



CONSENT CALENDAR  
July 13, 2021

To: Honorable Mayor and Members of the City Council  
From: Councilmember Taplin and Councilmember Hahn  
Subject: Resolution in Support of Ending Qualified Immunity Act

### RECOMMENDATION

Adopt a Resolution in Support of the Ending Qualified Immunity Act by Rep. Ayanna Pressley (D-Mass.) and Sen. Ed Markey (D-Mass) and send copy of resolution to the office of Rep. Barbara Lee (CA-13).

### FINANCIAL IMPLICATIONS

None.

### CURRENT SITUATION AND ITS EFFECTS

Qualified immunity is a legal doctrine that courts have applied to exempt law enforcement officers from liability in civil rights lawsuits, particularly in cases of police brutality. Federal legislation introduced by Representative Ayanna Pressley and Senator Ed Markey of Massachusetts would amend 42 U.S.C. Section 1983 to clarify that “it shall not be a defense or immunity to any action brought under this section” if the law enforcement officer was acting in good faith or “that the defendant believed, reasonably or otherwise” that their actions were lawful and constitutional.

According to an investigation<sup>1</sup> by Reuters, courts have granted immunity to law enforcement officers in the majority of suits since 2005. One of those cases included a cyclist in Dallas who was killed after being shot 17 times by 5 officers. Since 2009, the Supreme Court has allowed courts to disregard the Fourth Amendment’s prohibition on excessive force, traditionally the first step in determining whether the plaintiff qualifies for immunity. From 2005-2007, 56% of court cases favored the plaintiffs bringing civil rights suits against law enforcement officers; from 2017-2019, 57% of cases favored police.

In one example, the Fifth Circuit Court of Appeals granted qualified immunity to a correctional officer in 2020 who had pepper sprayed a prison inmate in the face without provocation.<sup>2</sup> In *Frasier v. Evans* (2021), the Tenth Circuit Court of appeals granted

<sup>1</sup> Chung, A., et al. (2020, May 8). For cops who kill, special Supreme Court protection. *Reuters*. Retrieved from <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/>

<sup>2</sup> Fifth Circuit Upholds Qualified Immunity for Guard Pepper-spraying Prisoner Without Provocation. *Prison Legal News*, Apr. 2, 2020. Retrieved from <https://www.prisonlegalnews.org/news/2020/apr/2/fifth-circuit-upholds-qualified-immunity-guard-pepper-spraying-prisoner-without-provocation/>

qualified immunity to police officers who violated First Amendment rights by confiscating a civilian's video recordings of police use of force.<sup>3</sup> In March of 2021, the US Supreme Court declined to review a case in which qualified immunity was granted to police who used force against a Black man in Cleveland while trying to enter his home.<sup>4</sup>

### BACKGROUND

The doctrine of qualified immunity was first applied by the Supreme Court in 1967 to grant exemptions to law enforcement officers from the private right of action against state and local officials who violate civil rights. This doctrine shielding police officers from liability in cases of abuse, misconduct, and negligence has undermined the substance and intent of the Civil Rights Act of 1871, now codified in 42 U.S.C. Section 1983. Qualified immunity is not codified in any civil statute; this proposed bill would explicitly prohibit it in order to provide greater accountability in cases of police misconduct.

### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

None.

### CONTACT PERSON

Councilmember Terry Taplin, Council District 2, 510-981-7120

Attachments:

1: Resolution

2: Ending Qualified Immunity Act (Bill Text)

---

<sup>3</sup> <https://www.ca10.uscourts.gov/opinions/19/19-1015.pdf>

<sup>4</sup> Chung, A. (2021, Mar. 8). U.S. Supreme court rejects case over 'qualified immunity' for police. *Reuters*. Retrieved from <https://www.reuters.com/article/us-usa-court-qualifiedimmunity/u-s-supreme-court-rejects-case-over-qualified-immunity-for-police-idUSKBN2B01L6>

RESOLUTION NO. ##,###-N.S.

RESOLUTION IN SUPPORT OF ENDING QUALIFIED IMMUNITY ACT OF 2021

WHEREAS, in the wake of George Floyd's killing and a nationwide reckoning on systemic racism and police violence, the City of Berkeley has commenced a Reimagining Public Safety process; and

WHEREAS, Congress granted individuals the right to sue state and local officials who violate their rights, including police officers, in the Civil Rights Act of 1871, now found under title 42 of the United States Code, Section 1983; and

WHEREAS, since 1967 the Supreme Court has issued several decisions gutting this protection by inventing the qualified immunity doctrine, shielding law enforcement officers from liability for misconduct, negligence, or abuse; and

WHEREAS, in *Harlow v. Fitzgerald* (1982), the U.S. Supreme Court ruled that judges could adequately determine whether an action falls within the scope of qualified immunity based on whether the government official facing litigation knew or should have known that their actions would violate the plaintiff's constitutional rights, under an "objective reasonableness" standard requiring that the rights being violated were "clearly established" at the time; and

WHEREAS, the doctrine of qualified immunity restricts accountability of government officials, prevents genuine justice from being served, and exacerbates violent racial inequities;

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby registers its support for the Ending Qualified Immunity Act of 2021.

.....  
(Original Signature of Member)

117TH CONGRESS  
1ST SESSION

**H. R.** \_\_\_\_\_

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

\_\_\_\_\_  
IN THE HOUSE OF REPRESENTATIVES

Ms. PRESSLEY introduced the following bill; which was referred to the Committee on \_\_\_\_\_

\_\_\_\_\_  
**A BILL**

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ending Qualified Im-  
5 munity Act”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds as follows:

1           (1) In 1871, Congress passed the Ku Klux  
2           Klan Act to enforce the Fourteenth Amendment and  
3           combat rampant violations of civil and constitu-  
4           tionally secured rights across the nation, particularly  
5           those of newly freed slaves and other black Ameri-  
6           cans in the post-Civil War South

7           (2) Included in the act was a provision, now  
8           codified at section 1983 of title 42, United States  
9           Code, which provides a cause of action for persons  
10          to file lawsuits against people acting under color of  
11          state law, including State or local officials, who vio-  
12          late their federal legal and constitutionally secured  
13          rights.

14          (3) Under section 1979 of the Revised Statutes  
15          (42 U.S.C. 1983) a person may be held liable for  
16          acting under color of State or local law, even if they  
17          are not acting in accordance with State law.

18          (4) Section 1979 has never included a defense  
19          or immunity for government officials who act in  
20          good faith when violating rights, nor has it ever had  
21          a defense or immunity based on whether the right  
22          was "clearly established" at the time of the violation.

23          (5) From the law's beginning in 1871, through  
24          the 1960s, government actors were not afforded  
25          qualified immunity for violating rights.

1           (6) In 1967, the Supreme Court in *Pierson v.*  
2           *Ray*, 386 U.S. 547, suddenly found that government  
3           actors had a good faith defense for making arrests  
4           under unconstitutional statutes based on a common  
5           law defense for the tort of false arrest.

6           (7) The Court later extended this beyond false  
7           arrests, turning it into a general good faith defense  
8           for government officials.

9           (8) Finally, in *Harlow v. Fitzgerald*, 457 U.S.  
10          800 (1982), the Court found the subjective search  
11          for good faith in the government actor unnecessary,  
12          and replaced it with an “objective reasonableness”  
13          standard that requires that the right be “clearly es-  
14          tablished” at the time of the violation for the de-  
15          fendant to be liable.

16          (9) This doctrine of qualified immunity has se-  
17          verely limited the ability of many plaintiffs to re-  
18          cover damages under section 1983 when their rights  
19          have been violated by State and local officials. As a  
20          result, the intent of Congress in passing the law has  
21          been frustrated, and Americans’ rights secured by  
22          the Constitution have not been appropriately pro-  
23          tected.

1 **SEC. 3. SENSE OF THE CONGRESS.**

2 It is the sense of the Congress that we must correct  
3 the erroneous interpretation of section 1979 of the Revised  
4 Statutes which provides for qualified immunity, and reit-  
5 erate the standard found on the face of the statute, which  
6 does not limit liability on the basis of the defendant's good  
7 faith beliefs or on the basis that the right was not "clearly  
8 established" at the time of the violation.

9 **SEC. 4. REMOVAL OF QUALIFIED IMMUNITY.**

10 Section 1979 of the Revised Statutes (42 U.S.C.  
11 1983) is amended by adding at the end the following: "In  
12 any suit pending on, or filed after, the effective date of  
13 the Ending Qualified Immunity Act of 2021, it shall not  
14 be a defense or immunity to any action brought under this  
15 section that the defendant was acting in good faith, or  
16 that the defendant believed, reasonably or otherwise, that  
17 his or her conduct was lawful at the time when it was  
18 committed. Nor shall it be a defense or immunity that the  
19 rights, privileges, or immunities secured by the Constitu-  
20 tion or Federal laws were not clearly established at the  
21 time of their deprivation by the defendant, or that the  
22 state of the law was otherwise such that the defendant  
23 could not reasonably have been expected to know whether  
24 his or her conduct was lawful."

