."[185] Still, the Court refused to review it.

The timing of these denials speaks loudly. These June and October denials came in the wake of public unrest and nationwide protests following the death of George Floyd, an African American man who was killed by a Minneapolis police officer who pressed his knee to Floyd's neck for several minutes.[186] People across the country subsequently united to demand justice for the many black and brown lives that law enforcement has taken.[187] Although police violence and accountability were in the national spotlight, the highest court in the nation made clear that it would not join in on the widespread debate. These denials of review illustrate that at this time, the Supreme Court does not intend to address the injustices that qualified immunity creates. Instead, Congress and state lawmakers must ensure that citizens' rights are protected and that their injuries are acknowledged and compensated when officers violate those rights.

2. Is There Hope for the Supreme Court To Break its Silence?

Although the Supreme Court has continued to strenuously apply the doctrine of qualified immunity, Justices have repeatedly expressed concern about its practical implications. In *Baxter v. Bracey*,[188] Justice Thomas dissented from the Supreme Court's decision not to grant review.[189] Despite his conservative leanings, he expressed "strong doubts" about the doctrine of qualified immunity, noting that the standard once provided protections for law enforcement only under confined circumstances.[190] Now, courts offer immunity broadly, relying on a "clearly established" test that has no historical common-law basis and "stray[s] from the statutory text."[191]

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184. *Id.*

185. *Id.* (quoting Petition for a Writ of Certiorari at i, Fijalkowski v. Wheeler, 141 S. Ct. 261 (2020) (mem.) (No. 19-1416)).

186. Quinn, *supra* note 181.

187. Lisa Shumaker, *U.S. Saw Summer of Black Lives Matter Protests Demanding Change*, U.S. NEWS & WORLD REP. (Dec. 7, 2020), https://www.usnews.com/news/top-news/articles/2020-12-07/us-saw-summer-of-black-lives-matter-protests-demanding-change.

188. For a description of the relevant facts, see *supra* Part III.A.1.

189. Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting).

190. *Id.* at 1863–65.

191. *Id.* at 1862.

Justice Gorsuch, another conservative justice, also adheres to a textualist philosophy.[192] And although Justice Gorsuch has applied qualified immunity generously, he does not believe the court should apply the doctrine boundlessly.[193] Illustrative of this is his dissent in *A.M. ex rel. F.M. v. Holmes*, where officers arrested a seventh-grader for burping in class.[194] Justice Gorsuch disagreed with the Tenth Circuit's grant of qualified immunity to the officers, reasoning that the officers acted unlawfully.[195] Further, in *Browder v. City of Albuquerque*, an officer sped through intersections with his emergency lights on after he had already finished his shift for the day.[196] The officer ran a red light and crashed into another vehicle, leaving one occupant dead and the other seriously injured.[197] Justice Gorsuch, then a Tenth Circuit Court Judge, denied the officer's request for qualified immunity, reiterating that less specificity is required to satisfy the clearly established prong where the conduct in question is sufficiently egregious.[198] Thus, while he has exercised caution in second-guessing police judgments and supports the practical protections qualified immunity provides officers, he does not agree with the broad application favored by other Justices. Due to his commitment to textualism, Justice Gorsuch may even agree with Justice Thomas that qualified immunity needs reexamination because its current broad form strays from the statutory text and common law basis. These are two conservative justices that could agree with the liberals that qualified immunity needs reconsideration.

Justice Sotomayor has also repeatedly expressed concern that qualified immunity offers protection too broadly. After the Supreme Court held an Arizona officer who shot a woman armed with a knife was entitled to qualified immunity, Justice Sotomayor dissented and highlighted how qualified immunity allows officers to escape liability for their gross misconduct.[199] She emphasized that the officers clearly acted unreasonably by opening fire on a woman who was seemingly composed, distanced from everyone around her, and holding a knife down at her side.[200] This conduct,

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192. Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST.: CATO AT LIBERTY (June 15, 2020, 11:27 AM), https://www.cato.org/blog/supreme-courts-dereliction-duty-qualified-immunity [https://perma.cc/6R2S-DET6].

193. Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163, 164 (2017).

194. A.M. v. Holmes, 830 F.3d 1123, 1129 (10th Cir. 2016).

195. *Id.* at 1170 (Gorsuch, J., dissenting).

196. Browder v. City of Albuquerque, 787 F.3d 1076, 1077 (10th Cir. 2015).

197. *Id.*

198. *Id.* at 1082.

199. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (per curiam).

200. *Id.* at 1155–56.

Justice Sotomayor mentioned, should not have been insulated from liability on grounds that it violated no clearly established law.[201] She cautioned that qualified immunity "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[202]

Justice Sotomayor further discussed how the Court "routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'"[203] Sotomayor argued that this one-sided approach transforms the doctrine into an absolute shield for officers who violate citizens' constitutional rights.[204] Providing sweeping protection to officers who act unreasonably not only decreases public trust in law enforcement and the legal system, but it also leaves victims without any redress.

Qualified immunity's transition into a bipartisan issue creates hope that the Supreme Court could reexamine its standard and its impact within the legal system. An interesting mix of conservative and liberal judges have expressed legitimate concern that qualified immunity is in serious need of modification or complete abolishment. They have noted that the modern doctrine has no basis in historical common law, fails to hold law enforcement officers accountable for their unconstitutional misconduct, and creates a system in which an absolute shield of immunity protects officers. Although these Justices often oppose each other's policies, they agree that for policy reasons, qualified immunity should go.

A recent Supreme Court decision, rejecting qualified immunity for correctional officers, has sparked hope in some legal scholars that a change in the qualified immunity doctrine is on the horizon.[205] This decision reversed a Fifth Circuit case, *Taylor v. Stevens*, where a state inmate brought a § 1983 claim alleging that prison officers subjected him to unconstitutional conditions and were indifferent to his health and safety.[206] In his complaint, Taylor contended he was forced to reside in two filthy cells for six days.[207] In

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201. *Id.*

202. *Id.* at 1162.

203. *Id.* (quoting *Salazar-Limon*, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from denial of certiorari)).

204. *Id.* at 1155.

205. Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, A.B.A. J. (Feb. 1, 2021, 9:11 AM), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity [https://perma.cc/8RAL-5B9E] (discussing Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam)).

206. Taylor v. Stevens, 946 F.3d 211, 216 (5th Cir. 2019).

207. *Id.* at 218.

the first cell, the floor, walls, and ceiling were covered in feces, creating a strong, repugnant odor.[208] Instead of cleaning the cell, the officers mocked Taylor and criticized him for voicing his complaints.[209] Taylor could not eat in the cell due to a fear of contamination and did not have access to water.[210] In the second cell, a clogged floor drain smelt strongly of ammonia, which made it difficult for Taylor to breathe.[211] Taylor was forced to hold his urine for twenty-four hours before he eventually urinated on himself because the officers refused to escort him to the restroom.[212] Taylor did not want to urinate on the floor, as the officers instructed him to, because the floor, where he had to sleep, was already soiled.[213] Further, Taylor was not allowed to wear clothing and was only given a suicide blanket while in the cell, which was kept at freezing temperatures.[214] Despite these inhumane conditions, the Fifth Circuit granted the officers qualified immunity.[215] While it was clearly established that "prisoners couldn't be housed in cells teeming with human waste for months on end," the court held that it was not clearly established that staying in a disturbingly filthy cell for "only six days" violated the law.[216]

In its November 2020 order, the Supreme Court vacated the judgment of the Fifth Circuit and held that the lower court had erred in granting the officers qualified immunity.[217] The Court held that the facts of the case were so egregious that any reasonable officer would realize Taylor's conditions were unconstitutional.[218] This case exemplifies how courts often apply the "clearly established" requirement too narrowly. In some cases, especially those with facts as horrific as these, there is hopefully no precedent on point because conduct as disturbing as this should not be a common occurrence. Not having precedent on point in cases that involve obvious violations of basic human rights should not deny plaintiffs any remedy.

Experts and advocates for the abolition of qualified immunity view the *Taylor* decision as a victory, hoping it may lead to change in qualified

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 218–19.
213. *Id.* at 219.
214. Petition for a Writ of Certiorari at 6, Taylor v. Riojas, 141 S. Ct. 52 (2020) (No. 19-1261).
215. Taylor v. Stevens, 946 F.3d at 222.
216. *Id.*
217. Taylor v. Riojas, 141 S. Ct. at 53.
218. *Id.* at 53–54.

immunity litigation.[219] They predict that lower courts who have unwillingly granted immunity in cases involving obvious violations of a victim's rights simply because there is no prior case on point will invoke this ruling.[220] However, does this ruling signal that the Supreme Court will soon respond to an increasing volume of requests to modify or abolish the doctrine of qualified immunity? Although some opine this ruling illustrates the Court's recognition that the doctrine is problematic,[221] it remains unlikely that the Court will fully address it any time soon. After all, if the Court wanted to reexamine qualified immunity, it could have done so in this case.[222] Instead, it placed a tiny, obvious limitation on qualified immunity: not requiring precedent on point when the violation is so obvious and egregious that the general constitutional standard suffices. By showing that qualified immunity has some limit, the Court illustrated its commitment to the doctrine. So, even in light of this decision, the Supreme Court still seems unwilling to commit to reexamining qualified immunity. Thus, it remains that state legislatures and the federal government may be the only source of redress.

B. Colorado's Law Should Be Replicated Elsewhere

Because the Supreme Court is unlikely to take action, this Section will discuss alternative ways in which Congress and Arizona can address qualified immunity's inequitable results. As highlighted in Subsection 1, Colorado's new law is an adequate legislative example that would bring well-needed social change and justice. Subsection 2 discusses the law's federal suitability, explaining how it would create nationwide police reform and ensure that victims everywhere receive an equitable outcome. Lastly, Subsection 3 discusses why Arizona would benefit from Colorado's Enhance Law Enforcement Integrity Act, while also suggesting a few modifications, like holding the municipality strictly liable, that could further improve the law's impact on Arizona communities and victims.

1. Colorado's Law Would Need Minimal Modification

Colorado's Enhance Law Enforcement Integrity Act is a monumental step in the right direction toward justice. This law increases police accountability

219. Jordan S. Rubin, *Supreme Court Rejects Qualified Immunity in Prison Case*, BLOOMBERG L. (Nov. 2, 2020, 1:19 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-rejects-qualified-immunity-in-prison-case [https://perma.cc/34AD-ENKZ].

220. *Id.*

221. *Id.*

222. *Id.*

because it holds officers responsible when they use excessive force, bans the use of chokeholds, and bans the use of deadly force for nonviolent offenses.[223] More significantly, it allows plaintiffs to vindicate their civil rights in court by precluding the qualified immunity defense[224] and, thus, prevents courts from disposing of a case at the earliest stage of litigation. Although most victims do not pursue claims against officers who violate their constitutional rights,[225] this law removes some of the barriers that discouraged and hindered them from seeking a legal remedy. In addition, lawyers will no longer feel the need to avoid the burdensome and near-impossible task of overcoming the qualified immunity defense. Ultimately, opening courthouse doors to plaintiffs and condemning officer misconduct will help restore trust between law enforcement and the community. It is a critical time in America for the legal system to show Americans that their rights are protected and that law enforcement is not above the law.

SB20-217 also sets an example for lawmakers in its removal of violent officers from the police force. Because the Act orders that officers who use excessive force or fail to intervene when excessive force is used will have their certification permanently revoked,[226] officers cannot engage in repeated misconduct without reprimand. Furthermore, good officers will not have to worry about facing tremendous financial burdens. Because law enforcement agencies will indemnify their officers, relieving all costs for officers who acted in good faith,[227] the law does not discourage good officers from doing their job. This also rebuts the argument that qualified immunity is essential to our society because it protects officers who need to make split-second decisions. Officers will not need to hesitate in high-pressure situations because, if the officer is acting in good faith and lawfully, he will not face financial responsibility. This good-faith standard will force officers who act unlawfully to think before they act. Ultimately, this law ensures that victims are properly compensated for their injuries while ensuring that officers are not discouraged from performing their duties to the best of their ability.

2. Congress Should Implement Change

Because the Supreme Court is unlikely to reexamine qualified immunity in the near future, Congress should address its unjust impact on victims across the nation. In early March 2021, the House passed the George Floyd Justice

223. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).
224. *Id.* § 3; *see also* COLO. REV. STAT. § 13-21-131(2)(b) (2021).
225. *See supra* Part II.B.2.
226. Colo. S. 20-217 § 2; *see also* COLO. REV. STAT. § 24-31-904 (2021).
227. Colo. S. 20-217 § 3; *see also* § 13-21-131(4).

in Policing Act.[228] This reform bill, among other things, bans chokeholds, bans no-knock warrants in certain cases,[229] and enhances training procedures for law enforcement officers.[230] Additionally, the bill alters qualified immunity, allowing plaintiffs to attain civil damages when an officer violates their constitutional rights and barring the qualified immunity defense for defendants.[231] The Biden Administration supports the bill and stated that "[w]e cannot rebuild . . . trust if we do not hold police officers accountable for abuses of power and tackle systemic misconduct—and systemic racism—in police departments."[232] The House passed a similar bill last year, but it did not pass in the Senate.[233] Republicans continue to insist that the George Floyd Justice in Policing Act would weaken and destroy community police forces.[234] And many have serious doubts that this bill will get sufficient votes in the Senate.[235]

Because many believe that the George Floyd Justice in Policing Act will not pass in the Senate, as an alternative, Congress should enact Colorado's law federally. This may be a feasible alternative, considering that Colorado's new law gained bipartisan support in just sixteen days. While judges and legal scholars have urged the Court to completely abolish qualified immunity, enacting federal legislation similar to Colorado's new law is a more comprehensive solution. It would allow victims to seek redress after officers violate their constitutional rights. But it would also implement nationwide reform by banning chokeholds, prohibiting the use of deadly force for nonviolent crimes, and setting new standards. This law would encourage municipalities to increase training and ensure that officers face appropriate internal repercussions for misconduct, given their financial responsibility for

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228. Chloee Weiner, *House Approves Police Reform Bill Named After George Floyd*, NPR (Mar. 3, 2021, 9:32 PM), https://www.npr.org/2021/03/03/973111306/house-approves-police-reform-bill-named-after-george-floyd [https://perma.cc/QM8U-PKDR].

229. *Id.*

230. Henry J. Gomez, *Here's What the George Floyd Justice in Policing Act Would Do*, NBC NEWS (Apr. 21, 2021, 10:04 AM), https://www.nbcnews.com/politics/congress/here-s-what-george-floyd-justice-policing-act-would-do-n1264825 [https://perma.cc/H8F6-KEEU].

231. The law states that it is not a defense in any action brought under 42 U.S.C. § 1983 that (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 when 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 such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

H.R. 1280, 117th Cong. § 102 (2021).

232. Weiner, *supra* note 228.

233. *Id.*

234. *Id.*

235. *Id.*

at least a portion of legal judgments caused by their officers' misconduct. Enacting this new law federally would help to bridge the gap between officers and communities across the nation. America is yearning for this change, as demands to hold officers accountable for their unconstitutional actions persist. This ongoing and growing need for change should encourage Congress to take action soon.

Some may fear that enacting Colorado's new law federally would have too many nationwide repercussions. Qualified immunity is said to protect officers who need to make split-second and often dangerous decisions from facing litigation. However, even without qualified immunity, officers will not be responsible unless they violate a person's constitutional rights, such as by using unreasonable force during an arrest.[236] If an officer acts constitutionally, such as by using reasonable force under the law, the arrestee will have no claim. Eliminating qualified immunity would simply hold accountable officers who, in making split-second decisions, act in an objectively unreasonable manner. Not only would this increase accountability, but it would force officers to stay conscious of basic human and civil rights in their everyday interactions with civilians. Officers should think before they act, especially in dangerous situations where a life is at stake. And when community members see this shift in behavior, the growing lack of trust in law enforcement will slowly but surely begin to narrow.

Others may argue that enacting Colorado's law federally would deter the public from assuming law enforcement roles out of fear of facing an overwhelming financial burden. However, this claim is unsubstantiated because, as discussed, Colorado's law provides that officers will be indemnified.[237] Officers are only responsible for a small percentage of resulting judgments in limited circumstances. And officers who face this financial responsibility—those who acted in bad faith or were criminally convicted for their misconduct—are the very types of officers who society does not want in law enforcement roles. Colorado's law will remove these officers from the force while also preventing potential officers who may act in such an unreasonable manner from joining the force. But the law will also protect good officers who act reasonably from troublesome financial burdens and will thus not discourage good candidates from assuming a role in law enforcement. Therefore, it remains that SB20-217 would bring positive change. Congress should address qualified immunity and should enact Colorado's law federally.

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236. *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (setting an "objective reasonableness" standard for officer excessive force claims).

237. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. § 3 (Colo. 2020); *see also* COLO. REV. STAT. § 13-21-131(4) (2021).

3. Arizona Should Adopt Colorado's Law

Legal scholars and lawmakers have expressed that Colorado's landmark SB20-217 "could blaze a trail for other states to follow."[238] Arizonans remain "disturb[ed]" by ongoing police violence that oftentimes occurs without any legal repercussions.[239] The state has yet to take any legislative action to address qualified immunity, but amidst civil unrest, now is the best time to enact change and restore public trust in the justice system. Arizona should enact Colorado's new law, allowing victims to bring suit in state court when an officer violates their rights under Arizona law. This would ensure that victims are properly compensated when officers violate their constitutional rights. Furthermore, it would legally mandate that law enforcement officers refrain from using excessive force. This would address concerns with ongoing police shootings and state-wide violence, bringing long-needed change to Arizona.

Arizona lawmakers may consider making a few minimal changes to Colorado's law to further enhance its impact. Arizona should ensure that the bar to qualified immunity applies to all governmental officers, not only law enforcement officers. As written, Colorado's law excludes over 1,300 governmental officers.[240] However, as previously discussed, qualified immunity arises in many contexts that do not involve police officers, such as incidents involving social workers who have violated citizens' constitutional rights.[241] These victims also deserve justice and compensation for their injuries when a governmental agent violates their constitutional rights. Amending Colorado's law to cover all governmental officers would ensure that courts hold all officers accountable for their unlawful acts and will provide all victims with legal recourse.

Even though Colorado's SB20-217 protects officers from paying out large judgments by promising indemnification, many still fear that officers will face excessive financial burdens. As a result, officers may retire from their job duties, and prospective officers may find alternative employment. To address this concern, Arizona could modify Colorado's law by holding governmental employers strictly liable[242] when their employees violate a

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238. Sibilla, *supra* note 112.

239. *See* Garcia & Burkitt, *supra* note 150.

240. Sibilla, *supra* note 112.

241. *See supra* Part II.B.1 (discussing *Sampson*, where the court held a social worker was entitled to qualified immunity after he sexually harassed the plaintiff).

242. Strict liability holds a defendant liable for an act without considering what his or her mental state was at the time of the act. *Strict Liability*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_liability [https://perma.cc/B3N3-W44A].

person's state constitutional rights.[243] This would assure that victims have redress, regardless of an officer's subjective intent at the time of the alleged misconduct, while eliminating the financial burden that officers may face after a suit. Under Colorado's law, an officer who acted in bad faith must pay a portion of any judgment against him.[244] Holding his employer strictly liable instead would eliminate the need to litigate what the officer's subjective intent was at the time of the alleged misconduct. As previously discussed, litigating an officer's subjective intent requires inquiry into an officer's values and emotions, creating substantial costs.[245] Thus, removing the need to determine whether an officer was acting in bad faith would preserve judicial resources and ensure that victims receive compensation when officers violate their civil rights under Arizona law.

This solution ensures that good officers will not need to worry about facing tremendous financial burdens because governmental employers will be legally responsible for judgments. Officers can continue to make split-second decisions reasonably, and victims can successfully seek redress when they experience unconstitutional treatment. While municipalities may not want these additional costs, holding employers accountable is preferable over leaving victims without any compensation or justice. Arizona will have a great incentive to hire qualified officers, train them rigorously, and supervise them closely. Although Colorado's SB20-217 sets the bar for legislative responses to qualified immunity, these modifications may make the law even more impactful in Arizona. Because the Supreme Court clearly will not take action to address qualified immunity in the near future, Arizona should follow Colorado's lead and take action to implement change. Arizonans are longing to put an end to police violence and to restore public trust in the justice system overall. This new legislation would surely initiate this change.

IV. CONCLUSION

Since its inception, the judicial doctrine of qualified immunity has prevented victims from attaining justice after a governmental officer violated their constitutional rights. Case law illustrates that government officers have

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243. Supreme Court Justices have considered this option. Bd. of Cnty. Comm'rs. v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting). Justice Breyer, Justice Stevens, and Justice Ginsburg opined that the Court should reconsider its ruling that municipalities are liable only for their official customs or policies and should consider whether they should instead be vicariously liable for the constitutional violations of their employees. *Id.* at 403–31.

244. S. 20-217, 72d Gen. Assemb., 2d Reg. Sess. § 3 (Colo. 2020); *see also* COLO. REV. STAT. § 13-21-131(4) (2021).

245. *See supra* notes 30–36 and accompanying text.

escaped responsibility for egregious acts, most times because the law was not "clearly established" at the time of the alleged violation. The legal system's failure to hold officers accountable for their misconduct, in effect, has distorted public trust in law enforcement and the justice system overall. Americans across the country have expressed outrage, and civil unrest has persisted without any remedy. The Supreme Court has illustrated that it will not reexamine qualified immunity and its unlawful impact on communities everywhere. However, Colorado became the first state to enact legislation that eliminates qualified immunity for state law claims. Along with banning chokeholds and excessive force, this law allows victims to seek and attain justice after an officer violates their civil rights.

Colorado's SB20-217, also known as the Enhance Law Enforcement Integrity Act, is a good legislative example that both Arizona and the federal legislature should replicate because it increases police accountability and allows plaintiffs to vindicate their civil rights in court. Replicating this legislation would bring needed reform to communities across the country, especially in Arizona where police violence is at an all-time high. Modifying the law to hold the municipality strictly liable for its officers' constitutional violations will strengthen its impact on Arizona victims and communities. Without any remedy, governmental officers will continue to violate citizens' basic human rights, and victims will have no attainable opportunity to vindicate these rights. Until the Supreme Court seriously reexamines qualified immunity, it is up to Congress and the states to protect Americans' most basic human and constitutional rights.