

## **HB 1727 (Tarver): Bad Apples in Law Enforcement Accountability Act Questions and Answers**

### **1. What does the HB 1727: Bad Apples in Law Enforcement Accountability Act do?**

- The language removes barriers to accountability *only* when law enforcement violates a person's constitutional rights. Under this law, when a person's constitutional rights have been violated by the actions of an on-duty police officer, they can bring a cause of action in Illinois state court under the Illinois Constitution, including Section 6 of the Illinois Bill of Rights, which protects against use of force violations.
- By passing this law, accusations of constitutional violations can be assessed on their merits and on a case-by-case basis, leading to more just and equitable outcomes for Illinois.

### **Is there support for this concept?**

- There is overwhelming support in Illinois: 9 out of 10 (91%) Illinois voters are strongly supportive of legislative efforts that hold police accountable for misconduct.
- 89% of voters say that holding law enforcement accountable for violating individuals' constitutional rights should be a major priority.
- 69% of voters want to end special protections for police officers – known as qualified immunity – that allows officers to escape from many lawsuits, denying victims of real harm a day in court. This is even higher than the national trend (which shows that nearly two-thirds of Americans support ending qualified immunity).

### **2. Why is eliminating qualified immunity for law enforcement is good policy for good police officers?**

- Eliminating qualified immunity would make it more possible that problematic law enforcement officers can be held accountable when they violate a person's constitutional rights. This will help create a more professional police force, start to restore the public's trust and confidence in police, and ensure that those who are harmed at least have a chance to have their claims considered in court.
- Special protections like qualified immunity shield problematic police officers from accountability for constitutional violations, while offering no additional protection to the vast majority of police who serve their communities honorably and with integrity.

### **3. Why is qualified immunity a barrier to accountability and justice?**

- (1) ***It undermines police accountability.*** Police officers who do not violate a person's constitutional rights will never have to think about qualified immunity. Police officers who *do* violate a person's constitutional rights can do so knowing they will almost certainly get away with anything because they will not be held accountable -- thanks to qualified immunity.
- (2) ***It makes policing harder, and harms the reputation of officers and departments.*** Law enforcement officers who do their jobs lawfully will never have the public's trust, respect, or cooperation as long as the public knows police remain largely unaccountable for their actions. As a result, policing is made more difficult – and dangerous – for officers and the communities they serve.

(3) ***It denies victims of even egregious criminal police misconduct any recovery.*** Qualified immunity makes it virtually impossible for someone whose constitutional rights have been violated by a police officer to recover damages in court. Ending qualified immunity has broad and overwhelming support from across the ideological spectrum; it is not a partisan issue.

**4. Is it true that police officers need immunity to protect their personal assets; without qualified immunity, police will be personally liable and could lose their homes.**

**NO**

- Qualified immunity has nothing to do with indemnification, which is governed by law and police contracts. Moreover, police are virtually always indemnified for all alleged misconduct. In the largest study of its kind, the data showed that governments paid approximately 99.98% of all dollars that civil rights plaintiffs recovered in lawsuits against police officers. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).
- Eliminating qualified immunity would not subject individual defendants to massive personal liability, but it would ensure that victims of unconstitutional misconduct can at least have an opportunity to obtain a remedy in court for constitutional violations.
- Although people defending qualified immunity point to widespread personal liability for police as the most critical issue, few of qualified immunity's proponents are ever able to provide evidence of even a single case where a police officer faced personal liability for their actions. And few who oppose [HB 1727](#) can rebut the self-evident argument that numerous other privately-employed professionals who work on matters of life-and-death do their jobs lawfully without any form of immunity.
- Some opponents of [HB 1727](#) speculate that the cost of civil rights claims would grow too high without qualified immunity, but this also is false. Indeed, today, with qualified and other immunities well in place in Illinois, the City of Chicago *still paid more than \$500 million in police-related settlement fees* over the past decade. The correct inference to draw is the same inference qualified immunity's defenders refuse to acknowledge: with qualified immunity, there is no accountability; without accountability, cities and municipalities are forced to pay exorbitant settlement fees whenever an unaccountable officer commits another grave violation of a person's constitutional rights.
- Without qualified immunity, police departments will have to apply and execute their own policies more rigorously; they will need to consider questions of discipline more thoroughly and effectively; and, they will need to train a police force that understands that they could be accountable for violations of a person's constitutional rights. These are all desirable results that we could achieve by providing a meaningful mechanism, like the state cause of action contemplated in [HB 1727](#), for people to vindicate their constitutional rights when police violate those rights.

**5. Is it true that without qualified immunity, frivolous lawsuits against police will increase?**

**NO**

- All the evidence shows that qualified immunity is not effective at dismissing frivolous lawsuits at all, and does nothing to discourage frivolous lawsuits against police. Indeed, in the most comprehensive study of the role qualified immunity plays in civil rights litigation against police, qualified immunity only resulted in the dismissal of *just 0.6%* of the 1,183 cases assessed before discovery, and resulted in the dismissal of *just*

3.2% of the cases before trial. See Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127 (2017).

- Qualified immunity significantly INCREASES costs of litigation and adjudicating claims against police. This comes as no surprise to most litigators – as one judge opined, “the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court.” *Turner v. Weikal*, No. 12-CV-915, 2013 WL 3272481, at \*3 (M.D. Tenn. June 27, 2013). Litigating the issue of qualified immunity regularly involves substantial motion practice, additional discovery, and interlocutory appeals of qualified immunity denials, often greatly driving up the cost of litigating constitutional civil rights claims, prolonged cases, and complicating what otherwise could have been a simple determination: *did the police officer violate the person’s constitutional rights, and if so, was that violation justified under the circumstances?*
- In addition, there are already ample safeguards against frivolous lawsuits against police. If a lawsuit is legally meritless and fails to articulate a constitutional claim, then it can be dismissed for “failure to state a claim upon which relief can be granted,” without any need to invoke qualified immunity. If the lawsuit could be one that is not *factually* supported — in other words, maybe the facts alleged, if true, *would* make out a constitutional violation, but the plaintiff is either mistaken or lying about the facts. But in that case, qualified immunity does little to help in dismissing the case, because of course, plaintiffs could theoretically lie their way around qualified immunity as well, just by alleging facts that *do* happen to closely match the fact patterns of prior cases. Heightened pleading standards, anti-SLAPP law provisions, and civil procedural rules also allow frivolous lawsuits to be dismissed quickly.
- And lastly, by its very nature as an affirmative defense, qualified immunity is only implicated only when the underlying constitutional claim has merit, i.e., in non-frivolous lawsuits.

Examples of the inequitable and unjust outcomes that occur when qualified immunity is applied:

- In *Jessop v. City of Fresno*, a case in which police officers stole more than \$225,000 in cash and rare coins while executing a search warrant, the Ninth Circuit held that while “the theft [of] personal property by police officers sworn to uphold the law” may be “morally wrong,” the officers could not be sued for the theft because the Ninth Circuit had never specifically decided “whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment.”
- The Eleventh Circuit in *Corbitt v. Vickers* concluded that a deputy sheriff in Georgia who accidentally shot a ten-year-old child lying on the ground – while repeatedly attempting to shoot a pet dog that posed no threat – was entitled to qualified immunity simply because there was no prior case with this particular set of facts.
- Finally, in *Baxter v. Bracey*, the Sixth Circuit granted immunity to officers who deployed a police dog against a suspect who had already surrendered and was sitting on the ground with his hands up. The plaintiff had successfully identified a prior case with nearly identical facts, in which the Sixth Circuit had held that it was unconstitutional for police to deploy a dog against a suspect who had surrendered by lying on the ground. However, the Sixth Circuit was able to distinguish the circumstances because in the prior case, the suspect was lying on the ground, whereas Baxter was sitting on the ground with his hands up.

**6. Will [HB 1727](#) (Bad Apples in Law Enforcement Accountability Act) push all civil rights litigation into state court?**

**No**

- First, you can already bring Section 1983 (federal) claims in state court, so no change there.
- Second, federal court offers a number of advantages over state court, including more favorable fee and cost recovery provisions, a faster schedule in most cases, and a more standardized set of procedural rules -- it will usually be the favored jurisdiction of civil rights plaintiffs who can assert such claims.
- Third, [HB 1727](#) just creates a cause of action sounding in tort; state courts are well-suited to adjudicate those claims, will be closer to the issues and the community, and will be able to help improve police departments over time by helping more readily identify and adjudicate claims against "bad cops." FYI, the reason "qualified immunity" shall not be a defense under the proposed bill is to ensure that no state court judge attempts to graft the existing, deeply flawed QI standard (the 'clearly-established law' balderdash) to any potential claims brought under this proposed law.

**7. Will eliminating qualified immunity ("QI") lead to police being criminally liable?**

- **NO.** QI has nothing to do with criminal prosecution.

**8. Is it true that qualified immunity "does not protect bad cops, but protects all cops"?**

- **NO.** QI primarily protects cops who violate people's rights, i.e., "bad cops." Good cops will be protected by the current judicial analysis of police actions, which looks to assess the reasonableness of the officer's actions and all the facts surrounding the constitutional claim. Bad cops benefit from QI. Good cops do not need it.

**9. Is qualified immunity necessary to protect cops from liability for accidental/unintentional situations where a cop may have harmed a civilian?**

- **NO.** Qualified immunity only matters when a police officer has violated someone's constitutional rights. Police officers who are "legitimately performing their duties" — i.e., acting lawfully — do not need qualified immunity because, by definition, they're not violating anyone's rights in the first place.

**10. Does qualified immunity allows courts to judge an officer's actions from the perspective of a reasonable officer, given the same set of circumstances, not from 20/20 hindsight.**

- The "reasonable officer, not 20/20 hindsight" standard comes from a Supreme Court case that literally has zero to do with qualified immunity and does not even mention that term ONCE in the majority opinion. *Graham v. Connor*, 490 U.S. 386 (1989). The "reasonable officer, not 20/20 hindsight" standard comes from assessing police actions UNDER THE FOURTH AMENDMENT, i.e., determining whether a cop's actions violated the Fourth Amendment.
- It is a VERY DEFERENTIAL STANDARD, but QI advocates like to confuse the issue by claiming the standard is tied to QI. It has nothing to do with it.
- Police don't violate the Fourth Amendment just because they make the "wrong call." Our constitutional standards for Fourth Amendment violations already reflect that police will sometimes arrest people who turn out to be innocent, or use force that turned out to be unnecessary. If we were

to eliminate QI, reasonable officers would still be protected from “20/20 hindsight,” because that protection does not derive come from qualified immunity in the first place, but from the Fourth Amendment.

#### **11. Will eliminating QI cost our communities too much money in payouts?**

**NO**

- Chicago has paid half a BILLION in the last 10 years, that is with QI and with tort immunity. It is forced to make monstrous payouts to compensate for egregious actions by bad cops, often repeat offenders (like Derek Chauvin and too many others to list).
- Eliminating QI will allow cases and claims to be adjudicated on a case by case basis. This will eventually DRIVE down costs as police become more aware and more thoughtful about their actions.